

USCIS HQ – AILA Liaison Meeting
April 6, 2017
Agenda

Staffing/Organizational Updates

1. Please provide an overview of any key staffing changes or other organizational/structural updates that have been implemented or taken effect since our last meeting.

USCIS Response: As of this month, James McCament is the USCIS Deputy Director and Acting Director. Effective April 2, Kathy Nuebel Kovarik is the Chief of the Office of Policy and Strategy. In addition, Craig Symons is currently serving as Senior Advisor to Secretary Kelly and Carl Risch is serving as the Acting USCIS Chief of Staff. Finally, USCIS is establishing a new directorate called External Affairs (EXA). The Offices of Legislative Affairs, Citizenship and Communications will be realigned into the new EXA directorate, with Angie Alfonso-Royals as the associate director.

Executive Orders on Immigration

2. On March 6, 2017, the President signed a new Executive Order, "[Protecting the Nation from Foreign Terrorist Entry into the United States](#)." The new order takes effect on March 16, 2017 and expressly revokes the January 27, 2017 Executive Order with the same name. The March 6, 2017 order includes in Section 5, a directive to create uniform screening standards across all immigration programs. Among the elements contemplated are: in-person interviews, amended application forms with new questions "aimed at identifying fraudulent answers and malicious intent," and the collection of information necessary to assess all grounds of inadmissibility or grounds for the denial of other immigration benefits.
 - a. Recognizing that the directives implicate multiple components within DHS and other agencies as well, to what extent has USCIS been involved in the development and implementation of these directives?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

- b. What steps have been undertaken thus far to implement these changes? Is there a working deadline for implementing some or all of the contemplated measures?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

- c. Within what time frame can we expect to see draft forms with new proposed questions to identify fraud and malicious intent?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

- d. Can we expect to see changes in terms of the types of applications and petitions that will require an interview?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

3. Also on March 6, 2017, the President issued a memorandum to the Secretary of State, Attorney General, and Secretary of Homeland Security on implementing parts of the March 6 Executive Order that dealt with vetting applications and petitions for immigration benefits.¹

- a. Is USCIS contemplating or developing additional guidance on the implementation of the directives contained in this memo?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

- b. The memo calls for the immediate implementation of additional screening and vetting protocols, but also includes a directive to implement procedures “as soon as practicable” to “enhance the screening and vetting of applications for visas and all other immigration benefits.” Has USCIS made any changes thus far as a result of this memo? What other changes are contemplated? Is there a working deadline for implementing some or all of the measures?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

- c. The memo also directs DHS (along with other agencies) to issue new rules, regulations, or guidance in order to “rigorously enforce” all existing grounds of inadmissibility and ensure subsequent compliance with related laws after admission. What steps have been undertaken thus far to implement this part of the memo? Is there a working deadline for completing some or all of the measures?

USCIS Response: In light of the extensive ongoing litigation we are not in a position to respond to any questions about implementation of any Executive Order or other Presidential action.

¹ The full title of that memorandum is *Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People.*

4. Does USCIS anticipate making any changes to the [November 7, 2011 guidance on the issuance of Notices to Appear](#) (NTA) in light of the changes to the DHS enforcement priorities outlined in the January 25, 2017 Executive Order 13768, “Enhancing Public Safety in the Interior of the United States?”

USCIS Response: USCIS is currently revising its Notice to Appear (NTA) guidance based on the Executive Order and DHS Instructions.

5. Under [the current DACA FAQs](#), a person with a criminal conviction may be eligible for DACA as long as they have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanor offenses not occurring on the same date and not arising out of the same scheme. Does USCIS anticipate altering its policies regarding the adjudication of DACA applications, in light of the changes to the DHS enforcement priorities outlined in the January 25, 2017 Executive Order 13768, “Enhancing Public Safety in the Interior of the United States?”

USCIS Response: USCIS continues to adjudicate both initial and renewal DACA requests in accordance with the June 15, 2012 DACA memo. The FAQs available on the www.uscis.gov/daca webpage remain accurate.

6. Section K of the February 20, 2017 DHS memorandum, “[Implementing the President’s Border Security and Immigration Enforcement Improvements Policy](#),” states that pending issuance of regulations on parole, “appropriate written policy guidance and training” regarding parole, including advance parole, is to be provided to employees so that parole authority is exercised “only on a case-by-case basis, consistent with the law and written policy guidance.”

- a. What changes, if any, have been made or are anticipated with respect to the adjudication and issuance of advance parole, including advance parole for individuals with pending adjustment of status applications?

USCIS Response: USCIS’s advance parole-related procedures are currently under review. Changes have not yet been made, but if and when they are, public guidance will be issued as appropriate.

- b. What changes, if any, have been made or are anticipated with respect to parole in place for family members of military service members?

USCIS Response: USCIS procedures relating to military parole in place are currently under review. USCIS is still accepting/processing Parole in Place applications under existing policy for U.S. military service members and their families. We will provide further information as it becomes available.

- c. What changes if any, have been made or are anticipated with respect to the parole programs for Haitians, Cubans and Filipino World War II veterans?

USCIS Response: USCIS procedures relating to these parole programs are currently under review. Changes have not yet been made, but if and when they are, public guidance will be issued as appropriate.

7. Section I of the February 20, 2017 DHS memorandum, "[Implementing the President's Border Security and Immigration Enforcement Improvements Policy](#)," directs USCIS to "increase the operational capacity of the Fraud Detection and National Security (FDNS) Directorate" and strengthen its support of RAIO to "detect and prevent fraud in the asylum and benefits adjudication processes...." What steps has USCIS taken to carry out this directive?

USCIS Response: USCIS has developed a revised staffing plan for the FDNS Directorate and will begin to execute this plan this fiscal year.

8. What is the current status of the training and assignment of USCIS Asylum Officers? How many are currently assigned to conduct credible fear/reasonable fear interviews along the southern border and how does this compare to the number of officers assigned to adjudicate affirmative asylum cases? Is there a cadre of new officers in training? How are refugee officers being utilized during the suspension of refugee processing?

USCIS Response: The number of Asylum Officer positions in the Asylum Division was expanded to 533 total officers during FY16, and there has been approval received during FY17 to expand up to 625 officers. As of Q2 FY17, the Asylum Division had on board 528 asylum officers. Included among these on-board officers are approximately 50 new officers who completed training during the week of March 20th and have returned to their respective offices to begin interviewing. Another 45-50 officers are scheduled to undergo training during April/May 2017. The approximate number of asylum officers assigned to credible fear and reasonable fear fluctuates significantly on an almost daily basis. Moreover, the manner in which credible fear and reasonable fear cases are processed makes it difficult to provide exact data on the number of employees assigned. For example, it is possible that an officer can work on two adjudication types during the course of one day. Noting these difficulties with providing exact data, the Asylum Division estimates that the number of officers assigned to the credible fear and reasonable fear workloads is approximately 140-175 during any given day. Any remaining officers who are not on leave, serving as acting supervisors, in training status, or assigned to other projects are assigned to adjudicate affirmative asylum cases.

Attorney Representation Issues

9. During the December 14, 2016 call with SCOPS, we noted reports of a new policy, purportedly effective on October 28, 2016, prohibiting Premium Processing Units (PPU) from communicating with anyone other than the petitioner or attorney/representative on the G-28. This has had the effect of precluding paralegals and other attorneys at the same firm from inquiring on a case. SCOPS responded that it was not a new policy, but was based upon PM 602-0055.1, "[Representation and Appearances and Interview Techniques](#)," dated May 23, 2012. However, though this memo addresses the role of attorneys and representatives, it does not suggest that inquiries may only be accepted by the attorney of record. Moreover, we

note that until October 2016, colleagues of the G-28 lawyer were able to communicate with the PPU without issue. In light of this, we reiterate our query as to whether or not this is a new policy, and if so, please explain the departure from past practice? Regardless, we ask USCIS to review this issue and consider once again permitting counsel's staff to make status inquiries to USCIS processing offices.

USCIS Response: SCOPS operates under current USCIS policy guidance on this topic, including the USCIS Policy Manual section, Volume 1 – General Policies and Procedures, Part A – Customer Service, Chapter 5, Privacy and Confidentiality in Customer Service. Without a signed privacy waiver, or a properly completed G-28, USCIS generally cannot give case specific information to anyone other than the applicant or petitioner. USCIS acts to protect private information to the greatest extent possible in order to prevent such unauthorized disclosures. Any departures from this policy that comes to our attention will be addressed in accordance with USCIS policy.

10. Over the years, we have had numerous discussions regarding Form G-28 and have long advocated for a notification system when a G-28 is deemed defective and is rejected by USCIS. We understand that USCIS has been actively working on a system whereby the applicant or petitioner would be notified if a G-28 is rejected by the Service. What is the status of this system and when can we expect it to be unveiled?

USCIS Response: On February 27, 2017, USCIS began notifying customers when we do not accept a [Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative](#) submitted with an application or petition at a Lockbox facility. If the Form G-28 has not been accepted, the customer will be notified on his or her application receipt notice. For applications and petitions that are filed directly with the service centers, a system update scheduled for the late summer or early fall will implement a notice for the customer which informs them that the G-28 was not accepted.

Immigration Benefits Issues

11. **Limitations on the Period of H-1B Validity.** AILA has received numerous inquiries regarding H-1Bs that are granted for less than the period requested. This occurs in cases where the beneficiary will be placed at a third-party site and when the beneficiary will be working at the petitioner's site, particularly when the petitioner is a small company. In general, INA §214(g) limits the total period of admission for an H-1B nonimmigrant to six years. 8 CFR §214.2 states that the initial period of admission shall be "up to three years" but provides no guidance or criteria for granting less than three years. After extensive research, the only guidance that appears to be available on this topic are a variety of emails and materials that were disclosed in response to a FOIA request and posted in the USCIS FOIA Reading Room, and the [January 8, 2010 policy guidance](#) regarding the employer-employee relationship and third party placements.

Based on a review of these resources, it appears that the practice of limiting H-1B admission periods is based on a strict reading of the contract requirement in 8 CFR §214.2(h)(4)(iv)(A)(1), and the itinerary requirement in 8 CFR §214.2(h)(2)(i)(B), as augmented by the January 8 memorandum. However, neither the regulations nor the

memorandum provide any legal authority to shorten the validity period when the petitioner is able to establish the existence of an employer-employee relationship and in the case of a third-party placement, the right to control the employee.

The practice of *sua sponte* shortening validity periods for third-party placements and small employers creates a situation where the period of authorized stay is defined by the length of a given assignment instead of the employer's ongoing need for the worker's services. It ignores the real world fact that the duration of one's employment is normally tied to satisfactory performance and demand for the worker's services. Moreover, most employment – absent an employment contract – is “at will” and may be terminated with or without cause. In the H-1B context, as in most other employment contexts, there is never a guarantee of employment for the entire requested period of admission. If employment conditions change or employment is terminated, the regulations require the petition to be amended or withdrawn. See 8 C.F.R. §214.2(h)(11)(i)(A). The law does not require the employer to guarantee H-1B employment for the duration of the requested period of stay. The law requires only that the petitioner be a U.S. employer and that there be a bona fide employer-employee relationship.

While we respect the need to avoid fraud and to ensure workers are not unlawfully benched, these concerns are adequately addressed elsewhere in the regulations. Instead, this practice creates a situation where USCIS is required to dedicate resources to adjudicate petitions with shorter validity periods more frequently. We respectfully ask that USCIS issue guidance confirming that the reduction of validity periods is not a proper means to address third party placement concerns or any uncertainties about small employers employment needs.

USCIS Response: USCIS respectfully declines to issue such guidance. USCIS has a longstanding policy and practice of limiting the petition approval validity period to the amount of time for which the petitioner has established eligibility. This policy and practice applies to all H-1B petitions and is not limited to third party placements. According to 8 CFR 214.2(h)(9)(ii), the validity period provided for an approved H-1B petition is not to exceed 8 CFR 214.2(h)(9)(iii) or “other Service policy.” Therefore, USCIS may grant a petition validity of up to 3 years, but can shorten the validity period if necessary. As indicated in existing USCIS policy, including the January 8, 2010 memorandum and our website at <https://www.uscis.gov/news/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions>, if the petitioner establishes eligibility for part, but not all, of the requested validity period, USCIS may approve the petition for the period of time for which eligibility has been established. See, for example, Questions 7 and 8 in the above link. As noted in the response to Question 8, “USCIS will limit a petition’s validity to the time period of qualifying employment established by the evidence.”

- 12. Impact of Changes in Accreditation Status.** On the February 8, 2017 call with USCIS SCOPS, we raised a question relating to the fact that the Accrediting Council for Independent Colleges and Schools (ACICS) is no longer recognized by the Department of Education (DOE) as an accrediting agency. We noted that this appears to be affecting individuals who graduated from ACICS accredited schools in a variety of ways, including issuance of NOIDs for H-1B master's cap nonimmigrants who long since graduated from these schools with a master's degree, seeking alternative evidence of the school's accreditation. We further noted that [DHS/SEVP is following the DOE's lead and is giving affected students and schools 18-](#)

[months](#) to obtain alternative accreditation or evidence of accreditation. In a more dire situation, when a college or university closes its doors (e.g., Antioch Law School in Washington, DC, in 1986, and as nearly happened with Sweet Briar College in 2015), the degrees issued remain valid. Similarly, we urge SCOPS to refrain from adopting a policy that would have significant negative retroactive effect on these individuals. These individuals have – in many cases – spent years in OPT and H-1B status waiting for their priority dates to become current and bear no fault or responsibility in the revocation of ACICS’s accreditation authority. At that time, USCIS stated that it is working with SEVP and looking at the number of individuals affected and impact on pending applications. Can you please provide an update on this issue?

USCIS Response: USCIS has worked with SEVP and reviewed relevant regulations to determine how to provide a fair and equitable adjudication of the cases impacted by the Department of Education’s decision.

It has been determined that there are two populations of students affected by this decision:

- English language study programs are required to be accredited under the Accreditation of English Language Training Programs Act.
- F-1 students applying for a 24-month science, technology, engineering and mathematics (STEM) optional practical training (OPT) extension must use a degree from an accredited, SEVP-certified school as the basis of their STEM OPT extension. The school must be accredited at the time the student applies for STEM OPT.

USCIS is working with the ICE Student and Exchange Visitor Program (SEVP) on providing detailed information to the public via uscis.gov, ice.gov, and studyinthestates.dhs.gov.

13. **FCCPT.** On September 16, 2016, the Foreign Credentialing Commission on Physical Therapy (FCCPT) announced that as of September 15, 2016, in order to obtain a Type 1 Healthcare Worker Certificate, USCIS is requiring that the individual possess a Master’s Degree or higher in Physical Therapy, and 202.1 semester credits, at minimum.² Specifically, FCCPT states that “USCIS is requiring the *degree title* of Master’s degree in Physical Therapy” and that in light of this, FCCPT will reject Type I certificate applications where the underlying degree is titled “Bachelor’s.”³ Prior to this, FCCPT would evaluate the degree and courses completed by the applicant for substantial equivalency to a master’s degree. Moreover, according to the FCCPT website, beginning in 2017, USCIS will require all foreign-educated Physical Therapists to possess a Doctor of Physical Therapy and 234 total semester credits.

a. Is the Doctor of Physical Therapy and 234 semester credits requirement now in effect?

USCIS Response: When it comes to the licensing requirements for physical therapists, USCIS relies on subject matter experts such as CAPTE. CAPTE indicates that as of

² http://www.fccpt.org/Portals/0/Resource/News_Notices/USCIS%20Requirement%20Notice_updateSept30.pdf.

Note: The original announcement was posted on September 16, 2016 and was updated on September 30, 2016 to include FAQs. The link above is directed to the September 30, 2016 version.

³ *Id.* at pages 1 and 5 (emphasis added).

January 1, 2016, the DPT is required for U.S. physical therapists entering the occupation. However, despite FCCPT's statement, USCIS did not require that FCCPT apply a specific minimum standard for the number of credit hours required for finding equivalency to U.S. Masters and Doctoral degrees in Physical Therapy when evaluating the credentials of foreign-educated physical therapists. Nor did USCIS mandate that FCCPT reject any Type I certificate application where the applicant submits a physical therapy degree with the title of "Bachelor's;" Moreover, USCIS did not require FCCPT to defer to a degree title in their analysis. USCIS has issued a request to FCCPT asking them to remove this statement from their website. As we do not control third party websites, the USCIS website is the best place to find USCIS guidance.

The credit hours referred to in our notice to FCCPT were obtained from a CAPTE report and were cited as a point of reference as to why our agency questioned lower existing standards used by FCCPT in the CWT5 and CWT6 coursework evaluation tools. However, USCIS has accepted FCCPT's revised standards as responsive to our concerns relating to the CWT5 and CWT6 tools, and we will continue to work to ensure that foreign-educated physical therapists have a comparable level of education, training and experience to what is required for physical therapists educated in the U.S. based on the evidence in each individual record.

- b. Has USCIS also required CGFNS to follow the same requirements for Physical Therapist Visa Screens? If not, are there plans to do so?

USCIS Response: As explained above, the standards referenced in FCCPT's statement were not mandated by USCIS.

- c. What is the rationale for requiring evaluators to defer to the degree title, rather than permitting a review of the degree and courses completed for substantial equivalency to the first professional degree requirement?

USCIS Response: USCIS did not mandate that FCCPT defer to the degree title when evaluating the credentials of foreign-educated physical therapists.

14. **Request for AAO Precedent Decision: *Matter of K-S-Y*.** On July 12, 2016, AILA submitted a request to Director Rodríguez to classify the AAO decision in *Matter of K-S-Y* as a precedent decision. Alternatively, or in the interim period, we asked that it be designated as an adopted decision and thus binding on all adjudicators. This case provides important policy guidance relating to the adjudication of employment-based first preference petitions for individuals "of extraordinary ability" under INA §203(b)(1)(A), based on a set of facts that is common and recurring in the sports and entertainment industries: where the individual of extraordinary ability is transitioning from one phase of their career to another within the same field of endeavor. In *Matter of K-S-Y*, the petitioner, a judo expert, was transitioning from competing as a judo athlete to coaching the next generation of judo athletes. Is USCIS still considering this request and if so, when might a decision be expected?

USCIS Response: USCIS is considering this request for publication, but we cannot estimate when a decision will be made.

15. **Visa Revocations.** On November 5, 2015, the Department of State instituted a policy of prudentially revoking the nonimmigrant visa of any individual charged with a DUI-related offense while in the United States. The State Department notices clearly advise the foreign national that the notice is a prudential revocation that takes effect upon departure, and that it does not affect the underlying status of the individual so long as they have a valid I-94 or admission document. However, AILA has received examples of Requests for Evidence citing the prudential revocation, and requesting proof of maintenance of status, suggesting that the State Department's notice renders the individual out of status. Please confirm that the prudential revocation of a nonimmigrant visa pursuant to the State Department's November 2015 policy does not terminate the status of a nonimmigrant properly admitted to the United States in the corresponding nonimmigrant classification.

USCIS Response: USCIS agrees that in cases you describe above where a DOS visa revocation is not yet effective, the status of the individual is generally not affected.

16. **FDNS.** AILA members who represent employers who are subject to a site visit are concerned with the lack of information that often follows after the visit. Understandably, employers and H-1B/L-1 workers need reassurance of the results of a site visit and whether/when visa revocation proceedings will be instituted.

- a. How can an employer determine the outcome of a site visit, and in particular, whether or not there has been a decision to refer the nonimmigrant petition for revocation? For example, are these cases tracked in a DHS/USCIS system that can be accessed upon inquiry (congressional or otherwise) to determine that the case has been reviewed post-site visit and will not be recommended for revocation?

USCIS Response: USCIS conducts site visits to determine whether or not the petitioner and/or the beneficiary qualify for the benefit sought. Site visits may be originated as a compliance review (CR) under the Administrative Site Visit and Verification Program (ASVVP) or as a referral from adjudications to address potential grounds of ineligibility.

If the results of the CR or administrative investigation indicate a need for additional information, the employer may be issued a Request for Evidence (RFE), a Notice of Intent to Deny (NOID), or a Notice of Intent to Revoke (NOIR) from adjudications.

Beyond random visits, we conduct targeted site visits and site visits in cases where there are suspicions of fraud or abuse and refer many of the cases to our counterparts at U.S. Immigration and Customs Enforcement (ICE) for further investigation. Targeted site visits will allow us to focus resources where fraud and abuse of the H-1B program may be more likely to occur. We will also continue to make unannounced and random visits to all H-1B employers across the country, both before and after any petition is adjudicated.

- b. What is the typical timing between an FDNS site visit and issuance of a Notice of Intent to Revoke?

USCIS Response: There is no typical timing. All benefit requests are handled on a case-by-case basis.

- c. Is there a deadline by which USCIS must take adverse action following an FDNS site visit?

USCIS Response: No. There is no deadline. All benefit requests are handled on a case-by-case basis. .

17. **CSPA.** AILA first raised the question of the application of the Child Status Protection Act (CSPA) to the "File by" dates in September 2015, when the State Department issued the first bifurcated Visa Bulletin. The question was again raised on the agenda for our meeting on April 7, 2016 and USCIS noted at that time that USCIS was "aware of the question, and continuing to look at it." In the absence of published guidance elsewhere, please confirm:

- a. That the "Final Action Date" (when an immigrant visa number is actually available), is the relevant date for calculating the one year deadline to determine if an applicant has "sought to acquire" permanent resident status and preserve status pursuant to the CSPA.
- b. That the filing of an application under the "Dates for Filing" chart will serve to freeze the applicant's age and confer CSPA benefits.

USCIS Response: USCIS uses the "Dates for Filing" chart, when available for use according to the USCIS website, as the relevant date for determining the date on which a visa is available as well as the "sought to acquire" date.

18. **Expedited Review Procedures.** AILA has received reports that USCIS is not consistently following its expedited review procedures for cases affected by certain administrative errors. See [*USCIS to Expedite Review for Certain Cases Affected by Specific Administrative Inaccuracies*](#). Under these procedures, USCIS is to review and take action on specific cases within five business days, including cases where USCIS has denied an application or petition for failure to respond to an RFE and there is evidence that the customer did in fact timely respond.

When AILA members have followed the outlined instructions and call NCSC to request an expedite service request to fix the administrative error, officers often state they are unable to complete an "expedited service request." The expedited review policy is an efficient, meaningful remedy for customers who suffer from inadvertent - but often damaging – errors made by USCIS. Could USCIS please remind officers of this policy, including NCSC officers and officers who respond to the USCIS follow up emails?

USCIS Response: USCIS will issue a reminder to the National Customer Service Center (NCSC) about this issue. When calling the NCSC, we recommend that the customer or representative refers to the administrative error process rather than the expedite process.

