U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Customer Service and Public Engagement Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

Questions and Answers

USCIS Field Operations – American Immigration Lawyers Association (AILA) Meeting
October 4, 2012

Overview

On October 4, 2012, the USCIS Field Operations Division hosted an engagement with AILA representatives. USCIS discussed issues related to biometrics collection, NSEERS registration, customer service, as well as other issues. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

Issuing NTAs in NSEERS Cases

Question 1: At the March 21, 2012 meeting, we discussed the issue of NTA issuance as it pertains to a finding of an NSEERS violation (AILA Doc. No. 12050847). USCIS indicated that guidance was forthcoming, and on April 16, 2012, DHS issued new guidance pertaining to the treatment of individuals who were previously subject to NSEERS (AILA Doc. 12042661). The guidance defines willful noncompliance and encourages officers to review the totality of the circumstances when adjudicating a case with a potential NSEERS failure to register issue. The memo further states that "[w]ithin sixty 60 days, components shall issue specific guidance consistent with this policy, ensuring that sufficient procedures are in place and that appropriate training and instruction is provided to ensure compliance of all personnel with this policy." AILA members report that local field offices have placed cases involving NSEERS issues on hold and are waiting for additional guidance and instruction from USCIS headquarters.

Please advise on the status of the USCIS guidance as discussed in the April 16, 2012 memorandum, and provide an indication of how soon action will resume on cases that have been placed on hold.

Response: USCIS provided adjudicators with guidance on implementing the Deputy Secretary's April 16, 2012, memorandum. We are working to develop training materials and procedures to ensure these cases are processed in a standardized manner and in accordance with the new policy.

NTA Issuance When Denied I-601 Waivers are on Appeal at the AAO

Question 2a: On April 7, 2011, USCIS indicated that NTA requests may be granted while an I-601 waiver remains pending at the AAO (AILA Doc. No. 11040735). Prior to these meeting minutes, some USCIS field offices would hold the NTA request until the Board of Immigration Appeals (BIA) issued a decision on the I-601 appeal. What guidance has been provided to field offices on the issuance of NTAs under these circumstances?

Response: USCIS assumes that the reference to the Board was intended to be a reference to the Administrative Appeals Office (AAO). USCIS is in the process of issuing a Policy Manual which contains a General Waiver section covering this topic.

Question 2b: If an NTA request is submitted after the appeal and the A-file has already been sent to the AAO, is there a mechanism for field offices to easily retrieve the A-file from the AAO so that the NTA can be issued?

Response: USCIS is generally going to issue an NTA prior to sending a file to the AAO. Internal USCIS file movement is covered in the USCIS Records Handbook. As noted in the Q&A from the April 7, 2011, engagement, the pendency of an appeal at the AAO does *not* deprive the immigration judge of jurisdiction to grant a waiver, in conjunction with an adjustment application. 8 CFR 1240.11(a)(2).

K-1/K-2 Adjudications Pursuant to *Matter of Sesay*/*Matter of Le*

Question 3: At the March 21, 2012 liaison meeting USCIS stated that guidance would be issued to field offices regarding the adjudication of K-1/K-2 petitions in light of the Board of Immigration Appeals (BIA) holdings in *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011) & Matter of Le, 25 I&N Dec. 541 (BIA 2011) (AILA Doc. No. 12050847). Please advise on the current status of the referenced guidance.

Response: This guidance is undergoing the internal review process.

Request for Evidence (RFE), Notice of Intent to Deny (NOID), and Denial of Petition or Application

USCIS may issue an RFE, NOID, or denial on an application or petition if the applicant or petitioner fails to submit required initial evidence or fails to submit evidence which establishes eligibility for a benefit. Though the regulations do not articulate the circumstances when an RFE, NOID, or denial should be issued, the Adjudicator's Field Manual (AFM) provides some guidance on when such actions should be taken.

Question 4a: The AFM states that RFEs should be issued when initial required evidence is missing or when additional evidence is needed to adjudicate the application/petition. An RFE should only be issued after USCIS thoroughly conducts an initial review of the application/petition and the information cannot be found through USCIS's resources. RFEs should be narrowly tailored to request the missing evidence necessary to render a decision in the case.

AILA has received reports from members whose cases have been denied after new eligibility issues are raised following an RFE response. RFE example: An I-751 petition is filed with a bona fide marriage exemption waiver request. During the interview, USCIS issues an RFE asking for a copy of the divorce decree because it was not submitted with the original petition. The self-petitioner submits a copy of the divorce decree in response to the RFE, but then receives a denial of the I-751 because he did not submit enough evidence showing the existence of a bona fide relationship.

In this example, the RFE properly requested evidence that was missing from the record. However, the USCIS adjudicator never indicated that there were additional issues and never gave the self-petitioner the opportunity to provide more documentation evidencing a bona fide marriage.

Would Field Operations remind examiners that where additional eligibility issues arise after a response to an RFE is received, the petitioner/applicant should be afforded the opportunity to respond to the new allegations before a decision to deny is made?
Response: An applicant or petitioner must establish that he or she is eligible for a requested benefit at the time of filing, but where an adjudicator provides an applicant or petitioner a subsequent opportunity to submit initial or additional evidence of eligibility, Field Operations will remind them that they should endeavor to put the applicant or petitioner on notice of all deficiencies via one RFE.

Question 4b: USCIS adjudicators have the option of denying a case if the initial requested evidence has not been submitted or does not establish eligibility. However, the AFM urges USCIS adjudicators to issue an RFE or NOID instead of denying an application or petition without giving the applicant/petitioner the opportunity to submit the missing evidence or rebut the derogatory evidence. Based on this, an RFE should be issued when there is missing evidence, while a NOID should be issued if there is evidence in the record that shows ineligibility for the requested benefit, or USCIS is aware of derogatory evidence, but the applicant/petitioner is not aware of such evidence.

RFE vs. Denial Example: An N-400 applicant resides outside the U.S. for one year during the continuous residence period. The N-400 is denied without issuing an RFE despite the fact that based on statements made by the applicant at the interview, he may qualify for an exemption of the continuous residence/physical presence requirements under INA §§ 316(b)-(c).

Given that the applicant was never given the opportunity to provide evidence to show that he qualified for the exemption, please confirm that in this situation, an RFE should generally be issued rather than a denial.
Response: It is the applicant or petitioner's responsibility to establish eligibility at the time of filing, however, in this situation an applicant is generally provided a subsequent opportunity to submit the requisite information.

Question 4c: NOID v. Denial Example: The date of entry into the U.S. provided by an I-485 adjustment of status applicant was inconsistent with the date that the USCIS adjudicator found in the USCIS computer system. Instead of issuing a NOID and giving the applicant the opportunity to rebut the contradictory evidence, USCIS denied the application.

Please confirm that in this situation, a NOID is warranted to allow the applicant the opportunity to rebut the derogatory evidence, rather than a denial.
Response: Based on the facts presented above, a NOID would be warranted in this situation.

Question 4d: Chapter 10.3(f) of the AFM instructs that when a NOID is issued, "applicants or petitioners may choose to respond in writing or ask to inspect the record of proceedings prior to submission of a rebuttal." If an applicant/petitioner asks to inspect the record of proceedings, what actual documents will USCIS permit the applicant/petitioner to inspect?
Response: To inspect the record of proceedings, the applicant must file a Freedom of Information Act (FOIA) request. Applicants will be allowed to inspect all documents unless exempt from release in whole or in part by law.

G-28s Submitted to the USCIS Field Office at an Interview

Question 5: AILA continues to receive reports from attorneys who are not recognized as the attorney of record notwithstanding the fact that a G-28 has been filed with USCIS. When an attorney submits a Form G-28 during an interview at a USCIS field office, will the G-28 be entered into a USCIS database so that it is electronically available to all USCIS personnel? If not, is there a way to make this process possible? If this is not possible, how will USCIS know that there is an attorney of record who needs to be notified

of actions/decisions in the case?

Response: Yes, when an attorney or authorized representative submits a Form G-28 during an interview it should be entered into USCIS systems. A copy of the G-28 will also be placed in the file. If an attorney is not receiving notices and other documentation from USCIS, please bring it to the Field Office director's attention.

Recording of Interviews at USCIS Field Offices

During the AILA USCIS Field Operations meeting on March 21, 2012, the issue of USCIS policy regarding the recording of interviews was discussed (AILA Doc. No. 12050847). USCIS stated that it was reviewing guidance on when interviews should be recorded. AILA was pleased to see a brief statement that offices should be equipped with video or audio taping devices, and that if such equipment was not available, arrangements should be made to record difficult cases in the Policy Memorandum of May 23, 2012, which amended pertinent parts of AFM Chapters 12 and 15, (AILA Doc. No. 12052940).

Question 6a: Please advise as to whether additional guidance on the recording of interviews will be issued. If so, what is the current status of such guidance?
Response: This guidance is undergoing the internal review process.

Question 6b: Is there a plan in place to ensure that all offices have the capacity to record interviews?
Response: No, internal discussions are being held to determine whether all offices will have recording capacity and which interviews will be recorded.

Question 6c: Are any districts recording interviews at this time? If so, please advise which offices are recording interviews and under what circumstances the recordings are being conducted.
Response: Some offices do record interviews. Which interviews are recorded varies depending on the office and the circumstances of the particular case.

Biometrics Processing-General Questions/Applicants Not in Proceedings

AILA members report that biometrics appointment scheduling can take more than four months when a case that has been held for visa availability at a district office or service center becomes current after a visa backlog. This delay causes undue hardship to such applicants who in many cases have already waited years for their visa numbers to become current.

Question 7a: What is the local office process for scheduling biometrics appointments, including renewing biometrics after they expire? Is the process the same at all district offices?
Response: At a field office, when a continued case is called up for review and the biometrics have expired, USCIS will re-schedule the applicant with the next available ASC appointment. Family based visa regressed cases are held at the National Benefits Center (NBC) until the visa becomes current. The NBC checks monthly to see if the biometrics have expired on any cases. If the NBC identifies some cases with expired biometrics, they report their findings to Headquarters for scheduling at the ASC closest to the applicant.

Question 7b: Are district offices expected to generate biometrics appointments within a certain period of time?
Response: There is no specific time requirement to generate a new biometrics appointment.

Question 7c: Can biometrics appointments be expedited, especially when a case has been pending for years due to retrogression?
Response: Yes, an expedite request can be made. The ASC manager considers requests for expedited biometrics capture on a case-by-case basis.

Biometrics Processing-Applicants in Proceedings

AILA members continue to report difficulty scheduling biometrics for certain cases in proceedings. Due to court backlogs, it is not unusual for a final merits hearing to be scheduled several years after the master hearing at which the application for relief is filed. By this time, the original biometrics have expired, and the alien is required to have them taken again before the final hearing. In such cases, attorneys report a number of problems, including:

- Lack of communication about when new biometrics are needed;
- Long delays of several months before biometrics appointments are scheduled; and
- Difficulties scheduling new biometrics appointments.

When such problems occur, attorneys often need to involve the local ICE Office of Chief Counsel (ICE-OCC) or risk abandonment of the application for relief. Sometimes ICE-OCC is able to run the biometrics again or to request an appointment for the alien at the local ASC. In other cases, ICE-OCC refuses to assist, saying it is a USCIS problem beyond their control.

Question 8a: Please describe the procedure for scheduling biometrics appointments for applicants in proceedings. What role does the local ICE-OCC play? What role does the service center play? What role does the local USCIS field office play? Is the procedure the same nationwide or does it vary by district office?
Question 8b: Upon request from a local ICE-OCC, may an ASC schedule a biometrics appointment for an alien in proceedings whose original biometrics have expired?
Question 8c: What role is played by district and field offices in troubleshooting biometrics scheduling problems, both for aliens in proceedings and those not in proceedings?

Response: Field Operations is unable to respond to these questions as biometrics scheduling for individuals in proceedings is done by the Texas Service Center. Service Center Operations would be in a better position to respond to these questions.

Regarding question 8c, for applicants not in removal proceedings, Field Offices will reach out to the Application Support Center (ASC) for resolution with biometrics scheduling problems.

Stakeholder/Customer Service-Filing Issues at Local Offices

Question 9a: Local USCIS offices operate under different hours and follow different procedures. Some local USCIS offices only accept filings, such as responses to NOIDS and RFEs, during certain hours. This causes confusion and can result in persons missing their filing deadline. Given the harsh consequences of missing a filing deadline, would USCIS consider creating a drop box system with a date stamp at local offices so that filings may be submitted, even after office hours?
Response: Thank you for this suggestion. We will review it; however, this proposal could be problematic in some offices due to building access restrictions, particularly after hours.

Question 9b: Would USCIS consider instructing all local USCIS offices to allow the filing of papers during regular office hours without restriction?
Response: We will discuss this proposal with Field Operations leadership.

Question 9c: Establishing a policy requiring local offices to provide 30 day notice to the community if office hours change?
Response: Field Operations will take this suggestion under consideration. We are also redesigning our public web pages, and when the new pages are posted online, they will contain real-time information about the hours and status of office openings.

Expedited Advance Parole

AILA seeks clarification regarding expedite requests for advance parole. To request expedited advance parole, USCIS provides several options:

(1) Call NCSC and place a service request;
(2) Schedule an InfoPass appointment; or
(3) Write a letter to the local office or service center.

Question 10a: Does USCIS prefer one method over the others when considering a request for emergency/expedited advance parole?
Response: For emergency advance parole, the applicant will need to visit a Field Office. The applicant should make an InfoPass appointment; however, if it is an urgent situation, the office should allow for a walk-in appointment. Applicants must bring evidence supporting the need for issuance of an emergency advance parole document. For an expedite request, calling the NCSC or writing the National Benefits Center (NBC) or Service Center where the Form I-131 is pending are both viable options. Keep in mind, however, that if the applicant contacts the NCSC, the NBC or Service Center will frequently request evidence of the need to expedite the application. If submitting the expedite request in writing, the evidence should accompany the request.

Question 10b: For requests made through the National Customer Service Center (NCSC) or via mail, is there a mechanism in place so that attorneys and/or clients can track the expedite request?
Response: When contacting the NCSC to expedite an application, a service request will be taken and a number will be assigned to this request. To track the status of that request, the attorney or applicant may contact the NCSC again for an update. There are no tracking mechanisms for written expedite requests.

Question 10c: In many cases, USCIS sends the denial letter only to the applicant. Will USCIS also provide notification of the expedite request to the G-28 attorney of record?
Response: Attorneys should also receive notification of the expedite decision.

Question 10di: For expedite requests made at a local office through the InfoPass system: Are all field offices equipped to adjudicate and issue advance parole documents?
Response: Yes.

Question 10dii: If not, please provide a list of offices that may accept emergency advance parole requests via InfoPass.
Response: Not applicable.

Question 10e: Where USCIS denies a request to expedite advance parole, but circumstances change within 30 days, how should the attorney renew the expedite request? For example, a request is made to visit an ill family member, but shortly after the expedite request is denied, the family member dies.
Response: The attorney or applicant will need to submit a new expedite request.

Adjustment of Status Following Termination of Conditional Residence

AILA recently received reports that some field offices were erroneously taking the position that the failure to file a timely I-751 does not result in automatic termination of conditional resident (CR) status, and that the alien continues to hold CR status until it is terminated by an immigration judge. Following this reasoning, USCIS was taking the following steps in cases where the alien obtained CR status, failed to timely file an I-751, and then filed a subsequent I-130/I-485 based on a new marriage:

- Where the subsequent I-130/I-485 was approved, USCIS rescinded the I-485, reinstated CR status based on the original I-485, and in at least some cases, issued a notice to appear (NTA);

- Where the subsequent I-130/I-485 was pending, USCIS denied the I-485, administratively closed the I-130, reinstated CR status based on the original I-130/I-485, and in at least some cases, issued an NTA;

Under 8 CFR §245.1(c)(5), an "alien who is already admitted to the United States for permanent residence on a conditional basis" is not eligible for adjustment of status under INA §245. Conditional resident status automatically terminates under INA §216(c)(2)(A)(i) if an I-751 petition to remove conditions is not filed within the 90 day period before the second anniversary of the alien's grant of CR status. In *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991), the BIA held that an alien whose CR status has been terminated is not barred by INA §245(d) from adjusting.

In addition, chapter 25.1 of the USCIS Adjudicator's Field Manual states:

> In 1996, the Attorney General proposed an amendment to the regulation, so that a conditional permanent resident would remain ineligible for adjustment of status even after termination of conditional LPR status. 61 Fed. Reg. 43028 (1996). Until the Department of Homeland Security publishes a final rule, and the final rule enters into force, however, USCIS officers are bound to follow *Matter of Stockwell*.

Therefore, it is clear that upon termination of CPR status, the alien is eligible for adjustment of status. There is no requirement in the statute, the regulations, or *Matter of Stockwell* that the immigration judge assume jurisdiction over the case for any reason.

Question 11a: We understand that at least one office has since acknowledged that the refusal to adjudicate and administratively close such cases, as described in the second bullet point above, was incorrect. However, it is reported that this office is now refusing to adjudicate these I-130s without an order from the immigration judge that specifically states that conditional resident status is terminated (i.e., an order terminating proceedings is not sufficient). Since conditional resident status automatically terminates under INA §216(c)(2)(A)(i) if an I-751 is not timely filed, please confirm that an IJ order as described above is not required, and that the I-130 should be immediately adjudicated.
Question 11b: We have also been advised that the actions described above were taken in response to an internal USCIS memorandum. If this is accurate, would USCIS Field Operations please provide AILA with a copy of this memorandum? Also, would USCIS please issue clarifying guidance to the field on automatic termination of conditional residence in order to ensure that field offices adjudicate these cases moving forward?
Question 11c: Similarly, we have received reports that at least one field office is taking the position that the former conditional resident whose status has terminated is ineligible to adjust unless he or she completes Form I-407, Abandonment of Lawful Permanent Resident Status. Given that CR status terminates automatically upon failure to file a timely I-751 under INA §216(c)(2)(A)(i), we ask USCIS Field Operations to instruct the field that the completion of a Form I-407 in this situation is not required.

Response: As to question 11a, an alien's ability or inability to seek permanent residence is not an issue in a Form I-130 proceeding. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). USCIS agrees, therefore, that a Form I-130 should be adjudicated on the merits, rather than "administratively closed," regardless of whether the beneficiary's conditional LPR status has, or has not, been terminated.

Nor is it "clear" that *Matter of Stockwell* establishes that an IJ proceeding is unnecessary where USCIS has terminated conditional LPR status. In point of fact, the respondent in *Matter of Stockwell* sought and obtained adjustment only *after* the immigration judge had sustained the charge of deportability, and had found that the respondent was not eligible for a hardship waiver. 20 I&N Dec. at 310.

Beyond those observations, USCIS notes that there are numerous scenarios/examples cited without the identification of the specific field office(s) or individual case number(s). We recommend that you bring the individual case(s) and/or issues to the attention of your local USCIS Field Office Director.

Communication with Field Offices

Question 12a: Please provide a current list of all District Directors and Regional Directors with contact information.
Response: Please see attached.

Question 12b: Please provide an updated organizational chart for the USCIS Field Operations Directorate.
Response: Please see attached.