



Questions and Answers

USCIS Service Center Operations Directorate (SCOPS) and American Immigration Lawyers Association (AILA) Meeting

February 29, 2012

I. Overview

On February 29, 2012, the USCIS Service Center Operations Directorate (SCOPS) hosted an engagement with American Immigration Lawyers Association (AILA) representatives. USCIS discussed issues related to operations and adjudications. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

II. Questions and Answers

1. Case Status Inquiries

AILA has noticed that many case status inquiries that have been sent through the National Customer Service Center (NCSC) follow-up e-mail addresses have resulted in the following response: "Your case is in the processing queue and will soon be assigned to an Adjudicating Officer for final processing. You should expect to see action on your case within the next 90 days."

Before a liaison inquiry is submitted through the NCSC e-mail address, the case must be outside the posted processing time, and the attorney of record must prove that he/she has called the NCSC and waited the requisite 15 days for a response. Once an NCSC inquiry is deemed appropriate and submitted via e-mail, the member often times must wait five weeks or more to receive a response that indicates that the case will soon be assigned to an officer and that the applicant should wait another 90 days (see above). Therefore we have two related questions:

- a. What is a reasonable timeframe for a customer to wait once a case reaches the NCSC follow up e-mail stage of the inquiry process?

USCIS Response: If the processing center does not respond in 15 days, the customer may contact the processing center directly via email. The center has 21 days to respond. If they do not receive a response in 21 days the customer may then contact SCOPSSCATA.

- b. If the NCSC e-mail response offers no substantive information and/or asks the caller to wait another 30-45 days before enquiring again, should the customer go directly to SCOPSSCATA@dhs.gov for a follow up?

USCIS Response: We want to thank AILA for bringing this to our attention. We are working with the centers' customer service staff to develop more accurate responses. We ask that you follow established protocols on moving inquiries through the path. However, if you have contacted the appropriate Service Center mailbox and not received a response within a reasonable time frame, please feel free to send a follow up inquiry to SCOPSSCATA@dhs.gov.

2. Notice of Appeal or Motion

AILA members report extensive time lags between the date they submit an I-290 Request for Reconsideration or Reopening/Appeal and the time when the case is either re-opened or sent to the AAO. There is currently no real method of tracking these cases or determining what an average or reasonable waiting period is. Members also report that when they submit inquiries on these cases either to NCSC or the service centers they either get a non-response that simply states the cases is still pending or they do not get any response at all. We therefore have a series of related questions:

- a. What is the average time that a service center takes to process a Form I-290B, review the decision and determine whether to reopen or reconsider, and/or forward the case to the AAO for review.

USCIS Response: In general, it is the goal of the service centers to process motions to reopen within 90 days and appeals within 30 days of receipt. We have experienced backlogs in the processing of some motions and appeals in the past few months. Currently, workloads at the California Service Center (CSC) are current, Nebraska Service Center (NSC) is about one month behind and Vermont Service Center (VSC) is a little over two months behind the expected processing goals. SCOPS has contacted all centers regarding the motions and appeals backlogs and the centers have reallocated their resources to bring the processing of I-290B filings within the expected processing timeframes.

- b. Would USCIS please post I-290B request processing times at service centers that indicate length of time to receive and initially review, length of time to determine whether to reopen or reconsider, and, length of time to render a decision on the merits after reopening and reconsideration, or, length of time to transmit the case to the AAO in the event reopening or reconsideration is denied?

USCIS Response: USCIS will consider the feasibility of this recommendation.

- c. Would USCIS adopt internally and publish for stakeholders guidelines that state processing goals for Form I-290B from initial receipt, through review for reopening and/or reconsideration, and /or transmittal to the AAO?

USCIS Response: Thank you for your suggestion. We will consider all operational impacts to determine if this is feasible.

3. Successor-in-Interest Doctrine

AILA urges USCIS to review the current range of corporate structural changes and corporate personnel policies and to apply the principles underlying the “successor-in-interest” doctrine expansively and flexibly in the case of personnel transfers among affiliated corporations, including parent corporations and their subsidiaries, and where a new affiliated corporation (a “spin-off”) is created.

Dial Auto and the Neufeld Memo of August 6, 2009 (and amendments to Chapter 22 of the AFM) speak to successor in interest, and set forth a 3 part test to determine if a successor corporation can proceed on an existing I-140 or PERM application. AILA has become aware of a fact pattern that occurs with some frequency where the employee is not transferred to a true successor in interest but rather to a wholly owned subsidiary of the original petitioning employer. For example, assume that Company A processes a PERM application for a Systems Engineer, working at 123 Main Street. Following approval of the I-140, Company A transfers the beneficiary to a wholly owned subsidiary, Company A-One, and he continues to do the same job, at 124 Main Street. Company A-One was organized by Company A to provide similar products or services, but for business, tax or regulatory reasons, the parent company created a wholly owned subsidiary. The beneficiary is now working for Company A-One, performing the same job duties at the same salary, in the same location (if not the same building, close by and certainly within the same MSA). However, because it is a wholly owned subsidiary, the FEIN is different. AILA would like to know whether, in such a scenario, USCIS would apply the same test to whether the PERM and/or the I-140 remains valid as it does to successor in interest cases, since the test of the labor market, assignment of the proper visa classification, assessment of the beneficiary's qualifications and satisfaction of the employer's stated requirements and the ability to pay have all been determined and the only real change is the name and FEIN of the employer?”

We note that the Neufeld Memo addressed the question of whether the policy behind the test of the labor market, and the resulting examination of the employer and employee's right to an immigrant visa petition, was furthered by recognizing the steps of the process already completed. The Memo used the term "successor" but as noted herein, the term was broadly used and in quotes. The specific questions that the memo required an examiner (and petitioner) to address are:

1. *"The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification."* In the situation set forth above, the job opportunity is the same in all material respects (duties, requirements, location and salary).
2. *"The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL."* Again, because the employer is a wholly owned

subsidiary of the parent company, it will have no problem complying with this requirement.

3. *"For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor."* This final factor seeks to test whether the petitioner has properly stepped into the role of the employer and assumed the duties and responsibilities of the prior employer. USCIS has consistently interpreted successor in interest to require assumption of the employment relationship and obligations as related to the particular individual, and not the entire business.

As USCIS reviews variations in the business transactions, the development of the law on successors has consistently looked at the substance of the relationship, and not bound the parties into specific transactions that may no longer be appropriate for a changing business environment. In this instance, the employer remains essentially the same, but for some structural changes that may not mirror the successor in interest, but nevertheless, suggest the same treatment in recognition of the changing needs of the business community. An expansion of the applicability of the "successor-in-interest" doctrine to include these kinds of corporate structures and personnel decisions will enhance the flexibility of U.S. businesses to address changes and remain competitive.

USCIS Response: USCIS acknowledges that changes in business ownership and employment are business realities. However, in order to determine whether the terms and conditions of the labor certification are being met by the petitioner, USCIS must distinguish between changes due to a "successor-in-interest" and simply a "change of employer." Petitioners attempting to qualify as an employer on an I-140 petition that differ from the employer listed on the labor certification, including those listed in your above example, will be reviewed by USCIS to see if they qualify as a "successor-in-interest." Chapter 22.2(b)(5) of the Adjudicators' Field Manual (AFM) describes in great detail the factors that must be met to qualify as a successor-in-interest, including the following factor: if the successor has adequately detailed the nature of the transfer of rights, obligations, and ownership of the prior entity. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. The burden is on the petitioner to submit sufficient evidence to establish that it qualifies as a successor-in-interest. If a petitioner fails to qualify as a successor-in-interest, the I-140 petition will likely be adjudicated as a "change of employer" and as such would be required to obtain its own labor certifications from the DOL.

4. H-1B Petition Processing Times

Are there any updates on actual processing times for H-1B petitions? For example, CSC is still reporting two months, but reports from the field indicate actual processing time is more than double that time. If the posted processing times are in fact not reflective of actual

processing times, would USCIS consider placing a notice on its published processing times that in some manner alerts the public to this fact?

USCIS Response: H-1B initial filings and extension requests are slightly outside the 60-day processing time frame. We recommend contacting the NCSC for assistance for individual petitions that have fallen outside the regular processing time frame. Please note that processing times are not updated on the web on a daily basis. Processing times vary greatly based on various factors, such as volume and general intake, so there may be slight fluctuation in actual processing times from day to day.

5. Change of Nonimmigrant Status

After longstanding practice to the contrary, CSC informed stakeholders during the November 8, 2011, CSC Stakeholder Engagement that it would deny a request to change status to H-1B for a former J-2 derivative of a former J-1 Foreign Medical Graduate who has been granted a waiver under INA §214(l) and a change of status to H-1B, but before the J-1 principal has completed his or her requisite number of years in H-1B status. (Cases denied under this policy include WAC-11-171-50852, WAC-11-214-51460). The denials cite to INA §214(l)(2) and 8 C.F.R. §212.7(c)(9); however, neither prevents a J-2 from changing status to H-1B before completion of the principal's three-year J-1 waiver commitment. The fact that these provisions do permit a change of status from J-2 to H-4 for dependents of J-1 physicians who have obtained an IGA waiver does not preclude a change of status for the J-2 to something else. Under 8 C.F.R. § 212.7(c)(9)(ii)(A), the Service "grants the waiver" upon issuing the approval notice. Based on that language, the grant of a waiver is final unless it is revoked which occurs automatically upon failure to fulfill the H-1B service requirement. This conclusion is strengthened by 8 C.F.R. § 212.7(c)(9)(iv) (stating that "[a] foreign medical graduate who fails to meet the terms and conditions imposed on the waiver . . . will once again become subject to the 2-year requirement under section 212(e) of the Act"); 9 FAM 40.202 N2.6(a) (same). The use of the words "once again" makes clear that the FMG (and therefore members of his or her family) are not subject to the waiver post-granting unless and until this automatic revocation occurs. AILA asks that SCOPS instruct the field to approve requests to change nonimmigrant status from H-4 to H-1B if the only impediment to approval is the fact that the former exchange visitor has not yet completed his or her H-1B service.

USCIS Response: A foreign medical graduate who was granted a waiver under section 214(l) of the Immigration and Nationality Act is not eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status until he or she completes the terms and conditions imposed on the waiver, including fulfillment of the requisite 3-year employment contract. The J-2 or H-4 spouse or child of a waiver recipient under section 214(l) is also not eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status until the waiver recipient completes the terms and conditions imposed on the waiver, including fulfillment of the requisite 3-year employment contract. See INA 214(l)(2)(B); 8 CFR 212.7(c)(4), 212.7(c)(9)(iv), and 248.2(a)(3). See also *Matter of Tabcum*, 14 I. & N. Dec. 113 (R.C.

1972). USCIS understands that there may be confusion by stakeholders on this issue and we will issue clarifying guidance as necessary.

6. Document Management Procedures

AILA has some general questions about document management procedures of the Service, particularly when large petitions are being submitted. Various reports indicate that only 50 pages of any submission can actually be scanned due to technological limitations. We also have been informed that petitions are broken down in the mail room (even when they comply with the Service's preferred document order), and that examiners may spend substantial time "reassembling" these petitions. In addition, RFEs received would increasingly suggest that not every document submitted actually makes it to the examiner. These RFEs ask for basic documents that were submitted in the initial filing, such as birth certificates and translations, and when RFEs list documents submitted on a particular evidentiary point the list often DOES NOT include multiple documents that were submitted. As a result, members express concern that critical evidence submitted is not making it to the examiners. Could SCOPS please address the procedure used to prepare a file for transmission to an examiner, the transfer process, and describe what mechanisms are in place to ensure that every part of every file is actually transferred from the mailroom to the examiner?

USCIS Response: Thank you for your question. We have asked AILA to reach out directly to Lockbox Operations for a response.