



February 2, 2011

Executive Summary

USCIS Administrative Appeals Office Stakeholder Engagement

Overview

On October 20, 2010, the Administrative Appeals Office (AAO) and the Office of Public Engagement (OPE) hosted the first ever national stakeholder engagement regarding the AAO. Director Alejandro Mayorkas opened the session with the following two announcements:

- For the first time in 12 years, the AAO has published [two precedent decisions](#).
- In Fiscal Year 2011, USCIS will be allocating additional resources to the AAO.

Director Mayorkas then handed the meeting over to Perry Rhew, Chief of the AAO. Mr. Rhew began by telling stakeholders about a blog, written prior to Mr. Rhew becoming the AAO Chief, that was very critical of the AAO. Mr. Rhew took note of the criticisms and assessed the need for change, attempting to enlighten the public on how the AAO conducts business. Throughout the engagement, Mr. Rhew shared with stakeholders what the AAO focused on over the past year, addressed questions, and listened to feedback from individual stakeholders. The session was for USCIS to listen to the views of individual stakeholders and was not used for the purpose of obtaining group or consensus advice.

Principal Themes

AAO Structure and Staff

The AAO is divided into nine branches – seven subject matter branches, one fraud branch, and one management support branch. Currently, the AAO has 88 employees, 59 of whom are adjudications officers. The AAO staff includes adjudicators with extensive experience at USCIS and/or the Immigration and Naturalization Service (INS) and 66 attorneys. Generally, AAO adjudications officers specialize in a particular type of case, but the AAO moves officers between branches and retrain, as necessary. The AAO will be adding a number of new positions in Fiscal Year 2011. Stakeholders can view the organization chart at www.uscis.gov/aao.

Role of the AAO

The role of the AAO is to produce appellate decisions that provide fair and legally supportable resolutions of individual applications and petitions for immigration benefits. These decisions provide guidance to

applicants, petitioners, practitioners and government officials in the correct interpretation of immigration law, regulations and policy. The AAO weighs in on matters affecting USCIS operations as a member of the senior leadership team. While the AAO has a long history of discussing legal and policy issues with other USCIS entities, it does not seek their input prior to reaching a decision in an individual case. The AAO does not seek to speak for the Office of Chief Counsel or the Office of Policy and Strategy, or for any other entity other than the AAO.

The Appeals Process

The AAO reviews appeals on a *de novo* basis, which means the AAO takes a new look at the entire case as if no decision had previously been issued. When a case arrives at the AAO, the branch manager assigns it to an adjudicator who drafts a decision in the case. Each decision goes through further review before being put in final form and mailed to the parties to a case.

In some instances, the AAO will also review cases that are certified from USCIS field offices. A certification is a request by a USCIS field office for a review of a decision (approval or denial). USCIS field offices will certify a case to the AAO when the facts or issues of a case are so novel or complex that review by the AAO is an appropriate means of obtaining guidance. In response to a stakeholder question, USCIS also clarified that it does not have jurisdiction over Cuban Adjustment Applications that are denied, but that there are instances where the field will certify a denial to the AAO, which explains why Cuban Adjustment Applications are listed on the USCIS website as an application under the jurisdiction of the AAO.

Individual stakeholders asked a number of questions relating to the process, including:

- **Oral arguments** – Some stakeholders asked about presenting oral arguments during the appeal process and the AAO confirmed that oral arguments can be presented. Please refer to 8 C.F.R. § 103.3(b). Stakeholders can find information about oral arguments in the [Instructions for Form I-290B, Notice of Appeal or Motion](#).
- **Amicus briefs** – One stakeholder raised a question regarding the role of an amicus brief during the appeal process. USCIS stated that it is developing a more robust amicus briefing procedure to allow attorneys to offer briefs in certain cases.
- **Copy of the record** – One stakeholder asked if it is possible to provide an attorney a copy of the record during the appeal process. The stakeholder indicated that often times an attorney may not have been the attorney of record for the duration of the case and therefore may not have all of the information that was filed with the appeal or that is contained in the record. USCIS indicated a willingness to consider expanding the availability of files.
- **Due process** – The Adjudicator’s Field Manual (AFM) chapter 23.2(1) permits an alien who originally filed for adjustment of status based on one eligibility ground but who is now also eligible on another ground to ask to have the Form I-485, Application to Register Permanent Residence or Adjust Status, adjudicated based on the new ground. One stakeholder asked if the Form I-485 is denied and the request to transfer is not addressed in the denial notice can lack of due process be argued in the Form I-140, Immigrant Petition for Alien Worker, appeal. If the Form I-485 was denied without addressing the transfer request, and the original eligibility basis is still valid, the applicant may want to move to reconsider the adjustment application on the basis of the original claim. The decision on the Form I-485 is not automatically certified if the decision on the Form I-140 is certified, but the files are consolidated to maintain the A-file for all future petitions and applications. The information in the Form I-485 application may also have relevance to the adjudication of the Form I-140 appeal.
- **Reconsideration of AAO decision** – One stakeholder inquired about requesting reconsideration of an AAO decision and the timeframe associated with such a request. If a party believes the law

was inappropriately applied in a particular case or if they have additional information they wish to have considered, they may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. After a decision is issued by the AAO the case file and accompanying documentation is returned to the office that originally decided a case on appeal. All motions must be submitted to that office by filing a Form I-290B, Notice of Appeal or Motion, with the appropriate fee. Any such motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Requests for Evidence

The AAO does, on occasion, issue a Request for Evidence (RFE). There is no discretion in extending the timeframe for a response. The maximum time allowed for a response is 12 weeks.

AAO Information Online

The AAO has established a web presence on the USCIS website (www.uscis.gov/ao) where stakeholders can find an overview of the AAO, information on how to file an appeal and case processing times. Case processing timelines are updated monthly and new information is being added to the AAO page as it is developed. For example, during the session the AAO referenced a document being developed that outlines the precedent decision process. This document has since been posted on the AAO page noted above.

USCIS recognized that accessing information, particularly AAO decisions, still remains an issue and noted that it is something that needs to be worked on going forward. Currently, stakeholders can find administrative decisions by visiting www.uscis.gov/laws and clicking on "[Administrative Decisions](#)."

Processing Times and AAO Staffing

During the past year, the AAO set a goal to achieve a processing timeframe of less than six months for at least 25 of the 41 types of cases reported online each month. By the end of the year, 31 of the 41 types of cases had an average processing time of less than six months. USCIS noted that some form types take a significant number of months to process purely because of the number of appeals of that type the AAO receives and staffing. On three occasions this year, the AAO shifted resources and retrained adjudicators to move them to more pressing caseloads. As additional adjudicators come on board in Fiscal Year 2011, USCIS hopes to reduce the backlog, in particular for the H-1 nonimmigrant classifications and for Forms I-140 and I-601, Application for Waiver of Ground of Inadmissibility.

One stakeholder raised a concern regarding the processing time for H-2A and H-2B appeals noting that by the time the case gets to the AAO it becomes a moot point. The AAO stated that it is aware of this concern and hopes to also address this with additional staff. In addition, some stakeholders commented that a decision on the merits for these cases is helpful in preparing future cases.

Another stakeholder noted that the processing reports are a measure of those cases that have reached the AAO, which means the reports do not account for all pending appeals since some have not yet arrived at the AAO. Form I-601 appeals filed abroad were given as an example. USCIS acknowledged that this is an ongoing issue and something that the agency is trying to address.

Some stakeholders requested information on expedited appeals. The AAO gets a large number of requests to expedite an appeal and it reviews each request on a case-by-case basis. While the AAO attempts to be lenient with requests to expedite an individual case, it does attempt to follow internal USCIS guidelines. Stakeholders can find general USCIS guidelines on requesting an expedite by visiting www.uscis.gov.

clicking the “Forms” tab, looking under the “Forms Guidance” heading on the right side of the page and clicking on “[Expedite Criteria](#).”

The AAO hopes to reduce the overall processing time with additional, well trained adjudicators. Questions were raised during the stakeholder engagement concerning staffing and training of AAO adjudicators. While the majority of adjudicators at the AAO are attorneys, several non-attorney adjudicators bring a wealth of historical knowledge of legacy INS issues and have adjudicated immigration appeals for years. The AAO tries to achieve a healthy mix of seasoned and newer adjudicators, knowing the importance of encouraging diversity in the workforce.

AAO adjudicators are trained by seasoned adjudicators and subject matter experts familiar with the laws and regulations surrounding the immigration appeals process. As laws change and new information becomes available the adjudicators are provided updates accordingly.

AAO Decisions

In addition to improved online access to AAO decisions, some stakeholders asked about available statistics on decisions made by the AAO. USCIS noted that it is limited in its ability to provide statistics as the statistics are not owned by the agency, but rather, are owned by the U.S. Department of Homeland Security (DHS). The AAO is working with the USCIS Transformation Leadership Team to ensure case information is correctly tracked during the transition to full transformation by the agency.

Some stakeholders asked about precedent decisions, which are binding on all DHS employees in the administration of the Immigration and Nationality Act (INA). Prior to October 20, 2010, USCIS had not issued a precedent decision since 1998. The two precedent decisions issued on October 20, 2010 were published as a result of collaboration between DHS and the U.S. Department of Justice (DOJ). Over the past year, the AAO has met with each of the seven entities within the departments that must review proposed precedent decisions and established a streamlined process. During the session, USCIS emphasized the importance of having this process back in place and noted that the two decisions were not a reflection of what USCIS considers the most significant or pressing issues.

Some stakeholders asked how USCIS determines that a case should be a precedent decision. USCIS stated that if the AAO determines that a case should become a precedent decision, it raises the case with the USCIS Senior Policy Council for them to review. If the Senior Policy Council agrees that the decision should be a precedent decision, USCIS initiates the process. As stated above, USCIS has developed a presentation outlining the precedent decision process, which can be found at www.uscis.gov/ao.

One stakeholder suggested that all cases should become precedent decisions unless a similar decision is already published.

The two precedent decisions are *Matter of Al Wazzan*, 25 I&N Dec. 359 (USCIS 2010) and *Matter of Chawathe*, 25 I&N Dec. 369 (USCIS 2010). The texts of these decisions are available through WESTLAW and LEXIS, and at <http://www.justice.gov/eoir/vll/libindex.html>.

USCIS Policies

Some stakeholders asked USCIS to reconsider the following policies:

- In the case of a Form I-140 that is denied by USCIS and subsequently appealed to the AAO, current USCIS policy states that the related Form I-485 must be denied. One stakeholder commented that the Form I-485 should be considered pending while on appeal.

- In the case of a petition that has been denied by USCIS and is subsequently appealed to the AAO, USCIS policy states that Service Centers will hold a subsequent filing in abeyance pending the outcome of the appeal. This means that if a petition is denied and the petitioner appeals that decision to the AAO and also submits a second petition to USCIS, the Service Center will temporarily put this petition aside and not make a decision on it until the appeal is withdrawn or a decision is made on the appeal. At least one stakeholder commented that this policy leaves petitioners with no recourse.
- One stakeholder asked after the engagement about addressing accrual of unlawful presence while a case is pending before the AAO.

The AAO stated that it is working to publish a proposed regulation that will help streamline the appeals process and give the public a much better understanding of what to expect when they file an appeal. The proposed AAO regulation, to be published for public comment soon, will address the third issue noted above and may provide an opportunity for stakeholders to comment on other policies, such as the first and second issues noted above.

Stakeholder Engagement Follow Up

Following the stakeholder engagement Mr. Rhew established a separate email box for receipt of additional questions. Several questions pertaining to specific cases and issues were received. Mr. Rhew followed up on those questions with individual practitioners, addressing the specific concerns during the two week period after the engagement and incorporating more general questions into the responses above.