



USCIS Meeting with the American Immigration Lawyers Association (AILA) Questions and Answers October 9, 2014

On October 9, 2014 USCIS hosted an engagement with AILA representatives. During this meeting, USCIS addressed questions related to the status of L-1B guidance, issuance of unnecessary request for evidence (RFE), O and P petitions, and I-130 appeal delays among several other topics. The information below provides an overview of the questions solicited by AILA and the responses provided by USCIS.

1. USCIS Policy Manual and Memoranda

In past meetings with AILA, USCIS has stated that it was reviewing its adjudication policies in a variety of subject areas. For example, at the October 9, 2012 meeting, USCIS stated that it was reviewing the issues raised in AILA's April 4, 2012, memorandum relating to the interpretation of "specialty occupation" in response to a question relating to recent denials of H-1B petitions (copy attached). USCIS also stated at the October 9, 2012, meeting that it was considering AILA's January 24, 2012, memorandum (copy attached) on the interpretation of "specialized knowledge" in the course of its review of L-1B policy and was also considering providing further guidance on the treatment of EB-2 physical therapists where the first professional degree has been evaluated to be as at least a Master's degree.

- a. What is the status of the review of USCIS policy on H-1B "specialty occupation" and L-1B "specialized knowledge"? Will USCIS release guidance on these and the EB-2 physical therapist issue before the release of the complete Volume 2 (Nonimmigrants) or Volume 6 (Immigrants) of the Online Policy Manual or will guidance in these areas be withheld until it can be included in the online Policy Manual?

RESPONSE: USCIS has reviewed and considered the memoranda submitted by AILA. USCIS will address the H-1B "specialty occupation" issue in the H-1B volume of the USCIS Policy Manual. A draft of that Policy Manual volume is currently in clearance.

In addition, USCIS has drafted a policy memorandum addressing the definition and analysis of "specialized knowledge" in L-1B adjudications. The draft policy memorandum also includes guidance on the 2004 L-1 Visa Reform Act. At present, this draft document is in clearance. We have also established an internal L-1 Working Group consisting of staff with operational, policy, and legal expertise. The group meets to identify and address issues such as the interpretation of "specialized knowledge" and the anti-"job shop" provisions in the Visa Reform Act. Earlier this year, Service Center Operations Directorate (SCOPS) also began monthly calls with the Vermont and California service centers (VSC and CSC) to discuss L adjudicative issues.

With respect to EB-2 issues, including those pertaining to Physical Therapists, please note

that the applicable Policy Manual Part is also currently in agency clearance. At this point, USCIS does not plan to issue any other form of guidance that would specifically address Physical Therapist issues. However, we may do so in the future if we determine that more specific guidance is needed.

b. What subject areas will the next release of the Policy Manual cover?

RESPONSE: We recently finalized or updated Policy Manual sections covering H-3 Trainees, customer service, and changes to dates of birth and names on Certificates of Citizenship. In addition to those noted above, we continue to finalize other Policy Manual sections, including sections devoted to travel, employment, and identity documents; adjustment of status (both family and employment based); special immigrant juveniles; and modifications to the oath for naturalization.

c. What is the anticipated completion date of the Policy Manual?

RESPONSE: We continue to work on various sections of the Policy Manual that are currently in various stages of completion. We do not have a specific estimated date of completion of the initial publication of each section of the Policy Manual.

2. Filing Locations for Applications and Petitions.

In order for an applicant or petitioner to learn the correct filing location for a USCIS form, the individual must review the form itself, which generally includes instructions to check the USCIS website if the form is being filed more than 30 days after the date on the bottom of the form, or call the 800 number if the individual does not have Internet access. The USCIS website instructions regarding filing locations can be confusing and are often lengthy and involved. Further, USCIS frequently transfers applications and petitions to different offices as workload demands fluctuate, which contributes to the confusion as to the correct filing locations.

The Adjudicator's Field Manual at Chapter 10.1(a)(2) previously stated:

(2) Screen for Applications and Petitions Which Must Be Rejected. [Chapter 10.1(a)(2) revised 01-19-2010]

No application form may be accepted for processing unless it is completed and signed and the proper fee submitted. See 8 CFR 103.2(a). If, subsequent to receipting, a check submitted for payment is returned as uncollectible, the receipt (priority) date is forfeited. Rejected

applications receive an “R” or reject number in the CLAIMS tracking system. Because rejection occurs before completion of CLAIMS data entry, the system maintains only skeletal information concerning rejected applications and petitions. If a rejected application is later resubmitted, process the case as if it had never been submitted.

Although the instructions for each type of application or petition specify where that application or petition is to be submitted, submission to an incorrect office (or incorrect post office box where more than one box is used by a service center to sort cases by application type) is not a reason for rejection. Such cases should be receipted and routed to the appropriate office for processing.

(Emphasis added)

This section has been deleted and 10.1(a)(2) is marked as “reserved.” In an announcement last updated September 11, 2013, USCIS advised that it will accept applications filed at the wrong lockbox and forward them to the correct location.¹ The announcement also states that applications filed at the wrong location, which are not processed at a lockbox, will be rejected.

Petitions filed at service centers, rather than lockboxes, include H-1B petitions – an excellent example of the complexity of the petition filing procedures with many screens of instructions and addresses.² Given this complexity, and with the recent surge in cap-subject H-1B petitions filed within the first business week of April, it is easy to see how a petitioner could file with the incorrect service center. USCIS previously accommodated H-1B petitioners who mistakenly filed with the wrong service center. In April 2008, USCIS posted an announcement that it “would not reject an H-1B petition that was subject to the fiscal year 2009 cap solely on the grounds that it was received at the wrong service center (e.g., the petition may have been inadvertently mailed to the California Service Center instead of the Vermont Service Center or vice versa). NOTE: This accommodation does not apply if the petitions were sent to the Texas Service Center or the Nebraska Service Center.”³

With the extreme complexity in determining the correct filing location, and the severe consequences that could result from a rejection, including expiration of nonimmigrant status, and/or missing the opportunity for selection in the annual H-1B quota, AILA requests that the procedures previously included in the AFM Chapter 10.1(a)(2) be reinstated and all applications that are signed and submitted with a fee be accepted and re-directed if need be by USCIS.

RESPONSE: USCIS has taken your request under advisement and may make any modifications to the AFM it deems appropriate. Although AFM Chapter 10.1(a)(2) indicated that submission to an incorrect office is not a reason for rejection, the preceding section in Chapter 10.1(a) indicates that this is a general instruction and that contractor SOP and the Form instructions should be relied on for specific filing instructions, USCIS notes that current H-1B visa program-specific filing instructions are set forth in the relevant Form I-129 instructions and on the USCIS website in a

¹ <http://www.uscis.gov/about-us/directorates-and-program-offices/lockbox-intake/lockbox-intake-processing-questions-and-answers>.

² <http://www.uscis.gov/i-129-addresses>.

³ AILA InfoNet Doc. No. 08040467 (posted Apr. 4, 2008).

clear and easy to understand manner. Petitioners should review the filing instructions carefully prior to filing in order to ensure that the benefit request is properly filed and to avoid rejection.

3. Unnecessary and Burdensome Requests for Evidence (RFEs)

As noted in the 2014 Annual Report of the CIS Ombudsman, members continue to report issues with the quality and consistency of adjudications in the H-1B and L-1 context; in particular, problems with the application and interpretation of the preponderance of the evidence standard and unnecessary and burdensome RFEs. According to the report, RFE rates for L-1A, L-1B, and H-1B petitions “have continued to rise in recent years.”⁴

Excessive and unnecessary RFEs impact not only the quality and speed of adjudications, but also the public’s trust and confidence in the integrity of the adjudication process. RFEs of this nature create uncertainty and unpredictability, with attendant cost, for employers and beneficiaries, particularly those who have a history of filing similar petitions successfully without receiving RFEs, and who are now forced to expend an enormous amount of time and resources in combing through what are often “boilerplate” requests and determining exactly what evidence is missing that prevents the adjudicator from rendering a favorable decision. As a result, respect for the process is compromised. Individual adjudicators must be armed with the confidence and authority to correctly apply the preponderance of the evidence standard, make a decision, and move the case forward.

- a. Members continue to observe RFEs and denials in H-1B petitions which are premised on a faulty and impermissibly restrictive interpretation of the definition of “specialty occupation.” Please explain how this approach furthers the Administration’s stated goal of attracting the best and the brightest to the United States in an effort to stimulate the economy and create U.S. jobs?⁵

RESPONSE: USCIS adjudicates H-1B petitions in accordance with the applicable statutory and regulatory requirements, and the agency’s policy interpretation of those requirements.

Over the past several months, this unfortunate trend has also bled over into adjudications of O and P nonimmigrant petitions. For example:

- **Consultation Issues:** Under 8 CFR §214.2(o)(5), with the exception of O-1 and O-2 petitions in the motion picture or television industry, where a consultation with both a union and a management organization must be submitted, all O-1/O-2 petitions must include only a consultation with an appropriate peer group, labor, or management organization. However, we have seen:
 - RFEs requesting a second consultation from the Alliance of Motion Picture and

⁴ See <http://www.dhs.gov/sites/default/files/publications/cisomb-annual-report-2014-508compliant.pdf> at page 21.

⁵ See White House Blog, “Taking Action to Attract the World’s Top Talented Professionals,” (May 6, 2014), <http://www.whitehouse.gov/blog/2014/05/06/taking-action-attract-world-s-top-talented-professionals>.

Television Producers (AMPTP) for musicians where the itinerary lists live television performances.

- RFEs discounting submitted consultations for new positions, multimedia artists, and other non-conventional positions and asking for proof that a labor union or peer group does not exist; or suggesting organizations that do not actually provide consultations.

RESPONSE: SCOPS has been working closely with the service centers to examine consultation issues as mentioned above for clarification for officers and the public. If you have specific examples of cases where the petitioner believes that the RFE inappropriately discounted submitted consultations, or suggested that the petitioner obtain a letter from an organization that does not provide consultations, please forward those examples to SCOPS through the SCOPSRFE@uscis.dhs.gov email box. Please note that the petitioner will still need to respond to the RFE if they have not already done so, as the examples forwarded to SCOPS are not included as part of the adjudicative record.

USCIS is also currently reviewing the O-1B Request for Evidence template to see if additional revisions need to be made to provide clarity for stakeholders and officers.

- **Itineraries and Contracts:** Under 8 CFR 214.2(o)(2)(ii), O-1 and O-2 petitions must be accompanied by, among other things, copies of any written contracts between the petitioner and beneficiary, or if there is no written contact, a summary of the terms of the oral agreement between the petitioner and beneficiary. In addition, the petition must include “[a]n explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events.” However, we have seen:
 - RFEs requesting 5 year itineraries for athletes and competitors when tour schedules are only done one year at a time, but repeat in substantially the same format every year.
 - RFEs requesting exact dates, times, locations, etc. for entertainers when this level of detail is frequently not planned more than three to six months in advance.
 - RFEs requesting signed contracts, even though it is an industry standard that contracts are generally signed at most 2 weeks in advance of (and often the day of) a performance.

RESPONSE: Please note that the regulations state that a petition for a beneficiary who will be working in more than one location must include an itinerary listing the dates and locations. Although USCIS provides some flexibility on how detailed the itinerary must be and takes into account industry standards when determining whether the itinerary requirement has been met, petitioners should provide as much information as possible, and include an explanation when additional information may not be available. Additionally, when a written contract does not exist, a summary of the terms of the oral agreement under which the beneficiary will be employed may be submitted. Please note, however, that the documentation submitted with the petition (e.g. the written contract or the summary of the oral agreement) should be specific

to the beneficiary, otherwise the evidence may not be sufficient to establish the terms and conditions under which the beneficiary will be employed.

- **O-2 Petitions:** We have also seen RFEs in the O-2 context which do not reflect the realities of industry practice. For example:
 - RFEs requesting newspaper articles or trade publications about the O-2 even though it is common for “behind the scene” positions to avoid the press to allow the O-1 athlete or performer to shine.
 - RFEs requesting photographs of the beneficiary with the O-1 artist or athlete when, as noted above, O-2s tend to avoid the limelight.
 - RFEs requesting proof of wages paid to the beneficiary by the same employer that pays the O-1, even though O-2s are frequently paid from entities that are different from the O-1 for legitimate business purposes.
 - RFEs requesting passport pages showing the O-2 and the O-1 have traveled together in the past, even though O-2s frequently travel before the O-1 and other performers to prepare for the production or event.

RESPONSE: USCIS issues RFEs when additional evidence is needed to determine whether, among others, the beneficiary has the requisite critical skills and experience with the O-1 alien that are not of a general nature, and that would make him/her eligible for an O-2 classification. In an effort to make those requests as informative as possible, USCIS provides the petitioner with examples and suggestions of possible evidence that may be submitted to establish eligibility. USCIS has also indicated in these instances that these are just examples and may not be applicable in every situation. Thus, in cases where the examples provided are not applicable to the industry, the petitioner may submit any additional evidence the petitioner believes addresses the evidentiary concerns as stated in the RFE and establishes the beneficiary’s eligibility for the benefit sought.

- **P-1 Petitions:** The following RFE examples have been reported in the P-1 context:
 - RFEs which incorrectly restrict the definition of “professional athlete” to that which is found under INA §204(i)(2), which is intended to clarify when a team-based athlete can change teams without having to file a new petition. The full definition of “athlete” which includes individual athletes is contained at INA §214(c)(4)(A).
 - RFEs which state that an amateur ranking does not establish that the beneficiary is internationally recognized even though 8 CFR §214.2(p)(4)(ii)(B)(2)(vi) only requires “evidence that the individual or team is ranked if the sport has international rankings” and by no means excludes amateur rankings.
 - RFEs asking for contracts with an “employer” for athletes engaged in individual sports (e.g., golf) where such contracts are not common in the industry.

RESPONSE: Thank you for bringing these O and P scenarios to our attention. SCOPS is currently reviewing the P-1 RFE templates to see if additional revisions need to be made to the

templates to provide clarity to petitioners and officers.

- a. The RFEs demand evidence beyond that which is required in the regulations, and beyond what has been accepted for many years, and discourage admission to the U.S. of individuals whose admission should be encouraged and welcomed. Please explain what has led to this shift in the Service's approach to O and P adjudications.

RESPONSE: SCOPS is exploring your concerns with the service centers and, if needed, will conduct additional training and roundtables as appropriate.

4. New I-693 Medical Examination Policy

As of June 1, 2014, Form I-693 is valid only for one year after filing with USCIS, and must be filed within one year of the report of examination. Several issues have arisen in connection with the new rules governing the I-693:

- a. We have seen RFEs requesting a new medical examination where the current medical examination is several months away from expiration, and the priority date is current. While we appreciate the need to ensure a file is ripe for adjudication, there is a significant cost attached to the medical exam process and an updated I-693 should not be required unless necessary. Please describe the overall Service policy for determining at what point (either before or after a priority date becomes current) an RFE for a new medical examination will be issued.

RESPONSE: USCIS generally does not issue an RFE for a new medical exam if the current medical exam is valid and the priority date is current. It is USCIS policy to issue an RFE for a new medical exam if the medical exam in the file is incomplete, has expired, or is likely to expire before adjudication, and the priority date is current or may become current within the next three months of the case review. If you believe an RFE was issued in error, please contact us or respond to the RFE by stating the reason for the erroneous RFE.

- b. When an RFE for a new I-693 is issued and the priority date is current but the existing I-693 is still valid, will USCIS continue to process the I-485 or will it cease processing until the RFE response is received? In this situation, may the applicant promptly respond to the RFE, ask that processing continue with the current I-693, and offer to update the I-693 before it expires if the priority date is still current at that time?

RESPONSE: The National Benefits Center or Field Offices should not request a new Form I-693 unless the current Form I-693 was not completed properly or is near its expiration and the office does not anticipate adjudicating the case prior to the expiration of the current Form I-693. If the expiration is "several months away," an RFE would still be appropriate if USCIS reasonably believes that the adjustment application will not be adjudicated before the I-693 expires.

Processing of the I-485 will resume upon receipt of a properly completed and

unexpired I-693.

- c. We understand that the medical examination policy is coordinated with the Center for Disease Control, which is concerned with public health and medical preparedness. In light of the very significant costs associated with obtaining a medical examination, would USCIS consider exploring with the CDC alternative options such as providing a supplement to the original I-693 with updates on critical vaccinations and certain tests such as TB?

RESPONSE: USCIS is committed to evaluating its policies regularly to make improvements and to reduce inefficiencies and costs, where possible, while still safeguarding public health. USCIS is open to continuing our discussions with CDC to explore alternative options regarding the validity of the Report of Medical Examination and Vaccination Record, Form I-693.

5. Expedited Processing of Petitions Involving Same-Sex Couples

A number of AILA members report that they have been denied expedited processing of petitions involving same-sex couples based on the “humanitarian situation” criterion. Many U.S. citizen and permanent resident petitioners, including asylees, have been separated from their partners for years and have been unable to safely return to their home countries to visit them. Other U.S. citizen petitioners have married or established a relationship with a non-citizen living abroad, yet remain alone as a result of being rejected by their own family members or because they do not have the financial resources to visit their partners abroad. Because of the personal nature of these situations, frequently all that is available to support the expedite request is the petitioner’s affidavit.

- a. Have examiners handling expedite requests received training on issues specific to LGBT petitioners? If not, we request that such training be provided so that adjudicators are sensitized to the particular circumstances of this community.

RESPONSE: USCIS routinely decides immigration cases that involve a variety of unique situations and backgrounds. As a result, our officers are trained to be sensitive to everyone’s individual situation. USCIS developed materials specifically to provide guidance to our officers regarding recent changes in the law that affect the processing of marriage-based petitions, including same sex marriages. This training was provided at all 4 Service Centers in 2013.

6. I-130 Appeal Delays

The issue of delays in the transfer of I-130 appeals from the district offices to the BIA has been the subject of discussion at a number of AILA meetings with USCIS, most recently at

the October 23, 2013 meeting with USCIS Field Operations.⁶ Unfortunately, it is an issue that remains unresolved. AILA members continue to report situations where USCIS is taking as much as one or two years to forward the I-130 appeal to the BIA. This delay contributes to the separation of families and can prevent respondents from applying for relief in removal proceedings because of a lack of an approved visa petition.

EOIR has made it clear that the BIA has no control over the appeal until USCIS forwards it to the BIA. Under 8 CFR §1003.5(b), USCIS is required to “promptly” forward the record to the BIA upon the receipt of the parties’ briefs or the expiration of the 30 day briefing deadline, and to “immediately” forward the appeal to the BIA if the petition is not granted within 45 days. Further, 8 CFR §1003.3(c)(2) provides the same 21 day briefing deadline for the petitioner and USCIS. Therefore, the regulations at 8 CFR §1003.3 and §1003.5 appear to be equally binding on both USCIS and the petitioner.

- a. What changes will USCIS make to ensure consistent and timely processing and forwarding of I-130 appeals?

RESPONSE: USCIS regularly reviews its processes to verify that both Field Offices and Service Centers are meeting the established timeframes. However, there are a number of factors that may contribute to a delayed BIA filing. If an appeal has been pending for a significant amount of time, you may contact the office to which the appeal was sent, make an InfoPass appointment or contact the National Customer Service Center:

<http://www.uscis.gov/about-us/contact-us/national-customer-service-center>

7. I-130 Appeal – Serving Copies of USCIS Filing

The regulations require each party to serve the other with copies of what has been filed with the BIA. *See* 8 CFR §1003.32(a). Yet some district offices and service centers do not serve the petitioner with the record that it forwards to the BIA as part of a visa petition appeal. This poses a problem for petitioners, who do not know whether the record omits evidence submitted with the visa petition, or includes evidence that the petitioner is unaware of.

- a. Will USCIS remind district offices and service centers that they are required to serve petitioners with a copy of all of the documents filed by USCIS with the BIA in visa petition appeals, including the record of proceedings?

RESPONSE: Prior to making an adverse decision, USCIS shall give petitioners an opportunity to address derogatory information which is unknown to them. 8 CFR 103.2(b)(16)(i). This is generally done through the issuance of a NOID or NOIR. Petitioners may respond to the NOID or NOIR with additional evidence and information. However, if the final decision is negative and the petitioner chooses to appeal, USCIS will

⁶ <http://www.aila.org/content/default.aspx?docid=46381>

create a ROP which will include all evidence relied upon by the agency in reaching the decision. There is no legal requirement that USCIS automatically supply the petitioner or authorized representative with a copy of the ROP when forwarding an appeal to the appellate authority. However, USCIS will forward a copy of its brief to the petitioner. The petitioner would already have copies of all the other material included in the ROP. A petitioner or representative may make an affirmative request for a copy of the ROP through established FOIA processes or a direct request to the agency. AFM 10.2(e). Pursuant to 8 CFR 1003.32(a), when DHS provides proposed exhibits or applications to an Immigration Judge (IJ), DHS must also provide a copy of these materials to the affected party; however, this regulation and procedure are not applicable when DHS is forwarding an appeal to the BIA.

8. Site Visits by the Fraud Detection and National Security Directorate

After several years of H-1B site visits, L-1 site visits have started, giving rise to a number of questions about the program.

General Questions:

- a. FDNS previously indicated that site visits may be conducted as part of a fraud inquiry and as part of a Benefit Fraud Compliance Assessment. Is USCIS currently conducting any Benefit Fraud Compliance Assessments? If so, what visa categories are being assessed?

RESPONSE: At the present time, no Benefit Fraud Compliance Assessments are being conducted.

- b. Please provide FDNS statistics for the past fiscal year. How many H-1B Administrative Site Visit and Verification Program (ASVVP) visits were completed in the last fiscal year? How many resulted in a “not-verified” finding?

RESPONSE: As of May 2014, 75,000 compliance reviews have been completed since the program’s inception in July 2009. The vast majority of compliance reviews are determined Verified.

- c. What are the standard operating procedures to be followed by FDNS and Service Centers subsequent to a “not verified” finding?

RESPONSE: If FDNS cannot verify the information on the petition or finds the information to be inconsistent with the facts recorded during the site visit, USCIS may request additional evidence from the petitioner or initiate denial or revocation proceedings. When indicators of fraud are identified, USCIS may conduct additional administrative inquiries or refer the case to ICE for criminal investigation.

- d. In what percentage of ASVVP cases has fraud been found (as opposed to non-fraudulent error) and what types of cases are involved in the majority of fraud cases?

RESPONSE: The vast majority of ASVVP compliance reviews are found Verified. Any Not Verified compliance reviews that rise to the level of suspected fraud are referred to FDNS Field Offices as appropriate.

- e. In 2012, FDNS advised AILA that targets for site visits were chosen randomly by zip code. Is this still the case? What percentage of employers, by visa category, are visited?

RESPONSE: USCIS conducts site inspections on 100% of pre-adjudication religious worker petitions; H-1B and L-1A petitions are randomly selected post-adjudication. H-1B employers receive a higher number of site visits given that the volume of H-1B petitions is high and that L-1A petition site visits just began in June 2014. All post-adjudication ASVVP compliance reviews are randomly selected based on office capacity by zip code.

Questions Specific to L-1 Site Visits:

E-mails from the Fraud Detection and National Security Directorate include extremely detailed questions (in at least one case, 46 questions, example attached) that include requests for information regarding the petitioning company and its related overseas entity that may not have been included in the petition, and are not necessary to meet the legal standards for L-1 status.

- f. Is the attached list of questions the standard list that ASVVP examiners issue to employers in an L-1 site visit?

RESPONSE: The attached list is an accurate representation of the types of questions asked at a physical L-1A compliance review site visit.

- g. If so, please explain how these questions, which place a burden on employers who are often asked to respond to the questions and provide requested documents within two business days, are designed to uncover fraud?

RESPONSE: Generally, the employer would only be receiving an email, phone call, or fax if the site inspector was unable to gather the information at the time of the physical site visit; if the petitioner or beneficiary declined participating in the site visit; or if the site inspector was unable to locate the petitioner or beneficiary during the site visit.

During a physical site inspection, many of these same questions would be asked and answered by either the petitioner or beneficiary, and any requested documents – if not immediately available – can be submitted to the site inspector as follow-up.

All of the questions refer to information that is either directly found in the petition, or is included with standard supporting documentation submitted with the petition. The following supporting documentation is representative of the evidence normally submitted with an L-1A petition:

- Relevant forms and listed fees;
- Employer’s letter supporting the petition;
- Certificate of Authority;
- Copy of license to maintain branch from [US SUBSIDIARY];
- Copy of Audited financial statement for year 20XX;
- Copy of federal tax return for years 20XX-20XX;
- Organization chart;
- Affiliation certification between [PARENT AND SUBSIDIARY];
- Copy of lease agreement;
- Annual report for FY 20XX;
- Consolidated audit reports for FY 20XX-20XX;
- Summary of FY 20XX business report;
- Copy of webpage and company history of parent company;
- Copies of passport, visa, and I-94 of beneficiary;
- Certificate of employment of beneficiary;
- Certificate of job duties and qualifications;
- Beneficiary’s resume;
- Evidence of academic credentials;
- Beneficiary’s income and tax records and recent paystubs;
- Copies of family members’ passport, visa, I-94; and
- Beneficiary’s family census relationship with translation.

The ultimate purpose of the questions – and of the ASVVP as a whole – is to foster a culture of compliance within the U.S. immigration system. The site visits allow our site inspectors to visually confirm the existence of the business and to speak to the petitioner and beneficiary directly to verify the information listed on, and submitted in support of, the petition.

9. **EB-2 I-140s for Physical Therapists**

Members continue to raise concerns about denials of Schedule A, Group I EB-2 filings for physical therapists who have received a Bachelor of Physical Therapy after completing a 5-year program that has been determined to be the equivalent of a first professional degree in physical therapy in the United States by a credentialing agency approved by the Federation of State Boards of Physical Therapy (FSBPT). According to the FSBPT, a candidate for credentialing as a physical therapist must have 60 semester hours of general postsecondary education, and a minimum of 90 semester hours of professional education – a total of 150 semester hours. https://www.fsbpt.org/Portals/0/documents/free-resources/CWT5_Rev0907.pdf.

Note that other professional degrees called “Bachelors” have been properly accepted by

USCIS as advanced degrees, including Bachelor of Medicine and Bachelor of Surgery (MBBS), Bachelor of Dentistry, Bachelor of Dental Science, and Bachelor of Laws. The 5-year professional Bachelor of Architecture is another example of a professional degree that would qualify for EB-2.

8 CFR §204.5(k)(2) states:

Advanced degree means any United States academic **or professional degree** or a foreign equivalent degree above that of baccalaureate. ...

There are currently five (5) credentialing agencies that are licensed to use the FSBPT's Coursework Tool (CWT) for foreign-educated Physical Therapists. Each version of the CWT reflects the minimum educational requirements for substantial equivalence to a U.S. first professional degree in physical therapy at the time of graduation. Of the current 212 accredited physical therapy education programs in the U.S. and Puerto Rico, 207 now grant only Doctorate of Physical Therapy (DPT) degrees, and the remaining 5 grant only master's degrees in Physical Therapy.

The Foreign Credentialing Commission on Physical Therapy (FCCPT) is the most commonly used FSBPT-approved credentialing agency. FCCPT issues more than one type of evaluation. FCCPT is an agency that authenticates, verifies and evaluates educational documents of foreign physical therapists and is authorized to issue the visa screen certificate required by the USCIS to satisfy the ground of inadmissibility for uncertified foreign healthcare workers at INA §212(a)(5)(C). The evaluations submitted in Schedule A, Group I Physical Therapist cases are issued not for licensure purposes but solely for the purpose of demonstrating equivalency to U.S. educational coursework and analyzing credits earned consistent with national standards.

Despite the recognized expertise of FCCPT as well as their strict standards for educational evaluations, USCIS has been denying EB-2 petitions even though FCCPT has concluded, after a detailed analysis of all coursework and credits, that the degree is substantially equivalent to a first professional degree in physical therapy in the United States.

Please confirm that a determination by the FCCPT (and the 4 other FSBT-approved credentialing agencies: ICD, ICA, IERF, and University of Texas-Austin for Texas only) and the various state licensing authorities authorizing the issuance of physical therapist licenses, that a foreign physical therapy degree is substantially equivalent to that of a first professional degree in physical therapy in the United States, meets the definition of "advanced degree" under 8 CFR §204.5(k)(2), and that such a determination would meet the burden of proof by a preponderance of the evidence that an I-140 immigrant visa petition for a Schedule A, Group I Physical Therapist is entitled to EB-2 classification

RESPONSE: To establish eligibility, a foreign worker must meet the applicable statutory and regulatory requirements for the particular immigrant benefit request sought including, as appropriate, meeting certain educational requirements. In your question, you note that 8 CFR §204.5(k)(2) states:

“Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. ...” (Emphasis in the original)

It is equally important to note that the definition of “advanced degree” provides that the degree, whether academic or professional, must be *“above that of baccalaureate.”*

The FCCPT's authority to issue certificates to foreign workers practicing physical therapy is granted by USCIS pursuant to 8 C.F.R. § 212.15(e)(3). USCIS notes that the regulatory authority of approved credentialing organizations to issue certificates for foreign health care workers is for the limited purpose of overcoming the inadmissibility provision at INA § 212(a)(5)(C). The FCCPT's authority does not extend to determining whether the beneficiary's education satisfies the regulatory definition of “advanced degree,” or whether the beneficiary's education satisfies the minimum requirements stated on the labor certification. Additionally, 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 C.F.R. § 212.15(f)(1)(iii).

In evaluating whether a foreign worker's education meets the educational requirements of the particular immigrant classification being sought in addition to the educational requirements of any labor certification accompanying the immigrant benefit request, USCIS considers all submitted materials, including opinions rendered by any educational credentials evaluator(s) in conjunction with a claim that the foreign worker's relevant educational credentials meet the statutory and regulatory requirements. In the course of adjudication, USCIS also may refer to other available credible resource material to determine the equivalency of any foreign educational credentials to United States college degrees. All these 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.

Rather than make a blanket statement regarding the merits of degrees evaluated by the FCCPT to be the equivalent of a first professional degree in physical therapy in the United States, USCIS will analyze the educational credentials of foreign workers practicing physical therapy on a case by case basis with due consideration being given to all submitted materials as well as to other credible resource material.

For more information on health care worker certification, we encourage your members to visit the USCIS website at: <http://www.uscis.gov/working-united-states/temporary-workers/health-care-worker-certification>

10. Immigrant Petitions Based on PERM

AILA recently raised a question with USCIS Service Center Operations (SCOPS) regarding RFEs that question certain components of the labor certification application that was certified by DOL and included with an I-140 petition. The response appears to assert a role for USCIS beyond the statutory and regulatory authority of USCIS. In the immigration petitions in question, USCIS requested (1) proof that U.S. workers were considered for the position

offered; (2) an evaluation of the employer's job requirements as listed on the ETA 9089 as compared to the Occupational Outlook Handbook (OOH); (3) an evaluation of the appropriateness of the employer's job requirements, and/or (4) proof that employment gained at the petitioning employer was in a substantially different position. According to the AFM at Chapter 22.2(b)(3), USCIS adjudicates the I-140 to determine whether the position offered is the same or similar position that was certified by the DOL, whether the beneficiary meets the qualifications for the position, and whether the employer has the ability to pay the wage offered. USCIS may invalidate a certified labor certification only if it determines there was fraud or willful misrepresentation in the Application. See AFM instructions in Chapter 22.2; 20 CFR §656.32 (revocation); 20 CFR §656.30(d) (invalidation). DOL has exclusive authority to determine eligibility as delineated in 20 CFR §656.17.

Courts have emphasized the distinction between DOL's authority to set the requirements for the job, on the one hand, and USCIS's authority to determine whether the alien beneficiary met those requirements. *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 990 (7th Cir. 2007). In *Hoosier Care*, the petitioner obtained a labor certification for a position that required a bachelor's degree in any field. USCIS denied the I-140, holding that the beneficiary's specific degrees were not relevant to the position. The Seventh Circuit reversed, holding that "[DOL] certifies the requirements for a job and the Department of Homeland Security then determines whether the alien whom the employer wants to hire satisfies those requirements—that is, whether he has the training that the Department of Labor believes is required for the job." *Hoosier Care* at 989. See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417 (D.C. Cir. 1977) (labor certification is under the jurisdiction of DOL and Legacy INS has no authority to double-check DOL's certification; *K.R.K. Irvine Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983).

- a. Please confirm that USCIS's role in the adjudication of I-140s is limited to whether the position offered is the same or similar position that was certified by the DOL, whether the alien satisfies the job requirements as set forth in the labor certification, and whether the employer has the ability to pay, and advise the field accordingly.

RESPONSE: USCIS's role in the adjudication of Form I-140 petitions is to determine whether a beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification under INA 203(b).

In adjudicating Form I-140 petitions requiring an offer of employment, USCIS must determine, based on the evidence, that the employer has the ability to pay the offered wage from the priority date until the beneficiary obtains lawful permanent resident status. In addition, in cases requiring labor certification by the DOL, USCIS must determine whether the position offered in the Form I-140 petition is the same or similar to the position that was certified by the DOL and whether the beneficiary satisfies the job requirements listed in the labor certification.

USCIS is responsible for determining that the beneficiary possesses the minimum education, training, and experience listed on the labor certification as of the priority date. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) and *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir 1983); *see also Matter of Katigbak*, 14 I&N Dec. 45 (R.C. 1971) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting R.C. 1977). To make such determinations, USCIS carefully reviews the information provided on the ETA Form 9089, as the DOL generally does not review the beneficiary's qualifications for the offered position when it approves the labor certification. *See* INA 212(a)(5)(A)(i) and 20 CFR 656.1(a). Thus, an approved labor certification is not conclusive evidence that the beneficiary meets the requirements of the labor certification. Pursuant to INA 204(b), before approving a Form I-140 petition, USCIS must be satisfied that all of the information contained in the Form I-140 petition (which includes the supporting labor certification) is true and all supporting evidence establishes eligibility. To complete its adjudication, USCIS must review the ETA Form 9089 to determine whether: (1) the offered position meets the requirements of the requested immigrant visa classification; (2) the beneficiary meets the requirements of the requested classification; and (3) the beneficiary meets all of the educational, training, experience and other requirements of the offered position as set forth on the Form 9089 by the priority date of the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

11. Systematic Alien Verification for Entitlements

- a. Many state DMVs will not issue a driver's license to a foreign national unless the SAVE system indicates that the foreign national is in lawful status in the United States. Please confirm whether the SAVE system would indicate that a foreign national is lawfully present in the United States in the following circumstances:
 - i. A nonimmigrant with a pending timely filed change of status application whose Form I-94 card has now expired, or a nonimmigrant who was admitted for D/S (i.e., F, M or J) and whose program and/or authorized grace period is still in place, or expired, at the time the driver's license is sought.

RESPONSE: The Systemic Alien Verification for Entitlements (SAVE) program can verify that a nonimmigrant has a pending change of status application using information from a Form I-797C, Notice of Action. SAVE may require the customer agency to submit a Form G-845, Document Verification Request and a copy of the Form I-797C to complete the verification. The SAVE program uses information from the Form I-20 or Form DS-2019 to query the Student and Exchange Visitor Program and determine when an F, M, or J nonimmigrant's program ends. If the program end date has passed, SAVE's response will automatically incorporate the grace period for all F, M, and J nonimmigrants except for the following categories of individuals:

- F-2s whose sponsoring F-1 was on post-completion Optional Practical Training (OPT);
- M-1s who are in post-completion OPT; and
- M-2s who's sponsoring M-1 is in post-completion OPT.

If a customer agency needs to determine if an individual in one of these categories is within his or her grace period, the agency must submit a request for additional verification using Form G-845.

- ii. A nonimmigrant with a pending timely filed extension of stay (either with same or an alternative employer who sponsored the original petition) whose Form I-94 card has now expired.

RESPONSE: A nonimmigrant with a timely filed extension of stay application should have an I-797 documenting the application, and using information from a Form I-797C, SAVE can verify that an individual has a pending extension of status application. If appropriate, the SAVE response will include the permitted extension period and indicate that the individual has a pending application. The customer agency would need to institute additional verification and may need to submit a form G-845 and a copy of the Form I-797C in order to complete the verification. The SAVE Program would indicate that the individual has a pending application.

- iii. A nonimmigrant with a pending timely filed I-485 application whose Form I-94 card has now expired.

RESPONSE: A nonimmigrant with a timely filed I-485 application should have a Form I-797C documenting the application, and SAVE can verify that whether an individual has a pending I-485 application. The agency may need to submit a form G-845 and a copy of the I-797C to complete the verification.

- iv. A DACA or other Deferred Action recipient whose EAD card has expired but who timely filed an extension request.

RESPONSE: SAVE can confirm a DACA recipient has a request pending using information from a Form I-797C. The customer agency may need to submit a

form G-845 and a copy of the Form I-797C to complete the verification. If there is no Alien or I-94 number, the DMV must submit the I-797C to the SAVE Program for verification using a G-845. The SAVE Program would indicate that the individual has a pending request. For other (non-DACA) Deferred Action recipients, there is no form the recipient can file with USCIS to request a renewal. Accordingly, SAVE can only verify an individual with an approved Deferred Action request.

- v. Individuals with approved TPS status who decline to file for an EAD.

RESPONSE: Individuals with approved TPS often will have an EAD, and this is used to verify status. If the individual has been granted TPS and it has not been withdrawn by USCIS or an immigration court, then the individual's I-797 from USCIS documenting that TPS has been initially approved can also be used to verify the individual is in TPS, regardless of whether he or she has an EAD. If the applicant is approved for TPS re-registration but has declined to file for an EAD, he or she should have received an I-797 with an I-94 attached documenting the approved TPS.

- vi. Individuals with approved TPS status who have either received automatic EAD extensions via Federal Register notice or who are in the process of re-registering and renewing the EAD.

RESPONSE: A DMV can determine whether an automatic EAD extension has been granted for a particular TPS country and for how long by checking the most recent Department of Homeland Security Federal Register notice for the individual's country of nationality at one of the following resources: Federal Register – <http://www.gpoaccess.gov/fr/>; USCIS TPS Web site – <http://www.uscis.gov/tps>; as well as SAVE System's Program Announcements. If a DMV wants to verify the TPS of an individual who has been granted an automatic extension of his or her EAD, it should request additional verification to complete verification of the applicant's TPS status. A TPS recipient with a timely filed application should have an I-797C that may contain an Alien or I-94 number. That document can be used to conduct verification. If there is no Alien or I-94 number, the DMV must submit the I-797C to the SAVE Program for verification using a G-845. The SAVE Program will determine whether the individual has TPS status.

- vii. Asylum applicants who are not yet eligible to apply for an EAD or with pending appeals of a denied asylum application.

RESPONSE: An asylum applicant who is not eligible to apply for an EAD or who has a pending appeal should have a Form I-797C or possibly a document from an immigration court indicating an application or appeal is pending. These documents can be used to conduct a verification, although the agency may need to submit a form G-845 and a copy of the documentation. The SAVE Program would indicate that an application is pending in either case.

- viii. Individuals who are recipients of CAT relief.

RESPONSE: An individual who has been granted deferral of removal under regulations implementing Article 3 of the CAT may have an EAD which SAVE can use to conduct a verification. An Order from an immigration court granting deferral of removal can also be used for verification. If there is no Alien or I-94 number, the customer agency must submit the Order to the SAVE Program for verification using a G-845. The SAVE Program would indicate that the individual has been granted deferral of removal.

- ix. Individuals who have been granted withholding of removal.

RESPONSE: An individual who has been granted withholding of removal may have an EAD. That document can be used to conduct verification. If the individual has an Order from an immigration court granting withholding of removal, the individual can use that document for verification. If there is no Alien or I-94 number, the customer agency may need to submit a copy of the Order to the SAVE Program for verification using a G-845. The SAVE Program would indicate that the individual has been granted withholding of removal.

- x. An F-1 student during H-1B cap gap period.

RESPONSE: An eligible F-1 student with a timely filed H-1B petition seeking to change status to H-1B should have a valid cap gap Form I-20 issued by the DSO. That document can be used to conduct verification. The SAVE program would indicate that the individual is an F-1 and may also indicate that the individual is the beneficiary of an approved H-1B petition.

- xi. An F-1 student whose regular OPT card has expired and who has timely applied for STEM OPT.

RESPONSE: An eligible F-1 student who timely filed for a 17-month STEM extension of his or her post-completion OPT work authorization whose EAD has expired can use the expired EAD for a period of up to 180 days while USCIS is making a decision on the STEM extension application. The student should also have a valid I-20 issued by the DSO. These documents can be used to conduct a verification. The expired EAD will not verify on initial electronic verification, so the student will have to advise the DMV to request additional verification with the SAVE Program. The SAVE Program would indicate that the individual is in F-1 status.

- b. If the SAVE system does not confirm that a foreign national in any of these circumstances is lawfully present, can it be updated to reflect that information given the fact that all of these individuals are entitled to be present in the U.S.?

RESPONSE: The SAVE program does not correct records, it merely accesses records maintained by other programs and agencies. Once a record is corrected by the program or agency that maintains the records, SAVE should be able to verify the

applicant's immigration status.

- c. If not, what procedure should be followed by the DMV and/or foreign national to obtain confirmation of lawful presence so that the foreign national can obtain/renew his/her driver's license? The hope is that we can avoid delays and the administrative burden associated with the state DMV having to file a G-845 to receive confirmation that the foreign national is in fact lawfully present in the United States.

RESPONSE: The SAVE program has a three step verification process:
1) Electronic initial verification; 2) Electronic second step verification; and
3) Manual or electronic third step verification using the Form G-845. Customer agencies may need to use one, two, or all three steps to make certain that all available records have been searched to verify the status of an applicant. SAVE has a scan and upload feature that can be used by the DMVs to speed up the electronic third step process and there is a Case Check service available that a DMV can use to allow the applicant to keep track of the progress of the SAVE verification. The DMVs are aware of these capabilities and can utilize them at their discretion. Unless all additional verification steps are followed as required by SAVE, the verification process may be incomplete and the integrity of the process compromised. In the event that SAVE is unable to verify the applicant's status after all three verification steps have been completed, the customer agency will advise the applicant on next actions. In order to increase the chances of an immediate verification, the applicant should be prepared to provide all relevant documentation demonstrating current immigration status as well as evidence of any pending immigration applications.

12. USCIS Communications (question moved from AILA/FOD meeting agenda)

We appreciate the efforts USCIS is making to update its Customer Relations Interface System (CRIS) Online Case Status and USCIS's willingness to issue a transfer notice to the applicant and the attorney of record when the Alien File or petition is sent to a different USCIS service center. To further aid communication, we request that USCIS update CRIS and issue transfer notices in the following situations:

- a) When any file is transferred to the National Records Center.
- b) When any file is transferred to the National Visa Center.
- c) When any file is transferred to a Field Office.

RESPONSE: A notice is not generated when a file is transferred from the National Benefits Center to the field office or from one field office to another. The National Benefits Center is the pre-processing center for all cases that are to be adjudicated in the field; therefore, USCIS believes it is not necessary that a transfer notice be

generated. Generally a file would be transferred from one field office to another only when the applicant has moved and changed jurisdictions. In this case a transfer notice would not be generated, but if the applicant has submitted a change of address, he/she should assume that the case has been or will be transferred to the office with jurisdiction over the case.

- d) It would be very helpful if file transfers were more accurately noted in CRIS to specify the specific Field Office or other USCIS Office that the file has been transferred to, rather than a just providing a generic statement of transfer. Can USCIS make such data available on CRIS to reduce the number of NCSC, INFOPASS, and liaison inquiries?

RESPONSE:

CRIS currently informs customers or their representatives when a file is transferred and the date the file is transferred. For customers that sign up for an account or have an account with us already, USCIS is planning to enhance the case status system to provide more specific case information related to that customer's case, which would include information about where a case has actually been transferred. USCIS will notify stakeholder's if/when such an enhancement has been implemented.