



USCIS Meeting with the American Immigration Lawyers Association (AILA) Questions and Answers April 16, 2015

Overview

On April 16, 2015, USCIS hosted an engagement with AILA representatives. During this meeting, USCIS addressed questions related to Executive Actions on Immigration, H-4 employment authorization, FDNS site visits, and H-1B specialty occupations among several other topics. The information below provides an overview of the questions solicited by AILA and the responses provided by USCIS.

Questions and Answers

Executive Actions on Immigration

DACA Expansion and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)

1. On November 20, 2014, DHS Secretary Johnson issued a Memorandum directing the expansion of the Deferred Action for Childhood Arrivals (DACA) initiative and the creation of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). As of the date this agenda was submitted, an injunction temporarily halting the implementation of expanded DACA and DAPA remains in place. Should the injunction be lifted by the date of our meeting (April 16, 2015), we look forward to engaging with USCIS in a productive discussion regarding the agency's progress on the implementation of these two initiatives, including an update on the anticipated dates that USCIS will begin accepting applications, when we can expect to see FAQs, guidance, and forms (draft or final), processing time goals, staffing updates, etc.

Other Executive Actions

On November 20, 2014, through various memoranda, DHS Secretary Johnson directed USCIS to implement a number of other actions that would impact business and employment-based immigration, the provisional waiver program, and parole in place for families of members of the U.S. Armed Forces, among other benefits.

2. In the November 20, 2014 memorandum, "Policies Supporting U.S. High-Skilled Businesses and Workers," the Secretary noted the importance of the L-1B intracompany transferee visa to multinational companies and directed USCIS to issue the long-awaited policy memorandum providing "clear, consolidated guidance on the meaning of 'specialized

knowledge.” AILA has long-advocated for the release of such guidance, beginning as far back as January 24, 2012, when we provided USCIS with a memorandum outlining our concerns with “specialized knowledge” adjudications. Please provide a timeline for release of the L-1B memorandum.

USCIS Response: On March 24, 2015, USCIS issued the memorandum, “L-1B Adjudications Policy,” with an effective date of August 31, 2015. Stakeholders are given until May 8, 2015, to provide feedback on this memorandum.

3. In the November 20, 2014 memorandum, “Directive to Provide Consistency Regarding Advance Parole,” Secretary Johnson notified USCIS, CBP, and ICE that he had directed DHS General Counsel to issue written guidance on the meaning of *Matter of Arrabally-Yerrabelly* to clarify that in all cases when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a “departure” within the meaning of INA §212(a)(9)(B)(i). As of the date this agenda was submitted, this guidance has not been released. In the meantime, AILA continues to receive reports that some field offices are taking the position that *Arrabally-Yerrabelly* is limited to its facts and does not apply to individuals who depart the U.S. and return on advance parole in contexts other than adjustment of status (such as DACA, TPS, etc.). Please provide a timeline for release of the *Arrabally-Yerrabelly* guidance.

USCIS Response: The Secretary’s Directive asked the DHS General Counsel to issue written legal guidance on the meaning of the *Arrabally* decision. USCIS will keep stakeholders informed of any new developments.

4. Please also provide an update on USCIS’s efforts with respect to *each* of the following November 20, 2014 directives, including whether and when we can expect to see draft, interim, or final rules (where required), guidance, or other actions including any opportunities for stakeholder engagement:
 - a. Coordination between USCIS and the Department of State to “improve the system for determining when immigrant visas are available to applicants during the fiscal year.” OP & S

USCIS Response: DHS and the Department of State have been in discussions on ways to improve the immigrant visa system.

- b. Additional agency guidance to bring clarity to employees and their employers with respect to the types of job changes that constitute a “same or similar” job for purposes of permanent portability under AC21.

USCIS Response: See item 4(e) response below.

- c. Notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for STEM students and graduates.

USCIS Response: While Immigration and Customs Enforcement (ICE) is primarily responsible for developing the proposed STEM OPT regulation, USCIS is coordinating the development of this regulation with ICE. As this initiative is currently under development and subject to agency, department, and executive branch review and clearance, we cannot provide a timeline for issuance at this time.

- d. Guidance or regulations to clarify the standard by which a national interest waiver can be granted with the goal of promoting its greater use to benefit the U.S. economy.

USCIS Response: See item 4(e) response below.

- e. Notice and comment to establish a program to permit DHS to grant parole to inventors, researchers, and founders of start-up enterprises who have been awarded “substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research.

USCIS Response: USCIS is currently working on the other initiatives listed above. Each of these initiatives is currently under development and subject to agency, department, and executive branch review and clearance. As such, we cannot provide a timeline for issuance at this time.

- f. New regulations and policies to expand the provisional waiver program to “all statutorily eligible classes of relatives for whom an immigrant visa is immediately available.”

USCIS Response: DHS is proposing to amend its regulations governing the provisional unlawful presence waiver process. Through this rule, DHS proposes to expand access to the provisional unlawful presence waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available, including those who can show extreme hardship to his or her lawful permanent resident spouse or parent. DHS is currently completing the development of the proposed rule and preparing the rule for the concurrence and clearance process.

- g. Additional guidance on the definition of “extreme hardship,” including criteria by which a presumption of extreme hardship may be found.

USCIS Response: DHS is currently completing the development of extreme hardship policy guidance and guidance is currently in the clearance process.

- h. New policies on the use of “parole in place” and deferred action for family members of U.S. citizens and lawful permanent residents who seek to enlist in the U.S. Armed Forces, as well as deferred action for undocumented family members of U.S. military service members and veterans who were inspected and admitted.

USCIS Response: USCIS is currently working on guidance to address the Secretary’s directive involving parole in place and deferred action. The guidance is undergoing

internal vetting through the USCIS concurrence process. USCIS will notify the public of any engagement activities related to this guidance at the proper time.

- i. Implementation of a process to accept credit card payments for filing fees in naturalization cases.

USCIS Response: USCIS plans to implement payment by credit card late this fiscal year. At the current time, it appears that implementation will likely occur in September 2015. As always, we will do our best to compress the schedule if we are able to do so. We will share more detailed information regarding how that process will work as we get closer to implementation.

5. In his November 20, 2014 memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," DHS Secretary Johnson set forth new civil immigration enforcement priorities. In addition, in the September 30, 2014 response to the Office of the CIS Ombudsman regarding recommendations to improve the quality and consistency in Notices to Appear, USCIS Director Rodriguez indicated that it was currently reviewing agency guidance regarding NTA issuance and agreed with the Ombudsman's recommendation to provide additional guidance on NTA issuance with input from ICE and EOIR.
 - a. In addition to addressing some of the concerns outlined by the CIS Ombudsman, please confirm that the new NTA guidance will incorporate the principles of the November 20, 2014 civil enforcement priorities memorandum.

USCIS Response: The USCIS response to the Ombudsman's concerns is posted on the public website at http://www.uscis.gov/sites/default/files/USCIS/About%20Us/2014-0930_USCIS_Response_Memo_-_NTA_Rec_Signed.pdf. In view of the new civil immigration enforcement priorities set forth in the Secretary's memo, USCIS has undertaken an extensive review of the current NTA guidance as contained in the policy memorandum *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* to determine the extent to which the USCIS NTA policies are inconsistent with the Secretary's memo. USCIS will be revising this guidance so that it aligns with the Secretary's memo and will also coordinate with other DHS components before issuing the new guidance.

- b. What is the timeframe for the release of new NTA guidance?

USCIS Response: As soon as possible.

- c. What type of training have USCIS adjudicators and officers received on the new enforcement priorities?

USCIS Response: The EIR memos were sent to the field. As the NTA guidance is completed, USCIS will send out instructions to officers in the field and develop and conduct training as needed.

H-4 Employment Authorization

We were pleased to see the publication of the final rule on employment authorization for certain H-4 spouses. With the rule coming into effect on May 26, 2015, we have a few follow-up questions. Under 8 CFR §274a.12(c)(26):

An H-4 nonimmigrant spouse of an H-1B nonimmigrant may be eligible for employment authorization only if the H-1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H-1B nonimmigrant's period of stay in H-1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002).

...

If such Application for Employment Authorization is filed concurrently with another related benefit request(s), in accordance with and as permitted by form instructions, the 90-day period described in 8 CFR 274.13(d) will commence on the latest date that a concurrently filed related benefit request is approved.

6. The rule limits employment authorization for H-4 spouses where the H-1B principal is the beneficiary of an approved I-140 or “the H-1B nonimmigrant’s period of stay in H-1B status is authorized” under AC21 sections 106(a) and (b). Given that a first H-1B extension under AC21 often includes time recaptured from the initial six years and would, therefore, be more than one year in duration, please confirm that the regulation will permit H-4 spouses to obtain employment authorization if the H-1B’s period of authorized stay *includes any time* authorized under AC21.

USCIS Response: As noted during the February 26, 2015, stakeholder engagement, USCIS will be posting Frequently Asked Questions (FAQs) regarding implementation of the final rule. We hope to post those FAQs shortly and will ensure that they include information responsive to questions 6-9.

7. The rule allows the H-4 spouse to file the EAD application either simultaneously with a change/extension of status or as a stand-alone application. When the rule comes into effect on May 26, 2015, many eligible spouses will have applications to change/extend status pending. Please confirm that eligible spouses in this situation will be permitted to file an I-765 immediately on May 26, 2015 and that the I-765 will be matched to the pending change/extension of status.

USCIS Response: Please see the answer to question 6.

8. The regulation states that the 90-day period for purposes of interim employment authorization under 8 CFR §274.13(d) “will commence on the latest date that a concurrently

filed related benefit request is approved.” This indicates that the H-4 and the underlying EAD might not necessarily be adjudicated concurrently. In order to avoid inadvertent and unnecessary status violations, please confirm that in cases where the spouse of the H-1B nonimmigrant was in a prior status that permitted employment (for example, H-1B or F-1 OPT), and the H-4 change-of-status application and EAD application are not adjudicated and approved simultaneously, the later-adjudicated EAD application will be approved retroactive to the start of the H-4 status.

USCIS Response: Please see the answer to question 6.

9. During the February 26, 2015 stakeholder teleconference, a caller asked USCIS to confirm that travel while the I-765 is pending will not affect the duration of the EAD. Stakeholders were advised that USCIS would address the impact of travel at a later date. We note that in the final rule, DHS agreed with commentators that the EAD validity should match the H-4 dependent spouse’s authorized status, pointing out that this should reduce the number of times that H-4 dependents have to file Form I-765. In addition, a policy whereby travel does not impact the duration of the EAD would be consistent with EAD policies for L-2 spouses, E-2 spouses, Optional Practical Training, and adjustment of status, none of which are affected by travel. With the possibility of well over 100,000 new EAD applications being filed on or around May 26, and the significant number of H-4s who will travel over the summer, it would be an administrative nightmare to require H-4s to refile an I-765 every time the H-4 travels. Please confirm that travel will not impact the duration of an H-4 EAD.

USCIS Response: Please see the answer to question 6.

Employment Authorization for B-1 Domestic Workers

10. AILA requests that B-1 domestic employees accompanying nonimmigrants receive EADs that are not affected by travel but are issued for the duration of the principal nonimmigrant’s petition validity, or six months, whichever is longer. It has only been in the past few years that USCIS has issued EADs with terminations back-dated to the day the individual left the U.S. Please advise as to whether USCIS is considering this change in policy and will return to its prior practice of issuing EADs for six months.

USCIS Response: USCIS understands the B-1 domestic employees employment authorization categories cover several types of business visitors and their own unique circumstances. USCIS will take these policy suggestions under consideration, but currently there are no immediate plans to change the policy.

K-1 Work Authorization

11. K-1 visa holders are listed under 8 CFR §274a.12(a)(6), as “aliens authorized for employment incident to status,” but are nonetheless required to obtain evidence of their authorization to work. Over the years, there has been conflicting guidance on the issue of employment authorization for K-1 fiancé(e)s. For example, during the October 5, 2011 meeting between USCIS and AILA, USCIS stated that an I-94 endorsed as “employment

authorized” would serve as a valid List C document for I-9 employment verification purposes for a K-1 fiancé(e), and that the K-1 could, but was not required to request an employment authorization document (EAD).¹ However, according to the USCIS website:

Permission to Work

After admission, your fiancé(e) may immediately apply for permission to work by filing a Form I-765, Application for Employment Authorization with the USCIS Service Center having jurisdiction over your place of residence. Any work authorization based on a nonimmigrant fiancé (e) visa would be valid for only 90 days after entry. However, your fiancé(e) would also be eligible to apply for an extended work authorization at the same time as he or she files for permanent residence. In this case, your fiancé(e) would file Form I-765 together with Form I-485 as soon as you marry.²

The published processing times for Form I-765 at each service center is three months. As a result, it is impossible for a K-1 fiancé(e) to secure an EAD until after the marriage has taken place and the adjustment of status application has been filed, plus at least three months. However, policy considerations – expressed in 8 CFR §274a.12(a), which states that K-1 fiancées are authorized to work incident to status—suggest that these future permanent residents should be permitted to begin work. This problem could be eliminated if USCIS were to take any of the following actions:

- a. Work with the Department of State so that K-1 visas contain wording similar to that which is included on immigrant visas stating “Endorsement serves as evidence of employment for 90 days.”
- b. Work with CBP to provide that the automated I-94 for K-1 nonimmigrants includes a notation that the K-1 is employment authorized upon admission.
- c. Amend the Form I-9 List A to include a foreign passport and I-94 with an “employment authorized” endorsement as a document that establishes both identity and employment authorization. This would be similar to current item number 5 in List A, which permits nonimmigrants authorized to work for a specific employer to present a foreign passport and I-94.

To ensure there would not be a break in employment once it is granted, additional action would be required such as amending the Handbook for Employers, M-274, to provide that a receipt for an application for adjustment of status (Form I-485), together with a K-1 I-94 noted above, extends employment authorization, to provide for continuity of authorization. Note that the portion of the USCIS website referenced above would need to be updated to reflect these changes. Given the obstacles that prevent K-1 fiancé(e)s from obtaining work

¹ Questions and Answers, USCIS American Immigration Lawyers Association Meeting, AILA InfoNet Doc No. 11100570 (posted October 5, 2011)

² See <http://www.uscis.gov/family/family-us-citizens/fiancee-visa/fiancee-visas>.

authorization in a timely manner, will USCIS agree to take the above steps to address this problem?

USCIS Response:

In order to obtain evidence of employment authorization on Form I-766, a fiancé(e) should file an I-765 Application for Employment Authorization with the USCIS Service Center having jurisdiction over their place of residence no more than 90 days after admission to the United States. If the applicant establishes that they qualify for the employment authorization category under 8 CFR §274a.12(a)(6), a secure Form I-766 Employment Authorization Document (EAD) is produced and sent to the applicant. The secure Form I-766 prevents misuse by unauthorized individuals.

Any work authorization based on a nonimmigrant fiancé (e) visa would be valid for only 90 days after entry. This EAD cannot be renewed. Any EAD application for other than a replacement document must be filed based on your pending application for adjustment under the (c)(9) employment authorization category.

An EAD presented to an employer establishes both evidence of employment authorization and identity for purposes of Employment Authorization Verification (Form I-9). Forms I-94 indicating K-1 employment-authorized nonimmigrant status are sufficient evidence of employment authorization for Form I-9, Employment Eligibility Verification, purposes (under List C). See the general statement on I-9 Central regarding such List C documents at <http://www.uscis.gov/i-9-central/acceptable-documents/list-c-documents>. No additional endorsement on Forms I-94 by CBP or on K-1 nonimmigrant visas by DOS is necessary. Your suggestion to amend List A on Form I-9 to include an individual's foreign passport in combination with Form I-94 containing an endorsement of K-1 nonimmigrant status would first require a regulatory amendment. While we may consider your suggestion in a future rulemaking, note that there are statutory standards (e.g., required security features) that must be met before DHS may add any document to List A.

Delays in EAD Issuance

12. Delays in EAD issuance are a recurring problem and have unfortunately resulted in many individuals suffering financial hardship as a result of lost jobs or interruptions in employment due to lapses in employment authorization. In addition, in many states, driver's licenses expire with employment authorization, thus triggering a cascade of problems for individuals who have timely filed EAD extensions. With the removal of the equipment that allowed field offices to issue interim EADs, USCIS has eliminated the only safety net for individuals on the verge of losing employment. While we understand the need for a secure document, the problems caused by the lack of any means to obtain an interim EAD are causing extreme hardship for scores of individuals. Indeed, 8 CFR §274a.13(d) is not discretionary; it mandates the issuance of interim employment authorization if the application is not adjudicated within 90 days. Will USCIS consider implementing one or more of the following options to address this issue once and for all:

- Empower local offices to issue a document, valid for 120 days, to extend an EAD where an I-765 has been pending for more than 80 days. This could be a fraud proof sticker affixed to the EAD card,
- Amend the regulations to provide for an automatic extension of employment authorization upon filing a timely EAD extension and provide that the receipt for the extension application, when accompanied by the expired EAD, is satisfactory proof of employment authorization for I-9 purposes.
- Permit applicants for renewal employment authorization to submit their applications 180 days before expiration of the current EAD, as opposed to 120 days which is now required.
- Announce that an I-765 receipt for all categories covered in 8 CFR §274a.13(d) will serve as an I-9 List C document for up to 240 days where 90 days have elapsed from the application received date.

USCIS Response: USCIS works diligently to give an adjudicative response to each employment authorization request that it receives within the time limits imposed by regulation. To minimize untimely adjudications, numerous reviews are conducted electronically to ensure that cases are worked in a first-in-first-out (FIFO) order. Further data scrapes are completed throughout the lifecycle of the pending application to ensure that the regulatory time frame is met. When cases approaching the regulatory limit are identified, processing steps are in place to attempt to adjudicate them as expeditiously as possible.

If your Form I-765, Application for Employment Authorization, has been pending more than 75 days, you may contact the National Customer Service Center (NCSC) at 1-800-375-5283 and ask that an Approaching Regulatory Timeframe “service request” be created. The NCSC will route the service request to the appropriate office for review. Please have your receipt number ready when contacting the NCSC. You also may request an InfoPass appointment.

USCIS no longer produces interim EADs. Prior to September 1, 2006, Employment Authorization Cards, Form I-688B, otherwise known as “interim” EADs, were produced at various Field Offices within USCIS. On August 18, 2006, USCIS issued an Interoffice Memorandum entitled, “Elimination of Form I-688B, Employment Authorization Card,” which mandated the elimination of Form I-688B by September 1, 2006.

<http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/Mike%20Aytes%202006%20memo%20on%20cards%20not%20produced%20locally.pdf>

Beginning March 27, 2015, SCOPS is now mailing the renewal reminder to DACA recipients 180 days prior to expiration of their current deferred action rather than the previous 100 days. We hope that by receiving the notice 2 months prior to the 120-day minimum for processing that individuals will have sufficient time to plan accordingly.

H-1B Specialty Occupations

13. Several federal district courts have now rejected the common USCIS practice of determining that a position is not a “specialty occupation” for H-1B purposes if the Labor Department’s Occupational Outlook Handbook (OOH) describes more than one educational path that an

individual can typically take to meet the requirements for the position.³ Specifically, the courts have stated that this approach impermissibly narrows the plain language of the statute and that the regulations do not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program.

- a. Has USCIS taken steps to incorporate the principles established by these district court cases into its training materials and guidance for Service Center and AAO adjudicators?

USCIS Response: USCIS disagrees that the averred practice is common. Petitioners may challenge any such decisions through available administrative motion and appeal processes. It should also be noted that the referenced district court cases involved field decisions that were not first appealed to the AAO.

USCIS continues to take steps to provide additional clarifying guidance on this issue. See item 13(b) response below.

- b. At the October 23, 2013 meeting with USCIS and AILA, USCIS stated that it was “continuing to review current policy on the interpretation of ‘specialty occupation’” and that it was “developing updated guidance that will be included in the publication of the H-1B Policy Manual volume.” What is the status of this guidance?

USCIS Response: USCIS continues to review the issues mentioned above and has developed a draft of the H-1B Part in the Policy Manual that is currently within the agency review and clearance process.

FDNS Site Visits

14. We understand that FDNS officers are instructed to advise employers and employees that participation in a site visit under the Administrative Site Visit and Verification Program (ASVVP) is voluntary.
 - a. Please describe the process that takes place if an employer or employee declines to participate in the site visit.

USCIS Response: If the employer or employee decline to participate in the site visit, USCIS will terminate the site visit and update the compliance review report accordingly. If the in-person interviews are unsuccessful, USCIS will make an attempt at following up on the compliance review by phone, e-mail, or fax to verify the information on the petition and supporting documents. A site visit is the fastest and easiest way to verify compliance.

³ *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), AILA Doc No. 12031265 (posted March 12, 2012) ; *Raj and Company v. USCIS*, Case No. C14-123RSM (W.D. Washington, 2015)– not reported in F. Supp. 3rd – AILA Doc No. 15022300 (posted January 14, 2015) ; *Warren Chiropractic & Rehab Clinic v USCIS*, 2015 WL 732428 (C.D. California, 2015) – not reported in F. Supp. 3rd, AILA Doc. No. 15011542 (posted January 12, 2015)

- b. If the employer or employee declines to participate in the site visit, will the results automatically be listed as “not verified” and result in a NOIR?

USCIS Response: No. USCIS will attempt to verify the information on the petition and supporting documents by phone, e-mail, or fax. If information in the petition cannot be verified or is inconsistent with the facts recorded during the site visit USCIS may request more information or evidence. The burden is on the employer to establish eligibility for the petition. Thus, failure to provide information or evidence requested may delay a final decision or result in the denial or revocation of the petition.

- c. If a NOIR is not automatic, what is the average NOIR rate in cases where the employer or employee declines to participate in the site visit, as well as the average revocation rate following the NOIR?

USCIS Response: The NOIR is not automatic. The decision to issue a NOIR is made on a case by case basis.

P-1 for Athletes

15. In recent months, AILA has received numerous reports from members of a recent trend in P-1 adjudications for athletes: Requests for Evidence (RFEs) and denials of P-1A (internationally recognized athlete) nonimmigrant petitions, which cite 8 CFR §214.2(p)(4)(ii)(A) and state that the petitioner failed to provide evidence that the beneficiary will be participating in competitions that require the services of internationally recognized athletes. For purposes of a P-1A petition for classification as an internationally recognized athlete, 8 CFR §214.2(p)(4)(ii)(A) states:

The athlete or team must be coming to the United States to participate in an athletic competition which has a distinguished reputation *and which requires participation of an athlete or athletic team that has an international reputation* [emphasis added].

Though we acknowledge that this is a current regulatory requirement, there is nothing in the statute to support such a requirement. INA §214(c)(4)(A)(i) defines an athlete as one who “performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.” As emphasized in the statute, it is the *athlete’s performance* that must be internationally recognized, not that the *event* require the services of an internationally recognized athlete. In likely acknowledgment that the statute does not support the regulatory provision, both legacy INS and USCIS have not requested evidence of the event’s international recognition in approximately 20 years of adjudications.

By way of analogy, the interim O-1 regulations included a provision at 8 CFR §214.2(o)(3)(iii) that required the O-1 alien to be coming to the United States to perform services requiring an alien of O-1 caliber in much the same way that the P-1 regulations state

that the event must require the services of an internationally recognized athlete.⁴ However, upon a review of comments submitted by the public, this provision was removed from the final O-1 regulations after legacy INS concluded that there was no statutory support for it. As stated in the preamble to the final regulation:

Criteria for Establishing That a Position Requires the Services of an Alien of Extraordinary Ability or Achievement—214.2(o)(3)(iii)

... After careful consideration, the Service agrees that there is no statutory support for the requirement that an O-1 alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber [emphasis supplied]. As a result, this paragraph has been deleted from the final rule. The alien, however, must be coming to perform services in the area of extraordinary ability as is required in the statutory definition of the classification.⁵

Though the parallel provision in the O-1 context was removed from the regulations, the P-1 provision remained. Thus, 8 CFR §214.2(p)(4)(ii)(A) is *ultra vires* and should be removed from Title 8 of the Code of Federal Regulations. Moreover, the recent RFEs and denials represent a significant shift in adjudicatory practice from the approach USCIS and legacy INS have taken for the past 20 years. In apparent recognition that this regulation lacks a statutory basis, RFEs and denials citing 8 CFR §214.2(p)(4)(ii)(A) were simply not issued until quite recently. What steps is USCIS taking to bring the adjudicatory standards and the regulations into compliance with the statute?

USCIS Response: There has been no change in USCIS policy or the statutory and regulatory requirements for P petitions. The regulation in 8 CFR 214.2(p)(4)(ii)(A) is consistent with the statutory framework for P-1 athletes. INA 214(c)(4)(A)(ii)(I), states that the athlete must be coming to the United States for the purpose of performing “as such an athlete with respect to a specific athletic competition.” The regulatory requirement in 8 CFR 214.2(p)(4)(ii)(A) interprets and is supported by the statutory language at INA 214(c)(4)(A)(ii)(I). The regulatory requirement is therefore not *ultra vires*. It should also be noted that the statutory language in the relevant O and P provisions of the INA are not identical. As a result of the different statutory provisions pertaining to the work an O nonimmigrant versus the work a P nonimmigrant must be coming to perform, comparison to conclusions that were reached in the O context are not applicable here.

Automatic Citizenship and SAVE

16. Lawful permanent resident minors who become U.S. citizens when their parents naturalize are citizens by operation of law and are thus not required to file an N-600 to obtain a certificate of naturalization. Minors who obtain automatic citizenship can apply for a passport with the State Department, and the passport will be issued with proof of the parent’s

⁴ 57 Fed. Reg. 12179-12190 (Apr. 9, 1992).

⁵ 59 Fed. Reg. 41818-41842, at 41820 (Aug. 15, 1994).

naturalization. In these cases, is the child's citizenship status reflected in the SAVE database so that state and local government agencies are properly advised of the individual's entitlement to benefits reserved for U.S. citizens? What steps, if any, does USCIS take to ensure this information is properly collected and that the SAVE database accurately reflects the child's citizenship status?

USCIS Response: SAVE does not currently interface with the Department of State and would not be aware that the Department of State has issued a passport. Individuals would need to file a Form N-600, Application for Certificate of Citizenship, and have it favorably adjudicated in order for SAVE to reflect that the individual is a United States citizen.

Marijuana

17. During the April 10, 2014 meeting between AILA and USCIS, USCIS stated that it has consulted with DOJ and DHS on issues surrounding the use, ingestion, purchase, or sale of medical marijuana in states where it is legal to do so, and that draft guidance was under review. Please provide an update on the status of this guidance. In addition, many states have enacted statutes that decriminalize the recreational use of marijuana or possession of small amounts of marijuana. Other states are considering enacting such statutes. Will USCIS also be releasing guidance on the impact of possession of and recreational use of marijuana in states where it is lawful?

USCIS Response: USCIS notes the fact that a State has decided not to make possession of marijuana, for medical use or other purposes, a violation of *that* State's criminal law does not alter the fact that possession remains a Federal criminal offense. Guidance remains pending, however, concerning how the provisions of State law may affect an individual's admissibility or other eligibility for an immigration or naturalization benefit, when the individual has not been convicted of any specific offense.

Physician National Interest Waivers (PNIW)

18. Pursuant to INA §203(b)(2)(B)(ii), physicians who agree to practice medicine full-time for five years in a federally designated medically underserved area, or at a Department of Veterans Affairs (VA) medical facility, are eligible for approval of a "national interest waiver" second preference immigrant petition, and may adjust to permanent resident status after completing the required five years of practice. In accord with the INA, *Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006), USCIS memoranda, and the Adjudicators Field Manual Chapter 22.2(j)(6), it is well-established that a physician may complete a portion or all of his or her five-year clinical service requirement before filing a PNIW petition. Only prior medical practice in J-1 status is excluded from the aggregate five years of service. Once the five years is completed, the physician has no further obligation to work at a VA facility or in a shortage area, and may adjust to permanent residence status, provided he or she has a current priority date.

8 CFR §245.18(f) requires that USCIS "provide the physician with timetables for completing the adjustment of status." Unfortunately, because these notices are not consistently provided

to physicians, many doctors are without documentation of when USCIS has determined the obligation will be met, or has been met. Physicians need this information in order to correct the completion calculation if needed and to help plan their future medical careers. This is particularly important given the backlogs in employment-based visas for India and China, which can delay adjustment of status for many years after completion of the five-year obligation.

Please remind service centers of the need to send the timetable notices to physicians as required by 8 CFR §245.18(f). In addition, would USCIS be willing to implement a process whereby notices could be issued to physicians confirming that their 5-year obligation has been completed?

USCIS Response: Both TSC and NSC NIWP processes include an upfront notice providing a timetable for the submission of evidence. A “Requirements Notice” letter is sent after the I-485 has been reviewed by the NIWP officer.

The NSC does send a “Completion” letter after the applicant has submitted evidence of the completion of the medical service, with one exception: completion letters are not sent when the I-485 is being approved or is to be immediately approved after an RFE is issued, as the approval notice serves as notice of completion.

However, the TSC does not have a process in place for sending the completion letter. TSC is in the process of duplicating NSC’s process of sending a completion letter after the applicant has submitted evidence of the completion of the medical service. They plan to have this implemented during the 3rd quarter of FY15.

Misrepresentations Made by Minors

19. On February 18, 2015, new guidance related to misrepresentations made by minors was added to the Department of State Foreign Affairs Manual (FAM) at 9 FAM 40.63 N5.3. The new guidance reads:

An alien under the age of 15 cannot act willfully and therefore cannot be found ineligible under INA 212(a)(6)(C)(i). For aliens aged 15-16, the consular officer will need to determine if the alien was acting at the direction of an adult, who may be ineligible under INA 212(a)(6)(E), or whether the alien did act willfully on their own. Aliens aged 17 and over are presumed to act willfully unless they can establish lack of knowledge or capacity as described above.

We note, however, that the USCIS Policy Manual at Volume 8, Part J.3(D)(5) states:

The fact that a misrepresentation occurred while the person was under 18 years of age, in particular, is not determinative. There is no categorical rule that someone under 18 cannot, as a matter of law, make a willful misrepresentation. A person may be able to

*claim, however, that, on the basis of the facts of his or her own case, he or she lacked the capacity necessary to form a willful intent to misrepresent a material fact.*⁶

Please confirm that the policy stated by the Department of State in the FAM note also represents the current policy of USCIS. When should we expect a conforming amendment to the USCIS Policy Manual?

USCIS Response: USCIS maintains its current policy on this issue, as stated in Volume 8 of the Policy Manual. USCIS agrees that a minor’s lack of capacity could mean that the alleged fraud or misrepresentation is not a basis for a finding of inadmissibility, But USCIS does not recognize any presumption, based solely on age at the time of the alleged fraud or misrepresentation, that an individual lacks (or lacked) capacity to act willfully.

Experience-Based Credentials Evaluations

20. In recent months, AILA has observed new requests for evidence (RFEs) that attempt to impose exceedingly strict requirements on credentials evaluations by college professors acting as independent consultants, such as consulting for private credentials evaluation firms or otherwise, that go far beyond that which has been requested in the past. For example, professors writing evaluations as consultants must now:

- Provide exceptionally detailed and voluminous documentation to “clearly” establish their qualifications as experts;
- Provide specific instances where past opinions have been accepted as authoritative and by whom;
- “Clearly” show how conclusions were reached and show the basis for the conclusions with copies of citations of any research material used.

In addition, RFEs frequently demand that the evaluation be accompanied by a letter from the Registrar of the institution (on the institution’s letterhead) to establish that the professor:

- Is authorized to grant college-level credit on behalf of the institution;
- Holds a bachelor’s degree in the field of study he or she is evaluating; and
- Is actually employed by the claimed college or university.

And, the evaluation must be accompanied by:

- Evidence that the institution is accredited;
- Copies of pertinent pages from the college or university catalog to show that it has a program for granting college-level credit based on training and/or experience (merely stating such in a letter is insufficient); and
- Evidence to show the total amount of college credit the Registrar or evaluator may grant for training or experience as part of the program, among other things.

⁶ See <http://www.uscis.gov/policymanual/Print/PolicyManual-Volume8-PartJ.html#footnote-28>.

Against this background, we have the following questions:

- a. The RFEs decisions appear to reflect a shift in policy on the acceptance of experience-based credentials evaluations by professor and contrary to the preponderance of the evidence standard. Please explain what led to this drastic increase in evidentiary burden.

USCIS Response: There has not been a shift in policy regarding the experience based credentials evaluations by professors. 8 C.F.R. 214.2(h)(4)(iii)(D)(1) states that the petitioner may submit an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Please note, however, that the petitioner carries the burden of proof to establish that the official drafting the evaluation has the authority to grant credit, as described in 8 C.F.R. 214.2(h)(4)(iii)(D)(1). Additionally, Service Center Operations will remind officers of the preponderance of the evidence standard when reviewing all phases of H-1B adjudication.

- b. A review of Chapter 31.3 of the Adjudicator's Field Manual, as well as the USCIS Policy Manual reveal no new or amended language that would lend support for this change in practice. Please provide a copy of the policy memorandum or guidance that preceded the new RFE template language and provides support for the evidentiary demands found in the RFEs.

USCIS Response: As stated above, there has been no new USCIS Policy Memorandum or Guidance relating to Experience-Based Credential Evaluations.

- c. Is it USCIS's position that an evaluation from a professor that lacks even one of the items referenced in the recent RFEs will be rejected for lack of probative value? If no, please describe the standards under which USCIS evaluates expert opinions and how it determines whether to accept the opinion as probative or reject it outright?

USCIS Response: The regulation at 8 CFR 214.2(h)(4)(iii)(D)(1) requires that the petitioner provide evidence that the official has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

8 CFR 214.2(h)(4)(iii)(D)(5) also gives USCIS the authority to make a determination that the equivalent degree has been acquired through a combination of education, specialized training, and/or work experience and that the beneficiary has achieved recognition of expertise in the specialty occupation as a result of training and experience. Under this regulatory provision the petitioner must "clearly" show that the beneficiary has recognition of expertise in the specialty by showing at least one of the following types of documentation:

- Recognition of expertise in the specialty occupation by **two recognized authorities in the same specialty occupation**; (emphasis added)
- Membership in a recognized or United States association or society in the specialty occupation;
- Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- Licensure or registration to practice the specialty occupation in a foreign country; or
- Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

If seeking to demonstrate recognition of the beneficiary's expertise through two authorities, it is the petitioner's burden to show that those authorities are recognized in the same specialty occupation.

USCIS evaluates the evaluations and expert opinions on a case-by-case basis and makes a determination based on the evidence provided in the record. Additionally, USCIS uses the preponderance of the evidence standard in all phases of adjudication.

EB-2 I-140s for Physical Therapists

21. During the October 9, 2014 meeting between AILA and USCIS, we discussed the issue of educational evaluations for EB-2 Physical Therapists, and in particular, the fact that USCIS has been routinely denying EB-2 petitions for Physical Therapists from the Philippines that are accompanied by an educational evaluation from the Foreign Credentialing Commission on Physical Therapy (FCCPT) concluding that the beneficiary's five-year Bachelor of Physical Therapy is the equivalent of a "first professional degree" (master's degree) in Physical Therapy in the United States.⁷

In its response, USCIS stated that the regulations recognize FCCPT's authority to issue certifications for the limited purpose of overcoming inadmissibility at INA §212(a)(5)(C), and that such authority does not extend to determining whether the beneficiary's education is the equivalent of an "advanced degree." Moreover, USCIS pointed out that the FCCPT's verification of the beneficiary's education, training, license and experience for admission into the United States is not binding on DHS. 8 CFR §212.15(f)(1)(iii).

USCIS stated that in evaluating whether a foreign worker's education meets the requirements for the requested classification, USCIS considers all submitted materials, including opinions rendered by educational credentials evaluators such as FCCPT, as well as "other credible resource material[s]" and that such materials "are considered and given due weight in determining whether the petitioner has established by the requisite preponderance of the evidence that the beneficiary meets the qualifications for the immigration benefit sought."

⁷ See AILA/USCIS HQ Liaison Q&As (10/9/14) , AILA Doc. No. 14101040

While we agree that USCIS should consider and give due weight to all relevant evidence in assessing whether the beneficiary is eligible for the requested classification, we have observed a number of denials which indicate that USCIS is, in fact, not giving *any* weight to FCCPT or other evaluations. Instead, it appears that USCIS relies solely on the EDGE database from the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that while a five-year Bachelor of Physical Therapy from the Philippines is a first professional degree in the Philippines, it is equivalent only to a U.S. bachelor's degree and therefore, does not equate to a first professional degree in the United States.

USCIS has recognized FCCPT as the sole authority to issue healthcare certifications for Physical Therapists. Moreover, the Illinois Physical Therapy Act (Title 68 of the Illinois Administrative Code, Part 1340.20(e)) requires graduates of Physical Therapy programs outside the U.S. to have their educational credentials evaluated, and specifically names FCCPT as a recognized authority for this purpose. In a March 13, 2014 letter from James W. McCament, Chief of the Office of Congressional Relations to Rep. Joseph Crowley, Mr. McCament states, “[t]he opinions expressed in evaluations and resource materials, *as well as EDGE, are not binding on USCIS. Additionally, USCIS does not endorse or encourage the use of EDGE over other types of credible resource material regarding the equivalency of the educational credentials to college degrees obtained in the United States.*”

- a. If USCIS recognizes the FCCPT's authority for the important purpose of providing healthcare certifications for the purpose of overcoming inadmissibility, and is not bound by the information contained in the EDGE database, why does it refuse to recognize that the FCCPT's opinions on matters of degree equivalency might be more persuasive than those contained in the EDGE database?

USCIS Response: At the outset, please note that not all FCCPT evaluations fail to support a favorable foreign degree equivalency evaluation. Adjudication of Filipino physical therapy credentials are evaluated and adjudicated on a case-by-case basis. Adjudicators analyze the basis and methodology upon which the credential evaluation sets forth equivalency. Some Filipino physical therapy cases include evaluations from FCCPT that contain a flawed basis for ascertaining equivalency and may not establish whether a foreign degree in physical therapy is the equivalent of an advanced degree as required by the EB-2 classification.

As stated on the FCCPT website, “FCCPT performs a comparison of an educational curriculum to a standardized tool developed and validated by the Federation of State Boards of Physical Therapy (FSBPT).” FCCPT determines whether or not an individual has completed sufficient coursework to overcome inadmissibility, not whether an individual holds the foreign equivalent degree of an advanced degree

In addition, in a paper entitled “Remediation for Foreign Educated Candidates,” the FCCPT states that “approximately 40% of all first-time foreign educated PT educational credentials reviews do not meet the minimum standards of the Federation's Coursework Evaluation Tool.” The paper further explains that additional coursework and even

College Level Exam Program (CLEP) credits are necessary “for foreign candidates who are not initially able to meet the educational criteria.”

<http://www.fccpt.org/download/fept/009.pdf>

FCCPT, therefore, does not evaluate whether an individual’s degree, with or without additional coursework or credits, is a single foreign equivalent degree above that of a baccalaureate, which is required by the EB-2 immigrant classification.

- b. Where a state, such as Illinois, has recognized the FCCPT as a credible authority for purposes of evaluating educational credentials for Physical Therapists, the FCCPT has concluded that the beneficiary has the equivalent of a master’s degree, the State is satisfied that the foreign national has met all of the qualifications for licensing in the State (and perhaps has even obtained the license), and the only contrary evidence is that the EDGE database says the underlying degree is the equivalent to a U.S. bachelor’s degree, would USCIS agree that the burden of establishing eligibility by a preponderance of the evidence has been met?

USCIS Response: State licensing evidentiary thresholds would not necessarily be a dispositive factor in evaluating foreign degree equivalency and establishing eligibility pursuant to a preponderance standard under immigration statutory and regulatory requirements. As discussed above, FCCPT determines whether an individual’s coursework, which may include coursework taken after graduation and CLEP credits, meets a minimum number of credits, which is not the same as determining whether an individual’s degree alone is the foreign equivalent of an advanced degree. Like FCCPT, Illinois’ licensing rules specifically allow individuals to take additional coursework and use CLEP credits for licensing purposes. USCIS is not aware of any state licensing board which requires an individual to have a single foreign degree equivalent to a U.S. master’s degree, and therefore, state licensure is not determinative as to whether a foreign physical therapy degree meets the minimum education requirement for this classification.

New Preparer’s Declaration on Form I-129

22. AILA renews its objection to the “Preparer’s Declaration” found in Part 8 of the 10/23/14 Edition of Form I-129, as expressed in its comment to the draft Form I-129 submitted on September 2, 2013, in response to the 60-day Notice of Revision published at 78 Fed. Reg. 40490 (July 5, 2013), and recorded as item USCIS-2005-0030-0230 on Information Collection Review docket USCIS-2005-0030. AILA also refers to and joins in the objections submitted by the American Council for International Personnel in response to the proposed revisions and recorded as item USCIS-2005-0030-0232, submitted September 3, 2013.

As adopted, the “Preparer’s Declaration” appears to impose unreasonable duties on a petitioner and a petitioner’s attorney, or the attorney’s legal assistant, in connection with the preparation of a Form I-129 and its multiple supplement forms. As adopted, the declaration contemplates that an attorney or legal assistant preparing an I-129 and supplements must engage in a line-by-line, item-by-item review of the completed form with the petitioner, and to obtain from the petitioner express agreement with each and every answer on the forms.

Strict compliance with the duties apparently contemplated by the declaration would impose significant burdens on both petitioners and on attorneys or their respective staffs.

If, by adopting the revised “Preparer’s Declaration,” USCIS contemplates that the preparer engage in the conduct of a line-by-line, item-by-item review of the Form I-129 and supplement with the petitioner, AILA urges USCIS to revise the “Preparer’s Declaration” to read as follows:

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this form on behalf of the petitioner, or another individual authorized to sign this form pursuant to form instructions. I prepared this form at his or her request, and with his or her express consent, and I understand that the preparation of this form does not grant the petitioner or beneficiary any immigration status or benefit.

USCIS Response: USCIS does not believe that the new preparer certification imposes an unreasonable burden on the preparer to review the form before they and the petitioner attest to the truth of all responses provided.

The certification on Form I-129 has always required the petitioner to attest, under penalty of perjury, to the truth of the entire form, every question on the form, and the supporting evidence. In addition, it is common practice for the petitioner to sign the form prior to the preparer, thus the petitioner should be aware of the full contents of the petition before the preparer signs their attestation. Consequently, USCIS believes that most preparers review the form and responses generally with the petitioner prior to the petitioner signing it. To the extent that a review of the form was not routine before signature and submission, USCIS may be imposing an additional burden with the more robust certification. The AILA-suggested language provides only that the preparer has prepared the form on behalf of the petitioner at his or her request. The suggested language does not state that the answers on the form were provided by the petitioner and only certifies to the relationship and not the source or veracity of the information provided. The new certification language clarifies that the signatories are vouching for all of the information on the form. USCIS appreciates AILA’s concerns but we have determined that any additional burden imposed was minimal and necessary.

H-2B Program

23. On March 4, 2015, the federal district court for the Northern District of Florida vacated the DOL’s 2008 H-2B regulations on the ground that DOL lacks authority under the INA to issue such regulations. *Perez v. Perez*, 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). As a result of this decision, DOL immediately stopped accepting and processing requests for prevailing wage determinations and applications for H-2B labor certification. As of March 5, 2015, USCIS temporarily suspended adjudication of Form I-129 H-2B petitions while it considers the appropriate response to the court order. However, the court order neither invalidates temporary labor certifications issued prior to the date of the order, nor enjoins USCIS from adjudicating petitions. Moreover, INA §214(c)(1) authorizes USCIS to adjudicate petitions, and relegates to DOL only a consultative role. Employers who acted in good faith to comply

with DOL requirements by obtaining a temporary H-2B labor certification should not be penalized now by an unnecessary bar to importing much-needed supplementary workers. The longer this bar continues, the greater the economic impact will be on a wide range of industries. Will USCIS reconsider the temporary halt in adjudication of H-2B petitions? What steps does USCIS anticipate in the near and long-term to secure the future of this much needed program?

USCIS Response: USCIS shares your interest in the continued operation of the H-2B program and recently, with DOL, took prompt actions to address the problem. On March 16, 2015, DOL filed an unopposed motion to stay the district court's March 4 order until April 15, which was granted by the court on March 18, 2015. In conjunction with the filing of DOL's motion, on March 17, 2015, USCIS resumed adjudications of H-2B petitions based on temporary labor certifications issued by DOL. Given the volume of cases received during the temporary suspension of H-2B adjudications, USCIS continued to suspend premium processing of H-2B petitions until further notice. Once USCIS has completed data entry of the pending cases and reassessed its ability to deliver appropriate levels of service to premium and non-premium filings, USCIS will make a decision as to when to accept new premium processing requests. Please note that USCIS has received enough petitions to reach the congressionally mandated H-2B cap for fiscal year 2015. March 26, 2015 was the final receipt date for new H-2B worker petitions requesting an employment start date before October 1, 2015.

Combating the Unauthorized Practice of Law

24. We commend USCIS for its efforts to protect noncitizens and their families and employers from the unauthorized practice of law, including its "The Wrong Help Can Hurt" campaign. With the complexities of immigration law and the serious consequences for even the most minor of mistakes, we offer our support to USCIS in continuing to combat UPL and protect the public from unscrupulous or well-intentioned but ill-advised actors. In the past, it was the small travel agency or notario office that was at the root of this problem. However, more recently, several large-scale businesses have entered the marketplace, offering immigration forms selection and completion services on-line to the general public. According to 8 CFR §1001.1(i), the practice of law includes assisting in the preparation of documents, applications, or petitions on behalf of another person. Under 8 CFR §1001.1(k), the practice of law also includes giving advice, such as advice on what forms to complete or how to complete such forms. Would USCIS initiate a review of the products and services offered by these business entities to determine whether their activities fall within the ambit of activities that warrant a public warning?

USCIS Response: USCIS remains committed to combatting those engaged in the Unauthorized Practice of Immigration Law (UPIL), and has observed the evolution of UPIL perpetrators, as noted above. To that point, USCIS has recently published two stakeholder messages that speak to businesses, both at the national and local level taking advantage of immigrants regarding the payment of back taxes, and those targeting immigrants in the absence of the Expanded DACA and DAPA programs.

USCIS continues to engage with our federal partners (U.S. Federal Trade Commission, U.S. Immigration and Customs Enforcement, and the U.S. Department of Justice) regarding UPIL, and discuss new schemes that have surfaced. Thus, USCIS welcomes representatives from AILA to continue to share information related to national and local businesses that may be engaged in UPIL practices, and we would be happy to review this information in coordination with our federal partners.