



Questions and Answers

October 27, 2009

USCIS American Immigration Lawyers Association (AILA) Meeting, October 27, 2009

I. WHAT'S NEW

STAFFING UPDATES

Roxana Bacon, Chief Counsel

Roxie brings exceptionally deep and strong immigration law expertise, management and leadership experience, and personal qualities to this important role within DHS and OGC. In her 35 years as an immigration law practitioner and policy advisor, she has, among other things, been a partner with the international firm of Bryan Cave, where she served on the firm's Executive Committee and as resident manager of the Phoenix office, and later founded her own firm, Bacon & Dear, which she grew from 10 to 150 persons. She also taught immigration law as a visiting professor and adjunct professor at Arizona State University College of Law and served as a judge pro-tempore on the Arizona Court of Appeals. Among her many professional achievements, Roxie was the first woman to serve as the president of the Arizona Bar Association, the first woman to serve as general counsel to the American Immigration Lawyers Association, and a recipient of the American Bar Association's Margaret Brent Award, its highest award given to women lawyers nationally.

Hubert H. Humphrey IV, Chief, Office of Communications

Hubert "Buck" Humphrey joins the Office of Communications as Chief, where he will lead and coordinate USCIS strategic messaging to stakeholders and oversee the community relations, media relations, new media and internal communications divisions. This is a schedule-C political appointee position.

Prior to his appointment, Mr. Humphrey was the Director of Federal and State Public Affairs and Public Relations at ASI Communications, Inc. in Minneapolis, Minnesota. Mr. Humphrey worked with a variety of clients including USTA, AT&T, MySpace, the Dewey Square Group, the State of Minnesota, the City of Minneapolis and the City of St. Paul. His work included marketing, branding, public affairs, public relations messaging, business development and strategic communications for a diverse range of clients. Mr. Humphrey also worked on the 2000, 2004 and 2008 Presidential campaigns in a variety of capacities.

Mr. Humphrey holds a master's degree in Public Administration from Hamline University, St. Paul, MN, and a bachelor's degree in Law and Society from American University, Washington, DC.

Perry Rhew, Chief of the Administrative Appeals Office (AAO)

On, Mr. Perry Rhew entered on duty as the USCIS Chief of the Administrative Appeals Office (AAO) on September 28, 2009. Immediately prior to his appointment Mr. Rhew served for four years as the first Chief Administrative Law Judge of and head of a new federal adjudicative agency within the Department of Health and Human Services, the Office of Medicare Hearings and Appeals. As Chief ALJ he oversaw the agency's hiring and training of over 570 employees, including ALJs, attorneys, paralegals, legal assistants, docket clerks and administrative staff members, and the opening of four adjudicative bodies around the country in Cleveland, Irvine, Miami, and Arlington. Mr. Rhew was instrumental in the creation of the new agency and in developing the policies and guidance that resulted in a reduction of average processing time for administrative appeals from an average of almost 300 days to under 90 days. He also served on the Secretary's Pandemic Preparedness Council, spoke frequently at public forums, and oversaw the budget planning, training, and staffing models for the agency.

A native of Missouri, Mr. Rhew obtained a B.S. in Psychology from Southeast Missouri State University and his J.D. from the University of Missouri – Kansas City. He served for twelve years in elected office in Missouri, first as a prosecuting attorney and then as a state trial court judge. In that capacity he heard criminal cases, ranging from misdemeanor offenses to capital murder, and civil litigation from uncontested divorce cases to complex civil litigation. He resigned from public office to accept an appointment as a United States Administrative Law Judge for the Social Security Administration in Cleveland in 1997.

TRANSFORMATION

AILA wishes to recognize and commend USCIS for the outreach the Office of Transformation Coordination (OTC) has engaged in especially over the last few months and most notably the interactive Collaboration Session and Webinar held on September 25, 2009. This session was extremely beneficial and AILA is eager to continue to work with USCIS as a partner in the transformation process. Are there any updates on the transformation process that USCIS wishes to share with AILA at this time?

Response: Thank you for your participation in the previous stakeholder session. We are planning to have several more in the next few months to get input and feedback on initiatives and business process changes. We will post invitations for the upcoming meetings on the USCIS website.

II. AILA Introduction

AILA recognizes and appreciates the efforts of Director Alejandro Mayorkas and his staff to reach out and engage the public as USCIS develops and implements new programs and avenues to serve its core mission of administering our country's immigration laws efficiently and with fairness, honesty, and integrity. AILA is committed to assisting USCIS in its mission and serving as a partner with USCIS to foster collaboration across all levels of government as President Obama directed in his Transparency and Open Government Memorandum issued this past January.

In particular, AILA values the opportunities for input and dialogue that Director Mayorkas has afforded our organization and other stakeholders in a variety of environments and venues over recent months, and we look forward to continued direct engagement with the Service. AILA especially wishes to

acknowledge and commend USCIS for the establishment of the Office of Public Engagement as a noteworthy step in the creation of additional pathways of communication that will offer more opportunities for stakeholder input, and which supplement and complement the avenues of communication that AILA and other stakeholders have historically enjoyed.

In addition, AILA wishes to recognize and commend the efforts that have been made to improve the USCIS website and to enhance customer service activities, including establishing direct email contact with the Service Centers and Service Center Operations (SCOPS). We look forward to partnering with Director Mayorkas and his team in this time of change and transformation as we work toward our shared goal to continue to improve USCIS and the administration of U.S. immigration laws.

Over the course of several prior liaison meetings, AILA has requested guidance on a number of issues, and we wish to acknowledge USCIS action on several of the requests. AILA would like to thank USCIS for issuing guidance, some long-awaited, on adjudication of Physical Therapist/Occupational Therapist petitions, on the treatment of I-751 applications to waive conditions on residence for applicants in divorce proceedings, on the treatment of surviving spouses of U.S. citizens after the decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), and cases following *Freeman*, and on the treatment of I-140 Immigrant Visa Petitions involving successors-in-interest issues. We would also like to thank USCIS for re-implementing Premium Processing for R-1 and I-140 petitions.

AILA expresses its appreciation to Director Mayorkas for his commitment to the values of transparency, consistency, integrity, fairness, and balance, and the commitment to reaffirm those values throughout the agency. AILA believes that there already exist memoranda, some incorporated into the Adjudicator's Field Manual, which enunciate principles of adjudication that embody these values, and which deserve reaffirmation. Among the memoranda are these:

- William R. Yates, Associate Director, Operations, "[Requests for Evidence \(RFE\) and Notices of Intent to Deny \(NOID\)](#)," HQ OPRD 70/2 (February 16, 2005)
[<http://www.uscis.gov/files/pressrelease/RFE021605.pdf>, last accessed September 27, 2009]
- William R. Yates, Associate Director, Operations, "[The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity](#)," HQ OPRD 72/11.3 (April 23, 2004)
[http://www.uscis.gov/files/pressrelease/Readjud_042304.pdf, last accessed September 27, 2009]
- Donald Neufeld, Acting Associate Director, Domestic Operations, "[Removal of the Standardized Request for Evidence Processing Timeframe Final Rule, 8 CFR 103.2\(b\)](#)," HQ 70/11, 70/12 (June 1, 2007)
[<http://www.uscis.gov/files/pressrelease/RFEFinalRule060107.pdf>, last accessed September 27, 2009]

Principles in these documents with respect to the examination and evaluation of evidence form the foundation for consistent, secure, fair and balanced adjudication of petitions and applications and efficient granting of immigration benefits to those entitled to receive them.

In our meeting in March 2009, we highlighted AILA's concern about the apparent evolution of adjudication standards in a number of visa categories and lack of announced policy or guidance that was counterproductive to USCIS' transparency goals and a strain on resources for both the agency and stakeholders. While AILA acknowledges improvement in some areas of adjudication standards and the issuance of long-awaited guidance in others, we remain concerned with a number of ongoing trends. The

following agenda seeks to offer solutions and refocus our discussion on some of the most pressing issues affecting USCIS and its stakeholders.

III. Regulations/Guidance/Policy

1. REQUESTS FOR EVIDENCE

While AILA acknowledges USCIS' efforts to improve the content of Requests for Evidence, members continue to report the receipt of requests for information that bear little or no relevance to the benefit being sought and/or are overreaching "boilerplate" requests. AILA acknowledges and reaffirms USCIS' legitimate need to verify information and eligibility for benefits, but believes that a balance must be maintained that preserves an applicant's right to have the petition or application fully and fairly adjudicated in accordance with applicable statute, regulations, and policy memoranda. In furtherance of striking this balance, AILA offers specific suggestions for improvements in the RFE process, using the L-1 visa category as an example and model for our discussion.

Response: During the previous fiscal year a significant amount of time was spent reviewing, evaluating, and rephrasing all of the L RFEs.

We would encourage AILA to continue to provide USCIS with receipt numbers (through proper communication channels) when they feel as though USCIS has made an error. Although USCIS may not always agree, USCIS takes this feedback seriously and will take corrective steps if necessary.

L-1 Visa Category:

a. Members continue to report receipt of RFEs requesting extensive documentation by the Service Centers for well-known, "name brand" companies and smaller companies with proven track records in both business and immigration. These requests do not appear to comport to Chapter 32.3(b) of the Adjudicators Field Manual which states:

[T]he regulations do not require submission of extensive evidence of business relationships or of the alien's prior and proposed employment. In most cases, completion of the items on the petition and supplementary explanations by an authorized official of the petitioning company will suffice. In doubtful or marginal cases, the director may require other appropriate evidence which he or she deems necessary to establish eligibility in a particular case.

Response: We know that at times USCIS adjudicators ask for repetitive information because they lack immediate access to prior filings. We are committed to exploring practical ways to avoid such duplicative requests and are open to your suggestions. Debra Rogers, Acting Deputy Director for Domestic Operations, will discuss VIBE (Verification Initiative for Business Enterprises) as one program that addresses open sources.

b. Service Centers have often requested detailed lists of information including copies of the petitioner's "[state] Quarterly Wage Reports for all employees for the last four quarters including name, social security number and salary." Also, the Service frequently requests list of all employees from the date of establishment to the present, including names, job titles and social

security numbers, beginning and ending date of employment, and wages. Other requests ask for Alien Registration numbers and immigration status of all non-US citizen employees or lists of all foreign national employees including NIV petition receipt number, name, date of birth, title.

AILA recognizes that where there are well-founded questions concerning the bona fides of the petitioner the Service may request additional information as directed by the Adjudicators Field Manual. A company that has not previously filed an L-1 should always be prepared to support statements and claims made in the petition, but these requests are not appropriate if the petitioner is a known entity with a history of immigration compliance. Further, AILA also understands that it may sometimes be appropriate for the agency to request documents that pertain to a specific L-1 beneficiary if it could help clarify the employee's role at the company. However, broad requests for a petitioner's complete payroll and taxation documents raise numerous concerns without providing helpful material for adjudicating an individual L-1. These requests are not only unnecessarily burdensome for the employers, but intrusive for the many US workers whose names, social security numbers, and salary information appear on the records.

Response: Our goal is to request sensitive financial information about potential employers or employees only when absolutely necessary to adjudicate effectively a pending petition. Debbie Rogers has created and will circulate now a brief handout regarding how you should raise concerns regarding this issue within USCIS. The handout emphasizes recent improvements in our National Customer Service Center processes, and includes email address information for our Service Centers and the Directors overseeing them.

c. AILA believes adjudicators training should emphasize the following:

- Excessive documentation should not be requested as a routine matter;
- Only in "doubtful or marginal cases" should voluminous, non-specific documentation be requested;
- The Service should recognize established companies with solid records of immigration compliance;
- Where additional documentation is necessary, such requests should be limited to the specific issues in question.

Response: USCIS appreciate and agrees with all of your recommendations regarding adjudicator training.

d. Another area where the RFE process could be revised is with respect to adjudication of L-1B petitions involving beneficiary placements at third-party sites. The L-1 Visa Reform Act of 2004 created additional requirements for approval of L-1 petitions involving off-site employment. Since that time, the Service has issued RFEs requesting information on the business relationship between the petitioner and an end-client, with the primary purpose of determining whether a labor-for-hire arrangement exists.

Typical requests from the Service ask for copies of signed contracts from client companies with specific validity dates of the intended employment, listing salary or wages paid and hours worked. The requests also imply that these contracts should include specific information about the benefits for services or products to be provided by the petitioners' employees and who will be supervising at the location where the work will be performed.

While AILA recognizes the need for the Service to request documentation that helps to establish control and supervision of off-site L-1 employees, contracts, statements of work, and other business documents may not provide the information that USCIS actually needs regarding the nature of specific L-1B employment. At the same time, such documents may contain proprietary information that is irrelevant to an L-1B petition and that a company does not wish to regularly disclose or may be protected by contractually mandated confidentiality provisions.

AILA suggests that rather than request specific information that must be contained in the contract, the requests should take into consideration the different legitimate business models and practices, and allow the petitioner to provide appropriate and probative information. We suggest the Service recognize the employer is in a better position than the adjudicator to identify appropriate and credible documentation that helps explain the control and supervision of the L-1 employees by the petitioning employer and the nature of the specialized knowledge of the intended beneficiaries.

With L-1 RFEs, we understand that USCIS uses templates to request information in an effort toward efficiency and consistency. Overbroad RFEs that do not appear to take into consideration the material presented in the initial submission actually serve to undermine USCIS' efficiency and consistency goals by causing confusion and "over answering." AILA wishes to suggest some changes in the way that templates are used/drafted. We believe that these suggestions will still allow USCIS to request the necessary information needed to adjudicate a petition, but they will also elicit more meaningful responses as petitioners will be able to fully understand what USCIS' concerns are. With the current templates, petitioners are often guessing what alternatives may satisfy USCIS' concerns because the RFEs are not clear.

For example, a common question that USCIS has for a small company filing an L petition is whether or not the company exists and whether there are sufficient premises. The current templates ask for a variety of documents including: leases, business licenses, proof of building ownership from the city assessor's office, fire marshal certifications, photographs and insurance documents. However, a company cannot always provide all of this documentation or the documents may not be applicable to the situation. This is a concern because failure to provide the documentation could lead to a denial. There is no opening statement in the RFE to explain what the USCIS is looking for or questioning.

Response: USCIS must have an understanding of the control and supervision of off-site L1 employees in any given case, and must ensure appropriate compliance. If the contract, statement of work (SOW) or other business document presented with the petition fails to provide all necessary information, then it would be in the petitioner's best interest to submit evidence that does, and to provide the officer with a clear understanding of the employment relationship. USCIS will not require an L-1 petitioner to submit evidence in an initial filing that is not required by the regulations.

We acknowledge that the information provided can be proprietary. All of our officers receive privacy training on a regular basis. Of course we welcome information regarding any inappropriate disclosures.

e. Our suggestion would be for USCIS to explain its question and then provide examples (rather than mandatory documents) of how to respond. We offer this suggested language:

- In reviewing the application, there is a question about whether there are sufficient premises to operate the business. Please provide documentation regarding the physical premises. Evidence may include photographs, leases, floor plans or any other documentation available to document the premises
- In reviewing the application, USCIS has questions about the existence of the petitioner. Please provide evidence to prove that the company is currently doing business. Evidence may include company brochures, business licenses, or any other documentation available to document that the company is doing business.

Where the RFE seeks information on financial viability, rather than request specific documents which a company may or may not have, USCIS might indicate:

- USCIS has questions about the petitioning company's financial viability. Please provide documentation available to prove financial viability. Evidence may include but is not limited to, tax returns, balance sheets, annual reports, etc...

Requests for specific documents to prove specialized knowledge are often difficult to respond to as they do not relate to the petitioners type of business or apply to the specific petitioner's policies. An example is the RFE that requests "training certificates" to prove that a skill is specialized. More targeted language could include:

- USCIS has questions regarding how the beneficiary gained the specialized knowledge described in the petition. Please provide documentation on how the foreign entity provides training. This may include but is not limited to evaluation forms, training classes, and/or on the job training.

AILA is committed to working with USCIS on the development of RFE language that explains what information or evidence the examiner needs, and provides better focus for the request. AILA would be pleased to assist USCIS in any way that would be of benefit to both the agency and stakeholders to refine these requests including providing training, additional sample RFE criteria and statements and any other resources of value to the agency.

Response: USCIS appreciates and will take into consideration this suggested language.

2. USE OF UNPUBLISHED AAO DECISIONS IN ADJUDICATION OF PETITIONS AND APPLICATIONS

AILA has previously expressed concerns about the practice of reliance on unpublished AAO decisions in the development and dissemination of benefits adjudication policies, particularly where there is an

established body of policy material directly on point. Unpublished AAO decisions are often fact-specific and have not been subject to the full review afforded decisions that will be designated for publication as precedent. Additionally, by their very nature, unpublished AAO decisions are not available to the public, and are not available to petitioners for review and rebuttal. We acknowledge that some AAO decisions are published on www.uscis.gov. They are only published by general topic and date, however, and are not searchable so the “publication” on the website is of very limited use to practitioners and the public.

One example of the use of an unpublished AAO decision in adjudications is the continued reliance on the rationale found in *In re: [name not provided]*, WAC 07 277 53214 (AAO, July 22, 2008) [hereafter “GST”].¹ In *GST*, the AAO rejected a body of binding policy guidance with respect to what constitutes “specialized knowledge” for L-1B purposes. Approaches to the analysis and adjudication of “specialized knowledge” claims enunciated in *GST*, which are in clear variance with standards and policies stated in applicable binding policy memoranda, continue to be found in L-1B RFEs and decisions.

AILA urges USCIS to suspend the use of unpublished AAO decisions in the adjudication of cases where there is applicable binding policy material. Where unpublished AAO decisions are used because of the absence of binding policy material, AILA requests that a copy of the AAO decision being referenced be sent with the decision and/or confirm that the decision cited is available to the public on USCIS’ website.

Response: USCIS is working on making available all AAO opinions on our website. We are reviewing the use of unpublished AAO decisions by our adjudicators and whether this is due to our own failure to provide binding policy guidance or material. We invite you to provide any specific examples involving the use of unpublished AAO decisions directly to Ellen Gallagher, Special Liaison Counsel in the Office of the Chief Counsel, via email at ellen.gallagher@dhs.gov.

3. H-1B DENIALS BASED ON UNPUBLISHED AAO DECISION AND DEFINITION OF “AFFILIATED WITH” FOR H-1B CAP EXEMPTION PURPOSES

AILA has previously requested that USCIS take steps to clarify the scope and applicability of the H-1B cap exemption in INA § 214(g)(5)(A and (B). AILA presented USCIS with examples of Service Center decisions that erroneously applied rationale from an unpublished AAO decision involving the application of the H-1B cap exemption to petitions for primary school teachers to H-1B petitions for beneficiaries who would be employed at a location that was entitled to cap-exemption under INA § 214(g)(5)(A and (B).² USCIS indicated that it was evaluating the definition of “affiliated with” for H-1B cap purposes and was considering issuing clarifying guidance to the field. To date, no such guidance has been issued. The absence of guidance has continued to foster uncertainty and confusion for those organizations relying on current Service policy material when filing H-1B petitions that claim cap exemption under INA § 214(g)(5)(A and (B).

¹ The decision in this case was widely disseminated without redaction of the name of the petitioner, GSTechnical Services, Inc., (“GST”). GST is currently on the Administrative Decisions page on the USCIS website at [http://www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20\(L-1A%20and%20L-1B\)/Decisions_Issued_in_2008/Jul222008_04D7101.pdf](http://www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20(L-1A%20and%20L-1B)/Decisions_Issued_in_2008/Jul222008_04D7101.pdf). (Last accessed September 26, 2009.) Its mere presence on the USCIS website does not afford it authority as binding policy material.

² The decision in question is *In re: [name not provided]*, EAC 06 216 52028 (AAO, September 8, 2006); [http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions_Issued_in_2006/Sep082006_07D2101.pdf](http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2006/Sep082006_07D2101.pdf). (Last accessed September 26, 2009).

AILA renews its request for guidance that clarifies the applicability of policy materials to claims of H-1B cap-exemption under INA § 214(g)(5)(A and (B).

Response: USCIS is working on issuing guidance on this matter. We appreciate your patience.

4. THE APPLICATION OF *MATTER OF TREASURE CRAFT*, 14 I&N DEC. 190 (SEPTEMBER 7, 1972)

Matter of Treasure Craft is widely cited by USCIS Service Center Adjudication Officers in Requests for Evidence and denials of employment-based nonimmigrant and immigrant visa petitions. This decision is generally cited for the general proposition that "...[s]imply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof..." The Service appears to also be applying this proposition to the evaluation of affidavits in the context of family and naturalization cases as well as several types of employment-based cases. AILA respectfully believes that this general proposition, unqualified, is an overstatement of the holding of *Matter of Treasure Craft* and undermines the preponderance of the evidence standard.

AILA requests that USCIS issue guidance to the field that limits the application of *Matter of Treasure Craft* to its proper purview and reestablishes the principle that letters, statements and affidavits are credible and probative evidence when consistent with other facts in the record and not clearly contradicted by other evidence.

Response: We are working on operational guidance regarding proper burdens of proof that we hope will address your concerns. Such guidance will be distributed to the public as an AFM update once completed.

5. COUNTING PERIODS OF TIME ABROAD FOR L-1 ELIGIBILITY

Recent USCIS L-1 adjudications depart from the long-held and applied interpretation of the requirement that an employee of a qualifying petitioner must have been employed for one of three years prior to seeking admission to the U.S., and that authorized periods of stay in the U.S. do not interrupt that year. The AFM states the following at Ch 32.3(b):

"The alien must have been employed abroad by the foreign operation for at least one of the last three years. Such one year of employment outside the U.S. must have been continuous. Although authorized periods of stay in the United States for the foreign employer are not interruptive of the prior year of employment, such periods may not be counted towards the qualifying year of employment abroad. See *Matter of Kloeti*, 18 I&N Dec. 295."

See also *Matter of Continental Grain Company*, 14 I&N 140 (time in the U.S. in H-3 trainee status does not interrupt period of employment). See also INA §101(a)(15)(L).

Accordingly, it is well-established that if, for example, an employee who worked for Company A in Japan for more than one year is transferred to the U.S. to work for its subsidiary, Company B, in E status, that employee qualifies to change to L status at a later time if he or she then works for Company A or a qualifying affiliated company. The time spent inside the U.S. working for the company does not affect the

eligibility for L status so long as prior to admission in E or another nonimmigrant status, the employee met the one year employment abroad requirement.

Contrary to the AFM, precedent decisions and long practice, USCIS now states that only time in the U.S. in L status, rather than any “authorized periods of stay in the United States for the foreign employer” does not interrupt the prior year of employment.

AILA requests that USCIS issue guidance to examiners reaffirming the principles found in binding precedent and the AFM.

Response: USCIS agrees that periods spent in the United States in a lawful nonimmigrant status authorizing such employment for a branch of the same employer or a parent, affiliate, or subsidiary thereof (and brief trips outside of the United States for business or pleasure while in such capacity) shall not be interruptive of the one year of continuous employment abroad requirement. As long as the alien remains lawfully employed in a valid nonimmigrant status – whether or not in nonimmigrant L classification - by an otherwise qualifying entity within the United States having the requisite qualifying relationship with the foreign entity abroad, and further provided that there has been no intervening employment with a non-qualifying entity since arriving in the United States, USCIS will consider the three-year clock to have stopped with respect to the foreign employment requirement, even if more than three years have lapsed since the alien was last employed abroad with the affiliated entity.

6. RIGHT TO COUNSEL DURING THE COURSE OF AUDITS AND SITE VISITS & TRAINING FOR INVESTIGATIVE OFFICERS

As we have discussed in prior meetings and other public forums, AILA is aware of the dramatic increase in post adjudication audits of H-1B and L recipient companies. AILA also notes the addition of the section “USCIS Compliance Review and Monitoring” on the Form I-129 instructions stating the Service’s right to verify information through, among other methods, “Unannounced physical site inspections of residences and places of employment.” AILA has several questions relating to procedures for such site visits.

At the outset of our discussion we believe that the right to counsel for any party being “examined” is a fundamental premise provided for in the regulations at 8 C.F.R. §103.2(a)(3) as well as by general concepts of procedural due process. See *Ali v. I.N.S.*, 661 F.Supp 1234 (D.Mass. 1986).

The failure to provide right to counsel per USCIS regulations may be, in and of itself, a violation of procedural due process under the Fifth Amendment. See *Ali v. I.N.S.*, 661 F.Supp 1234 (D. Mass. 1986). In addition, administrative regulations “do not necessarily exhaust the requirements of due process.” See *Haitian Refugee Center v. Civiletti*, 503 F.Supp 442, 456 (S.D.Fla 1980), *aff’d sub nom.*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). In other words, “the adequacy of statutory and regulatory procedures for deprivation of a liberty or property interest, even one that is statutorily created, must be analyzed in constitutional terms.” See *Ali*, 661 F.Supp. at 1247 (finding that the fact that the INS may have followed its own regulations in the context of an immigration-related interview absent representation of counsel did not mean that no procedural due process violation had occurred). As stated in *Ali*, the voluntariness of a statement is a consideration in determining its probity, and the absence of *Miranda* warnings is a relevant factor in assessing the question of voluntariness, even when such questioning is not related to custodial interrogation. *Id.*

RIGHT OF COUNSEL:

In recognition of the right of counsel in the context of the worksite investigations by USCIS officers, how will this fundamental right be recognized? Particularly:

- a. Will counsel with G-28s on file be notified of the site visit in advance as is often done with the R-1 investigations?

Response: USCIS is in the process of amending several forms (such as the Form I-129 instructions referenced above) and receipt notices to advise our customers that USCIS may conduct compliance site inspections at any time pre or post adjudication. There are currently no plans to provide advance notice of a site inspection conducted under the ASVVP.

Advance notice is provided by FDNS officers when conducting site visits/administrative inquiries on cases containing elements of suspected fraud unless the officer believes that advance notice would jeopardize or hamper the site visit. FDNS officers also provide notice to attorneys of record when conducting site visits under the Benefit Fraud Assessment and Compliance Program.

- b. If not, will petitioners/beneficiaries be informed of their right to call their attorney and have the attorney present before questioning commences?

Response: Participation in an ASVVP compliance site inspection/any USCIS site visit is voluntary.

- c. If the petitioner/beneficiary/other person being questioned invokes the right to counsel (i.e., “I would like to have my lawyer here before I answer your questions”), will the IOs stop the investigation to allow the person to contact his/her attorney?

Response: Yes, a petitioner/beneficiary/other persons will be allowed to contact their counsel if they are immediately available (in person or telephonically), however, such contact should not unduly delay the process or entail unusual accommodations in which case the site inspection or site visit may be terminated.

- d. If the attorney contacted instructs the person being questioned to stop talking, will the IOs stop questioning or will it be up to the person being interrogated to continually refuse to answer questions?

Response: Yes, the IO will terminate the interview if the attorney so requests.

- e. Will IOs reschedule site visits at a time when an attorney can be present if the parties invoke the right to counsel or will they report that the subjects were uncooperative and thus urge denial of the petition?

Response: Site inspections under the ASVVP will not be rescheduled. If the petitioner’s attorney is not available and the petitioner declines to participate in the site inspection or site visit, the Site Inspector (or FDNS officer?) will note this in his/her report. USCIS will review the information contained in the report to determine what, if any, follow-up action would be appropriate.

- f. If counsel cannot be present, but the subject would like to go ahead with the interview, we assume that there is no reason the interview cannot be recorded. A recent H-1B investigation

team told the subjects that they could not record the interview, but we find no law or regulation to support this assertion.

Response: USCIS is not aware of any law or regulation stating that the subject cannot record the interview. However, normally all parties to a conversation/interview must consent to its recording. USCIS is currently reviewing whether there are any legal, contractual, and/or policy concerns on its end that would render consenting to such recordings improper or inadvisable.

TRAINING:

Regarding the new initiative to investigate H-1B and other employment-based petitions for possible fraud, several questions have arisen about the parameters of these investigations and the way in which investigators will be trained, particularly those who are contractors not experienced with immigration law.

- g.** In general terms, how are the subjects of investigations chosen? Recently, an investigation team told the subjects “You were chosen because you are of Indian origin and file a lot of H-1Bs.” We assume that absent a foreign policy consideration, national origin should not be a factor in choosing investigation subjects.

Response: Pursuant to 8 CFR, 214.2 (r)(16), USCIS’s policy is to conduct site visits on all religious worker petitions prior to approval. Inspections are of petitioning locations who have not had a prior site visit. H-1B petitions are selected at random for post-adjudication site inspections. In either scenario, national origin is not a factor in determining whether a site inspection will be conducted.

- h.** What training is provided to IOs who are charged with investigating H-1B fraud, for example, or other types of employment-based application fraud? Given that applying a complex law with numerous criteria concerning eligibility often requires years of training or experience for immigration lawyers, to what extent will the assessment of a relative novice investigator be given deference with regard to such issues as whether the job offered is a “specialty occupation” or whether the L-1 applicant has “specialized knowledge” for example?

Response: Training is provided to each site inspector and immigration officer during the initial/basic training provided after their entry on duty. Please note that site inspectors only collect and report information which is then analyzed by immigration officers who do have appropriate immigration law training. Immigration officers also receive the same basic officer training as immigration services officers regarding the topics of “specialty occupation” or “specialized knowledge” aspects of employment-related petitions and applications for benefits.

- i.** What opportunity will petitioners/beneficiaries have to review adverse information collected in an investigation? As stated on the I-129 instructions, “Subject to restrictions under 8 CFR part 103.2(b)(16), you will be provided an opportunity to address any adverse or derogatory information, that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on your case or after the agency has initiated an adverse action which may result in revocation or termination of approval.” Given that the response time for a NOID or motion to reopen or appeal is 30 days, a FOIA is not possible. How will the Service Center state the nature of the adverse information, summarize it or otherwise present it for rebuttal?

Response: All adverse or derogatory information is provided in a Notice of Intent to Deny or Revoke. The petitioner will be given an opportunity to respond to the Notice of Intent to Deny or Revoke as required per the regulations.

- j. Will IOs conducting investigations be given business cards or be required to provide contact information so that an attorney may follow up to question or clarify matters that may arise in the course of an investigation, such as if the attorney could not be present or was not hired at the time of the investigation?

Response: The IOs provide their contact information at the site, typically via business cards. If you encounter difficulties later contacting an IO, you should contact the relevant USCIS Field Office Director (FOD).

- k. Finally, what safeguards are being implemented to assure that such unannounced site visits are a reasonable search under 4th Amendment considerations?

Response: Participation in the site inspection and/or site visit process is voluntary. Moreover, site inspections and site visits do not constitute a “search” within the meaning of the Fourth Amendment. These administrative inquiries are primarily concerned with compliance and eligibility for a civil immigration benefit, and not with the pursuit of criminal charges.

We would also like to note that the Office of Public Engagement will host a stakeholder meeting in January that will be themed around ASVVP.

IV. Specific Processing/Procedural Issues

7. “TERMINATION” OF EMPLOYMENT AUTHORIZATION DOCUMENTS

AILA renews its objection to USCIS policy to terminate the ancillary benefits of employment authorization and advance parole for adjustment of status applicants whose applications for adjustment of status have been denied.³ The policy to terminate ancillary benefits at the time the adjustment of status application is denied deprives an alien of the authorization to continue in or accept employment and to engage in international travel between the date of denial of the application for adjustment of status and the time that the alien is able to renew the adjustment of status application in removal proceedings pursuant to 8 C.F.R. § 245. 2(a)(5)(ii). The policy to summarily terminate employment authorization without proper notice is in violation of the regulations.

Pursuant to 8 C.F.R. § 274a.14(a), previously approved employment authorization is automatically terminated upon the occurrence of one of three events: (1) the expiration date is reached; (2) exclusion or deportation proceedings have been instituted; or (3) the alien is granted voluntary departure.⁴

³ William R. Yates, Deputy Executive Associate Commissioner, INS, “Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied,” HQADN 70/23.1, February 28, 2003 [Not published on USCIS website, but available on AILA InfoNet at Doc. No.: 03030644; <http://www.aila.org/content/default.aspx?docid=16878>].

⁴ 274a.14(a) Automatic termination of employment authorization. (1) Employment authorization granted under §274a.12(c) of this chapter shall automatically terminate upon the occurrence of one of the following events: (i) The expiration date specified by the Service on the employment authorization document is reached; (ii) Exclusion or deportation proceedings are instituted

Absent one of these three events, previously approved employment authorization may only be revoked pursuant to 8 C.F.R. § 274a.14(b) (by the “district director”) on one of two bases: 274a.14(b)(1)(i) Prior to the expiration date, when it appears that any condition upon which it was granted has not been met or no longer exists, or for good cause shown; or 274a.14(b)(1)(ii) Upon a showing that the information contained in the application is not true and correct.⁵

AILA requests that USCIS provide guidance to the field to remind examiners that employment authorization cannot be summarily or automatically revoked or terminated absent the institution of proceedings or grant of voluntary departure; that the requirements for revocation of employment authorization pursuant to 8 C.F.R. § 274a.14(b) include providing a notice of intent to revoke as well as the grant of fifteen days from the service of the notice in which the alien may submit countervailing evidence; and that the revocation cannot be effectuated until these requirements are met.

Response: We appreciate your bringing this to our attention. USCIS is reviewing language used in adjustment of status denial decisions to ensure it provides proper notice regarding the termination or revocation of any ancillary benefits.

8. I-130 DENIALS THAT ARE APPEALED TO THE BIA

When an I-130 Immigrant Visa Petition is denied, the Board of Immigration Appeals (BIA) has jurisdiction over the appeal. However, the appeal must initially be filed with USCIS per regulation 8 C.F.R. § 1003.3(a)(2). In a problem that is most frequently encountered in Field Office processing of I-130 appeals, members report that some appeals remain with USCIS for several months and are not timely transferred to BIA. In addition, members report that USCIS Field Offices fail to comply with regulations at 8 C.F.R. § 1003.3(c)(2) regarding briefing schedules and other case-processing timelines. Can USCIS please describe the process of transferring cases to the BIA and the average time it takes to transfer the file? Are there any ways that the process can be made more efficient by the applicant? Can USCIS provide further information about the briefing schedules and how often they are issued?

Response: It is USCIS’ goal to process the receipt of all EOIR-29 Notices of Appeal in a timely manner. The regulations provide that the EOIR-29 can be deemed either a motion to reopen or an appeal to the BIA. Once an EOIR-29 is received, the petitioner has 30 days to also file a brief. After receiving all offered documentation, USCIS prepares a record of proceeding (ROP) and responds to the arguments presented on appeal. The regulations do not provide a specific timeframe by which USCIS must forward the ROP to the BIA, however, we make every effort to do so as quickly as possible. If you are aware of EOIR-29 matters that have been pending for months with a particular USCIS office or location, we encourage you to raise your concerns with the local FOD.

(however, this shall not preclude the authorization of employment pursuant to §274a.12(c) of this part where appropriate); or (iii) The alien is granted voluntary departure.

⁵ One example from a recent I-485 denial: “Title 8, Code of Federal Regulations 274a.14(b)(1)(i) allows termination of employment authorization when it appears that any condition upon which it was granted has not been met or no longer exists. ... You are reminded that the documents, the Employment Authorization Document and the Advance Parole Document are revoked and will not be valid and cannot be used to allow yourself to work in the United States or...” Another example from a recent denial: “In accordance with Title 8, Code of Federal Regulations, Part 274a.14(b)(i), any authorization to accept employment is terminated.”

V. General Processing/Procedural Issues

9. QUALITY CONTROL, TRAINING AND MONITORING OF CIVIL SURGEONS

Our members have reported a large number of Requests for Evidence issued by the Service Centers on employment-based adjustment applications regarding incomplete or improperly completed medical exam reports, with the medical exams returned with instructions to return to the Civil Surgeons to have the deficiencies corrected. In addition, in the summer of 2007 a number of members reported a sharp increase in the fee charged by some Civil Surgeons for the required medical examination, which seemed to be connected to short-term supply and demand. Incomplete medical exam reports create processing delays and waste USCIS resources unnecessarily. These reports from our members prompt several questions:

We understand that under 8 C.F.R. § 232.2(b), Civil Surgeons are selected by the District Office Directors and that “[a]n understanding shall be reached with respect to the fee which the surgeon or clinic will charge for the examination.”

- a. Can you describe the training that is provided to Civil Surgeons with respect to completion of the I-693 and Vaccination Supplement forms? Can you provide us with copies of any materials provided to Civil Surgeons to assist them in proper completion of the forms?

Response: Pursuant to the Immigration and Nationality Act Section 232 and 8 CFR 232, a civil surgeon must perform the medical exam according to HHS regulations at 42 CFR part 34 and the *Technical Instructions for the Medical Examination of Aliens in the United States* (Technical Instructions) as published by the Centers for Disease Control and Prevention (CDC). The Technical Instructions and any updates are published on CDC's website at <http://www.cdc.gov/ncidod/dq/civil.htm>

Civil Surgeons are expected to review the Technical Instructions as part of their responsibilities as civil surgeons.

- b. Can you describe how Civil Surgeons are notified when medical examination forms or requirements change? Who in the agency is responsible for such outreach efforts?

Response: Civil Surgeons are expected to remain current with any updates to the Technical Instructions as posted on CDC's Website. USCIS will also post any new information pertaining to the Technical Instructions and form changes on its public website.

Additionally, Civil Surgeon Coordinators in each District communicate changes to civil surgeons within their jurisdictions.

- c. Can you explain what is meant by “an understanding with respect to the fee”? For example, does USCIS mandate a range within which a Civil Surgeon may charge for a medical exam fee or is there a “reasonable fee” standard?

Response: USCIS does not regulate civil surgeon fees.

- d. Does the Civil Surgeon sign a written agreement with USCIS when selected that addresses his/her responsibilities to properly complete the documentation and with regard to fees? If so, can you provide us with a sample?

Response: There is no written agreement.

By signing part 5 of the Form I-693, the civil surgeon, under penalty of perjury, that he or she is authorized to conduct alien medical examinations and that he or she performed the medical examination in accordance with the Centers for Disease Control and Prevention's Technical Instructions. Failure to perform the examination according to the CDC's Technical instructions is reason for revocation.

- e. Are Civil Surgeons periodically reviewed by USCIS Office of Field Operations?

Response: Sweeps of the civil surgeon listings are conducted by USCIS HQ and Field Offices periodically, confirming that USCIS still has current information about the individual civil surgeons. Depending on the resources available, District Offices perform additional periodic reviews of civil surgeons. Also, depending on the circumstances, site visits may be conducted.

- f. What oversight of Civil Surgeons takes place?

Response: A civil surgeon's medical practice is subject to regulation by the State agency with authority to regulate the practice of physicians in the State. Conduct that may warrant disciplinary action against the civil surgeon should be reported to the State agency.

USCIS may revoke a physician's authority to act as a civil surgeon if the physician regularly fails to follow CDC's Technical Instructions, or has fraudulently completed a Form I-693, or has had his or her license suspended, revoked or terminated.

- g. What are the processes for filing complaints against Civil Surgeons with the USCIS?

Response: Complaints against a Civil Surgeon can be submitted to the Civil Surgeon Coordinator or an Immigration Services Officer at a Field Office. Again, conduct that may warrant revocation, suspension or termination of a physician's license should be reported also to the proper State licensing authority.

If USCIS believes that grounds may exist for removing a physician's designation as a civil surgeon, USCIS will serve the physician with a notice of intent to revoke by Certified Mail/Return Receipt Requested. The notice will clearly state the exact reasons for the intended revocation with notice the physician has 30 days from the date of the notice to respond with countervailing evidence. The physician may be represented by counsel at his or her own cost.

The physician will be notified in writing of the decision to uphold or reverse the notice of intent to revoke the civil surgeon designation.

VI. Other

FOLLOW-UP ITEMS FROM PREVIOUS BENEFITS MEETINGS

10. Work Authorization for B-1 Domestic Workers Incident to Status

As discussed in our Fall 2008 meeting, AILA respectfully renews its request that USCIS amend 8 C.F.R. § 274a.12(a) to include B-1 domestics as aliens authorized employment incident to status and eliminate the need for these nonimmigrants to apply for a work authorization document. B-1 nonimmigrants admitted as personal/domestic employees of foreign nationals in nonimmigrant status or as employees of U.S. citizens on temporary assignment to the United States are currently designated under 8 C.F.R. § 274a.12(c)(17) as “aliens who must apply for employment authorization.” Under 9 FAM 41.31 Note 9.3, an individual cannot be properly admitted to the United States as a B-1 nonimmigrant under this provision unless it is for the express purpose of being employed as a personal or domestic employee. As the FAM defines the parameters of employment, AILA believes that this category of B-1 nonimmigrants fits squarely into the category properly classified as authorized to work incidental to status and that this section of the regulations should be amended to remove the EAD requirement of B-1 personal/domestic employees.

Response: This issue requires vetting through the affected DHS components before a formal decision can be made. If any policy change is considered by DHS, rule making would be required to obtain public comment. CIS would also have to determine the actual number of aliens currently impacted by this provision to determine the issue’s priority within the agency’s rule making agenda. In addition, CIS would need to determine if there are significant safeguards available to ensure that any new provision relating to employment would not be abused by unscrupulous individuals.

The agency is reviewing our regulations and the role of Department of State in the process.

11. ADMINISTRATIVE APPEALS OFFICE: JURISDICTION AND PROCESSING

Jurisdiction:

AILA requests clarification regarding the case types that fall under the jurisdiction of the Administrative Appeals Office (AAO). We understand that after a notice in the Federal Register, 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) was repealed. AILA respectfully request that the regulations be amended to clearly indicate the type of petitions and applications that are permitted to be appealed. While regulations are being promulgated, AILA urges USCIS to provide on its website a list of those case types that can be appealed. The absence of regulations and clear instructions has caused confusion for both our members and the Service.⁶

Response: The AAO will publish an updated summary of its appellate jurisdiction on the new USCIS website. With one exception, the AAO continues to exercise appellate jurisdiction over those matters

⁶ For example, in the denial of an I-602 waiver submitted with an adjustment of status application to a USCIS Field Office, the Field Office indicated that the applicant could appeal the denial to the AAO. The applicant filed the notice of appeal with the USCIS Field Office, along with the \$585 filing fee. The appeal was ultimately rejected by the AAO on the basis that the AAO does not have jurisdiction over denials of I-602 waiver cases.

listed at 8 C.F.R. § 103.1(f)(3)(iii), as in effect on February 28, 2003. As the one exception, U.S. Immigration and Customs Enforcement now maintains authority to review petitions for the approval of schools to accept foreign students under 8 C.F.R. § 214.3 and to withdraw school approvals under 8 C.F.R. § 214.4. Additionally, the AAO administers several immigration programs that have been newly delegated to the AAO or created by regulation since 2003. To provide clear instructions to the public, the AAO has drafted a proposed rule that will update and re-insert the AAO's appellate jurisdiction in the regulations.

Processing: Filing Briefs and/or Additional Evidence Within 30 days of Filing an Appeal

When a denial is appealed, the petitioner/applicant or attorney of record has the option to send both the brief and the I-290B concurrently to the USCIS within 30 days. In the alternative, an applicant may select the option of submitting the I-290B to USCIS within 30 days and then follow-up with a brief and/or additional evidence to the AAO within 30 days.

AILA requests clarification on the handling of cases where the brief is sent separately to the AAO. It appears that there may be confusion between the AAO and USCIS which is causing delay in these cases.

- a. Since the I-290B would not first be reviewed as a motion in this scenario, what is the timeline for USCIS to forward the I-290B to the AAO?

Response: The regulation at 8 C.F.R. § 103.3(a)(2)(iv) requires the reviewing official to "promptly" forward an appeal to the AAO. Although the term "promptly" is not defined by regulation, most USCIS offices forward appeals to the AAO within 60 days of receipt. To ensure that offices forward the appeals in a prompt manner, AAO notes specific office delays regarding the transfer of a case and collaborates with USCIS Domestic Operations to correct the situation.

- b. What is the AAO process to match the I-290B from the Service Center with the evidence submitted directly to the AAO?

Response: Upon receipt of a brief or evidence, the AAO creates a file and then stores the record material in the AAO fileroom. When the appellate record of proceeding arrives at a later date, the USCIS file tracking system informs the fileroom staff of the existing file so they can match the materials to the incoming appeal.

- c. Does the AAO have an internal tracking system that prompts it to follow up on cases for which it receives after-filed evidence but does not receive an I-290B within a predetermined period of time? If not, we would like to ask if the AAO would consider implementing such a system to help keep review of appeals synchronized with AAO processing timelines.

Response: Yes, the AAO creates a file for the after-filed evidence and briefs. If this file remains on the shelf in the fileroom for six months, the AAO fileroom will request the appellate record from the originating office. This system allows the AAO to keep the review of appeals synchronized with AAO processing timelines.