U.S. Citizenship and Immigration Services

Questions and Answers

March 29, 2012

USCIS American Immigration Lawyers Association (AILA) Meeting
March 29, 2012

I. AILA Introduction

AILA welcomes this opportunity to meet with USCIS to discuss issues of mutual interest to USCIS and its stakeholders and to voice concerns and ideas for improving actual adjudication, bringing it inline with longstanding legal standards and the agency's stated goals and policies. AILA appreciates the extensive continued outreach USCIS conducts.

II. Questions and Answers

1. Preponderance of the Evidence Standard

a) We are aware that stakeholders continue to receive RFEs and denials of petitions for "New Office" L-1A petitions on the basis that the new office lacks sufficient staff to support a full-time managerial or executive position. According to the regulations, L-1A managers or executives must be "primarily," not exclusively, engaged in managerial or executive functions.[1] Moreover, the January 19, 2011, AAO decision WAC 10 081 50986 and the December 15, 2011, AAO decision WAC 09 227 XXXXX each held that "the reasonable needs of the petitioner may justify a beneficiary who allocates 51% of his duties to managerial or executive tasks as opposed to 90 percent" (AILA Doc. Nos. 11012430 & 11122324).[2]

Response*:* USCIS believes it is important to train ISOs on the preponderance of the evidence standard for adjudicating all applications and petitions. The Office of Human Capital and Training (HCT) and the Office of the Chief Counsel recently developed training that provides specific examples for several immigrant and nonimmigrant classifications. USCIS piloted the use of these training materials in its Basic Immigration Officer Training Course in February and will finalize the materials for broader use in the third quarter. In finalizing these materials, HCT will work closely with

[1] 8 C.F.R. §214.2(l)(1)(ii)(B) and (C)

[2] *AAO Approves L-1A Petition on Certification from CSC*, AILA Doc. No. 11012430, http://www.aila.org/content/default.aspx?docid=34245 & *AAO Sustains L-1A Appeal on Certification from CSC*, AILA Doc. No. 11122324, http://www.aila.org/content/default.aspx?docid=38007

SCOPS to develop fact patterns that address the issues that may arise in the L-1A and H-1B contexts.

i) What specific training does USCIS provide adjudicators regarding adjudicating "New Office" L-1A petitions?

Response: USCIS adjudicators are provided case-type specific training in the adjudication of I-129 L petitions at their respective offices. This training includes the presentation and familiarization with the statute, regulation, and agency policy and procedures pertaining to the L classification. New Office petitions are covered in this training.

ii) For the benefit of stakeholders, please provide information and examples of the type of evidence USCIS needs in support of "New Office" L-1A petitions to satisfy the preponderance of the evidence standard.

Response: All L-1A new office petitions require evidence that sufficient physical premises to house the new office have been secured, a qualifying relationship between the U.S. entity and foreign entity exists, the beneficiary has been employed abroad in an executive or managerial capacity for one continuous year in the last three years and that the proposed employment involves executive or managerial authority over the new operation, and that the new office will support an executive or managerial position within one year of petition approval.

Suggested evidence that the petitioner may choose to submit to show that the proposed new office will support an executive or managerial position within one year of petition approval includes, but is not limited to: a detailed letter from the foreign entity explaining the need for the new office, the proposed structure, staffing, and financing of the new office; a description of the proposed duties of the beneficiary; a business plan/time table for the new office; studies, meeting minutes, or other corporate records where the proposed new office plan was discussed; a detailed organizational chart for the proposed new office that includes staffing, job titles and duties, staff education levels and salaries; and any other evidence that the petitioner believes will establish the eligibility requirements by a preponderance of the evidence.

b) In the L-1A classification for functional managers, AILA receives increasingly frequent reports that RFEs and denials indicate that the petitioner has not provided evidence of possible employees who could relieve the functional manager of performing the duties of the position, and/or stating that the beneficiary appears to be performing the function him or herself, rather than supervising or controlling the work of employees.[3] This appears contrary to the definition of a functional manager and contrary to the intent of the regulations allowing for functional managers.

[3] 8 U.S.C. §1101(a)(44) states as follows:
(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily—
(i) manages the organization, or a department, subdivision, function, or component of the organization;

What training does USCIS provide to adjudicators on the definition of a functional manager and the distinction between a manager of people and a manager of a function?

Response: USCIS adjudicators are provided case-type specific training in the adjudication of I-129 L petitions at their respective offices. This training includes the presentation and familiarization with the statute, regulation, and policy that pertains to the L classification. The term "Managerial Capacity" which covers management of people and functions, and the differences between the two, are covered in this training.

c) Another example of a failure to apply the preponderance standard is in the H-1B Specialty Occupation Worker context. AILA notes the following issues:

i) USCIS must consider all optional criteria when defining a specialty occupation

The regulations set forth four possible criteria for a petitioner to show the position offered is a specialty occupation.[4] The specialty occupation position need meet only **one** of those regulatory criteria.[5] AILA continues to receive reports from stakeholders that USCIS RFEs and denials focus exclusively on the first criterion, that "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position." Moreover, USCIS relies on the Department of Labor's (DOL) *Occupational*

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, ***or manages an essential function*** within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) ***or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed***; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional (emphasis added). See also 8 C.F.R. §214.2(l)(ii)(B).

[4] 8 C.F.R. § 214.2(h)(4)(iii)(A)

[5] *See* LIN 05 179 53382 (Feb 6 2007), posted to USCIS website: http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2007/Feb062007_03D2101.pdf; In sustaining the appeal of a denied H-1B petition for a Strategic Planner five years ago, the AAO found that the duties to be performed by beneficiary in petitioner's business environment were so specialized and complex that the knowledge required to perform them was that usually associated with attainment of a baccalaureate or higher degree. The AAO specifically noted that the proffered position satisfied the fourth criterion at 8 C.F.R. §214.2(h)(4)(iii)(A)(4). The petitioner required a minimum of a bachelor's degree in business with a concentration in marketing or advertising, communications, psychology or related fields for the proffered position.

Outlook Handbook (OOH) to the *exclusion of other authoritative resources*, such as the Department of Labor's Occupational Information Network (O*Net) and Program Electronic Review Management (PERM) Professional Recruitment Occupations list as to what may be a "normal minimum requirement" for a position.[6]

Documentation that the specialty occupation position offered meets one of the other criteria of *8 C.F.R. 214.2(h)(iii)(A)(2)-(4)*, satisfies the preponderance of the standard. What steps are being taken by USCIS to train adjudicators that the focus is not exclusively on *8 C.F.R. §214.2(h)(iii)(A)(1)* and that evidence from the other regulatory criteria (degree requirement is common to the industry, the employer normally requires a degree, the duties are so specialized and complex they require knowledge from a baccalaureate or higher degree) must be considered, along with other evidence provided by the petitioner, such as the employer's evidence of the classified advertisements and job postings, evidence of similar recruitment by similar businesses in the field, and letters and other testimonial evidence from experts?[7]

Response: All Vermont and California Service Center officers adjudicating H-1B petitions are trained that the petition must establish that the position meets one of the regulatory criteria in 8 CFR 214.2(h)(4)(iii)(A). Officers must weigh all of the evidence provided and evaluate the totality of the circumstances to determine whether the petitioner has established by a preponderance of the evidence that it has met one of these regulatory criteria. It is noted that certain pieces of evidence may carry more evidentiary weight than other types of evidence.

ii) Misinterpretation of OOH

AILA received reports that USCIS RFEs and denials also rely on OOH comments that a particular occupation "*may*" or "*often*" requires a degree to deny an H-1B petition on the basis that the occupation does not *always* require a degree. Where the OOH or other competent evidence, alone or in combination, demonstrates that a degree in a specialized field of knowledge is a requirement for "most" employers, that evidence should be considered "more likely than not." AILA requests that USCIS train examiners accordingly.

Response: USCIS thanks AILA for this comment. We will further examine this matter and invite AILA to provide specific case examples.

iii) Specialty Occupations may require alternative fields of study

[6] The OOH introductory notes caution that: "*[T]he Handbook provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. The Handbook, therefore, is not intended and should never be used for any legal purpose . . .";* http://www.onetonline.org/.; Published in Appendix A to the preamble of the final PERM regulation.

[7] *8 C.F.R. §214.2(h)(iii)(A)(2)-(4).*

AILA received reports that USCIS RFEs and denials are sometimes based on a

finding that a degree in one of several related fields is considered suitable for performance of the duties of an occupation field. For example, instead of specifically identifying a single academic major, the OOH discusses a body of knowledge that must be acquired and applied in the daily responsibilities of an occupation. USCIS adjudications interpret this to suggest that the position is not a specialty occupation because more than one academic major could provide the appropriate educational background to perform the position duties.[8] Many decisions cite *Matter of Michael Hertz Associates* for the proposition that a general liberal arts degree is not specific; however, the point is not whether a liberal arts degree should or should not be sufficient, the point is that a body of highly specialized knowledge may be acquired through academic studies in a variety of academic majors.[9] As an example, the engineering principles required for software development may be studied in an academic program leading to a degree in computer science, management information services, mathematics, physics or one of several engineering programs. The occupation, software developer, requires a body of highly specialized knowledge, but the academic major can be one of several programs, all of which provide specialized knowledge. In other words, while a degree reflects the *attainment* of a body of highly specialized knowledge, the label placed on that knowledge is not determinative of whether a position is a specialty occupation.

Response: USCIS thanks AILA for your comment. We will look into your concern further; however, would request that AILA provide specific case examples.

d) AILA suggests that compliance with the preponderance of the evidence standard, would be enhanced by supervisory review prior to RFE issuance. What other steps is USCIS taking to ensure that RFEs are not vague or boilerplate, but rather a useful tool to obtain evidence to evaluate if a petition can be approved?

Response: USCIS routinely conducts quality reviews regarding decisions involving all forms and classifications, including Service Center RFEs. Additionally, supervisors conduct quality reviews as part of the routine performance evaluation of their employees. USCIS believes that the RFE Project is a critical step in the goal to ensure agency integrity. USCIS is actively engaging with stakeholders to review and revise current templates used at the Service Centers. As part of the review and

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[8] Current H-1B adjudication trends reflect a USCIS tendency to find that if the OOH indicates a baccalaureate level of training is ***generally required*** or ***preferred*** for a proffered position or, that a number of ***different degree fields*** could qualify an individual for the position, then, by definition, the position cannot qualify as a specialty occupation because the position does not require a baccalaureate level of education in a ***specific specialty*** as a normal, minimum entry into the occupation.

[9] *Matter of Michael Hertz Associates*, 17 I&N Dec. 558 (Commissioner 1988), Note that *Matter of Michael Hertz Associates* is a pre-IMMACT 90 case interpreting "distinguished merit and ability."

revision process, templates and training are designed so that officers request only that evidence which is required to establish eligibility for the requested classification. A vital part of the RFE Project is training at the centers, which is conducted in concert with the Office of the Chief Counsel (OCC). During the training, officers are instructed on how to use the new templates and reminded about the preponderance of evidence standard. So far, the RFE Project has revised the E-11 immigrant template and the O**,** P and Q nonimmigrant templates. Currently, we are reviewing the E-12 and E-13 immigrant templates and the L, F, M, and J nonimmigrant templates.

2. Entrepreneurs and Small Business

AILA welcomes the launch of the USCIS "Entrepreneurs in Residence" initiative in follow-up to the August 2, 2011, announcement on *Initiatives to Promote Startup Enterprises and Spur Job Creation* by Secretary Napolitano.[10] AILA greatly appreciates the opportunity to continue to engage with USCIS on ways that entrepreneurship can be encouraged under the current immigration framework, not only in the context of the EB-5 program and L-1B intracompany transfers, but also in the context of H-1B specialty occupation workers and new office L-1A petitions.

a) Consistency of Adjudications: L-1A petitions and EB-1-3 I-140 petitions for Multinational Managers/Executives

Stakeholders experience inconsistent adjudication between the initial L-1 approval and the subsequent EB-1-3 Form I-140 petition on the issue of whether the current position qualifies as an executive or managerial position. The requirement for an immigrant visa for a multinational executive or manager is almost identical to that for an L-1A manager or executive. The only difference is that for an EB-1-3 petition, the qualifying experience abroad must have been as a manager or executive, whereas employment in a position of specialized knowledge may be deemed sufficient for an L-1A. Thus, the same evidence used to document that a U.S. position qualifies as executive or managerial in the L-1A context, assuming the individual was a manager or executive abroad, should be sufficient at the I-140 stage. However, in practice, members report excessive requests for evidence and denials on EB-1-3 petitions where the duties of the prior employment abroad and the duties of the employment in the U.S. are unchanged from the time of the L-1A petition. This adjudicatory practice creates confusion and uncertainty for multinational employers, who may decide not to remain in the U.S.

Please explain the inconsistency in adjudications between L-1A and I-140 EB-1-3 petitions where the L-1A did have managerial/executive employment with the qualifying overseas employer during the required time period.

Response: Although both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of

[10] *DHS Outlines Initiatives to Fuel the Economy and Stimulate Investment*, AILA Doc. No. 11080238, http://www.aila.org/content/default.aspx?docid=36464, http://www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm

proof. Each petition must stand on its own individual merits.

Prior approval of an L-1A petition on behalf of an I-140 beneficiary may be a relevant consideration in adjudicating the E13 petition. However, the individual's eligibility as an L-1A nonimmigrant does not automatically establish his or her eligibility for E13 classification. Adjudicators are not required to approve an E13 petition filed on behalf of an individual who was previously accorded the L-1A nonimmigrant classification if the facts do not support approval of the E13 petition.

b) Specialty Occupations in the Context of Start-Up Businesses and Small Businesses

AILA welcomes USCIS' clarification that an H-1B beneficiary who is the sole owner of the petitioning company may establish a valid employer-employee relationship for the purpose of qualifying for an H-1B nonimmigrant visa. AILA continues to receive reports from stakeholders of a wide disparity in the adjudication of H-1B petitions for start-up companies and small businesses as compared to larger companies. AILA reports that RFEs and denials routinely note that "a business of the size of the petitioner does not require the services of an individual performing duties of a specialty occupation," based on nothing more than the adjudicator's own assumptions about what a business would want or need. For example, an adjudicator may independently decide that a start-up company or small business does not require the specialty occupation of an accountant, but rather only requires a bookkeeper. Another example is the adjudicator's independent conclusion that a start-up company or small business does not require an individual in the specialty occupation of a Market Research Analyst, which is often an essential position for a start-up to market its products or services. In such cases, the adjudicator either issues an RFE or denial. The CruiseWise case (WAC1117551757) is a clear example of an instance where USCIS determined that the founder beneficiary was not a "chief executive officer," but rather, was a general manager," based upon a narrow interpretation of the evidence describing the beneficiaries duties, and this case perhaps best exemplifies the negative impact on job creation such adjudications can have.

What is the regulatory basis for USCIS to limit the types of specialty occupations that can be used by small businesses?

Response: Section(g)(1) of Chapter 31.3 of the Adjudicator's Field Manual (AFM) outlines a number of factors, including but not limited to the nature of the petitioner's business, to consider when determining whether the position qualifies as a specialty occupation. Section (g)(4) of same chapter, entitled "Assessing the Needs of the Petitioner for the Services of the Beneficiary," further states that:

This issue is occasionally present in H-1B petitions filed by small businesses for aliens with professional skills not normally associated with persons employed in such businesses (e.g., a petition filed for an accountant filed by an auto repair business or restaurant)…The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation.

While USCIS officers may not be able to judge whether the petitioner has the "need" for a particular position, officers can and should evaluate whether the petitioner has the capacity to employ the beneficiary to perform specialty occupation duties. Officers must determine whether the petitioner has established by a preponderance of the evidence (more likely than not) that the beneficiary will, in fact, be employed in the capacity specified on the petition.

3. Requirement for Amended H-1B Based on a Move to New Geographic Location

In follow-up to the October 5, 2011, meeting, what is the status of USCIS providing stakeholders/employers with guidance as to when a change in an H-1B employee's work location requires a new H-1B petition (AILA Doc. No. 1100570)?[11]

Response: USCIS continues to review and develop new guidance on amended H-1B petitions as part of its overall policy review for H-1B. USCIS may issue additional guidance on this issue in the H-1B section of the USCIS Policy Manual.

4. L-1B Adjudications

On several prior agendas, including the October 5, 2011 agenda, AILA posed questions respecting the Service's adjudication procedures and trends for L-1B adjudications. These issues have also been presented in a variety of forums, including to SCOPS and in the context of the May 12, 2011, L-1B stakeholders engagement (AILA Doc. No. 11042965).[12] Two main issues continue to be of serious concern:

- Failure to apply the Specialized Knowledge definition in IMMACT 90 and the Puleo and Ohata memos on L-1B adjudication.

  Most recently, January 24, 2012, AILA submitted an L-1B Brief to USCIS Director Alejandro Mayorkas describing and analyzing the full legislative history of the 1990 revisions to the Immigration and Nationality Act (IMMACT 90), which dramatically changed the L-1A and L-1B programs and how AAO

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[11] AILA recommended the position taken in the October 23, 2003, Efren Hernandez letter that an amended Form I-129 is not needed for geographic moves so long as an LCA has been filed and certified for the new location prior to the employee's move to the new location, an LCA notice posting under DOL regulations has been completed, and other wage and hour obligations are met (AILA Doc. No. 03112118). *AILA/USCIS Liaison Meeting Q&As (10/5/11)*, AILA Doc. No. 1100570, http://www.aila.org/content/default.aspx?docid=37258, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0fec088dbb8f2310VgnVCM100000082ca60aRCRD&vgnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD

[12] *USCIS Executive Summary on L-1B Specialized Knowledge Teleconference*, AILA Doc. No. 11042965, http://www.aila.org/content/default.aspx?docid=35253; http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d36c7faca91af210VgnVCM100000082ca60aRCRD&vgnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD

administrative jurisprudence and service center adjudications relying thereon, are based on a fundamentally flawed analysis of IMMACT90 (AILA Doc. No. 12012560).[13] AILA also provided specific examples of adjudications that are inconsistent with the law.

- Evidentiary demands continue to exceed the preponderance of the evidence standard.

Stakeholders continue to report that a petitioner's statement that the beneficiary received specific training is disregarded, because there is no independent corroborating evidence that the "beneficiary actually received the training." In addition, there are evidentiary requests that are not relevant to the adjudication of whether the position at issue in the petition is one that requires specialized knowledge. These include requests for documentation of the number of individuals who have the same job title or description, the number of individuals who have received the training, etc. or, the number of years the beneficiary was employed abroad in the position.

a) Has additional training on L-1 adjudications taken place? If so, which Service Centers have received the training to date?

Response: In October of 2011 both the Vermont Service Center and the California Service Center participated in L1B refresher training provided by Service Center Operations, the Office of Policy and Strategy and the Office of Chief Counsel.

b) Would the Service please share with stakeholders the relevant training materials for the aforementioned bullet items absent a FOIA request?

Response: USCIS plans to post participant guides used by employees in Basic training on our public website. We have just started review of the materials for that purpose. USCIS does not envision posting more materials publicly at the moment. USCIS is starting to examine our policies on which materials may be appropriate to publish outside the FOIA process.

5. **Period of Authorized Stay Based on Timely Filing of Change or Extension of Status**

In order to obtain an approval of an extension of stay or change of status, the beneficiary must demonstrate continued maintenance of nonimmigrant status as required by 8 C.F.R. §214.1(c)(2)(4), which provides:

Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, * * *

USCIS interprets this provision to require approval of any previously pending and still un-adjudicated petition or application to extend or change status before the next petition or application can be approved. However, processing times are four-six months for many

[13] *AILA Memorandum to USCIS Interprets L-1B "Specialized Knowledge,"* AILA Doc. No. 12012560, http://www.aila.org/content/default.aspx?docid=38301

extensions or changes of status, making it common for a new or subsequent petition or application to be filed while the prior application is still pending. Problems arise when, based on other regulatory requirements, a petitioner must withdraw an un-adjudicated petition.

This scenario is best illustrated by example: Beneficiary's H-1B status through Company A would expire on September 30, 2011, and a petition to extend was timely filed on August 29, 2011. Continued employment is permissible pursuant to 8 C.F.R. §274a.12(b)(20). Unfortunately, the employment with Company A was terminated after October 1, 2011, but before the extension petition was approved. In compliance with 8 C.F.R. §214.2(h)(11)(i)(A), Company A notified the USCIS and, because the company had no intention of employing the individual further, withdrew the petition. **Prior to termination and withdrawal by Company A**, Company B filed a new H-1B petition to change employers and extend the beneficiary's status. The service center issued an RFE, indicating that it could not adjudicate this petition until Company A's extension was adjudicated. However, since the regulations required Company A to notify the USC IS of the termination, Company B's timely filed change of employer petition could not be approved.

Any perceived gap in status results solely from the delay in USCIS adjudication of the first petition. The language of 8 C.F.R. §214.1(c)(2)(4) does not require the approval of prior petitions, only that such petitions be timely filed. We therefore request USCIS to please consider and comment on the following solutions:

a) Would USCIS recognize the filing date of the Petition filed by Company A as sufficient to satisfy the requirements of 8 C.F.R. §214.1(c)(2)(4) and adjudicate Company B's petition?

Response: USCIS will review its current procedures with respect to this issue and determine whether changes are necessary. If so, USCIS will further assess whether either of the approaches proposed by AILA would be advantageous and feasible within the existing statutory and regulatory framework.

b) Would USCIS adjudicate and approve the petition (assuming it is otherwise approvable) as if it had been timely adjudicated to provide a valid petition from the date of filing, or the date status expired, through the date of withdrawal by Company A, thus providing a complete and continuous record of maintenance of status?

Response: USCIS will review its current procedures with respect to this issue and determine whether changes are necessary. If so, USCIS will further assess whether either of the approaches proposed by AILA would be advantageous and feasible within the existing statutory and regulatory framework.

6. EAD and the Asylum Clock

a) EOIR has stated that it does not measure the 180-day waiting period for EAD eligibility and that determination of EAD eligibility is in the exclusive purview of USCIS (AILA Doc. No. 11111545).[14] In addition, as the CIS Ombudsman's Office pointed out in a

[14] *Operating Policies and Procedures Memorandum 11-02: The Asylum Clock* at 3-4, 16 (Nov. 15, 2011), AILA Doc. No. 11111545,

recent report, when an asylum application is pending before EOIR, USCIS adjudicates the EAD request by reviewing asylum clock information in EOIR databases (AILA Doc. No. 11082677).[15]

i) How does USCIS determine whether the 180-day waiting period has been satisfied?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

ii) When making a decision about an asylum applicant's EAD eligibility, does USCIS view the specific EOIR adjournment code that affects the applicant's asylum clock?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

iii) Does USCIS always rely on EOIR's adjournment code to determine whether a delay is attributable to the applicant? If not, under what circumstances will USCIS independently determine whether a delay in removal proceedings is attributable to the applicant?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

iv) What is USCIS's position on whether the EAD clock continues to run while an asylum application is on appeal?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

v) What is USCIS's position on whether and when the EAD clock starts or may be restarted following remand by the BIA or a federal court?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

b) A January 4, 2012, USCIS memorandum from Deputy Director Lori Scialabba to the CIS Ombudsman, issued in response to the Ombudsman's recommendations, mentions "training modules on the asylum clock" provided to USCIS officers at Service Centers (AILA Doc. No. 12011262).[16] When will USCIS make these training modules

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http://www.aila.org/content/default.aspx?docid=37657, http://www.justice.gov/eoir/efoia/ocij/OPPMLG2.htm

[15] *CIS Ombudsman Recommendation on EADs for Asylum Applicants* at 2 (Aug. 26, 2011), AILA Doc. No. 11082677, http://www.aila.org/content/default.aspx?docid=36784, http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf.

[16] *USCIS Responds to Ombudsman Asylum EAD Clock Recommendations* at 3 (Jan. 4,

available to stakeholders?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

c) The use of administrative closure as a tool in DHS's prosecutorial discretion initiative raises some questions regarding EAD eligibility and the clock.

i) What is USCIS's position or policy regarding whether the EAD clock will run following a grant of administrative closure?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

ii) Does USCIS take the position that where administrative closure is granted prior to the clock reaching 180 days, the clock stops as a result of applicant-caused delay?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

iii) Will applicants who have satisfied the 180-day period prior to administrative closure be able to continue to renew their EADs while their cases are administratively closed?

Response: USCIS cannot comment at this time as these issues are currently the subject of active litigation.

7. AAO Issues

a) Staffing Updates/AAO Processing Times
Please provide an update on AAO staffing and processing times.

Response: We have completed our hiring of the 18 additional adjudicators announced earlier, and are working to hire additional adjudicators in an effort to bring all of our case processing times down to within the six month goal. Our average case processing times are updated monthly online.

b) AAO Adjudication Statistics **(OPQ)**
At the October 5, 2011, meeting, the AAO reported that the Enterprise Performance Analysis System (ePAS) is expected to be introduced in April 2012 (AILA Doc. No. 1100570).[17] Please confirm whether ePAS will be introduced in April and that AAO performance reporting will also become available at that time.

2012), AILA Doc. No. 12011262, http://www.aila.org/content/default.aspx?docid=38166, http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/USCIS%20Response%20to%20Formal%20Recommendation%2050.pdf

[17] *AILA/USCIS Liaison Meeting Q&As (10/5/11)*, Q11 (c), AILA Doc. No. 1100570, http://www.aila.org/content/default.aspx?docid=37258,

Response: The USCIS Office of Performance and Quality (OPQ), in coordination with the Office of Information Technology (OIT), has determined that an extension of the Testing & Evaluation phase of ePAS is necessary to ensure the integrity of the new data collection and reporting mechanism. While there is no firm date for release at this time, OPQ and OIT anticipate delivery of the new tool in the fourth quarter of FY 2012.

c) Electronic Mailbox for Receipt of Amicus Briefs
The AAO recently clarified that it cannot receive packages hand delivered by courier due to the screening required, but indicated it would consider creating an electronic mailbox for receipt of amicus briefs, with the understanding that a print copy will follow. Please confirm that the AAO will create an electronic mailbox for receipt of amicus briefs and when it will be made available.

Response: Prior to the next request for amicus briefs, USCIS plans on having an electronic mailbox in place to receive amicus briefs.

d) Cases on Appeal – the "A File"
Please confirm our understanding that when a Form I-140 is appealed to the AAO, if the related Forms I-485 have also been filed in connection with the denied Form I-140, the entire "A file" is forwarded to the AAO in order to keep the "A file" intact. If the appeal is eventually sustained, will the USCIS reopen the denied Forms I-485 on its own motion?

The concern is that the I-485 adjustment of status petition is denied when the I-140 is denied, but the I-485 denial is not appealable. It would be helpful to know how such cases are treated pending appeal, and should the I-140 eventually be approved.

Response: If an I-140 is eventually approved by the AAO, the entire file is returned to the initiating office. The AAO would not take action on the I-485.

e) Please confirm our understanding that when a Form I-140 is appealed to the AAO, if the related Forms I-485 have also been filed in connection with the denied Form I-140, the entire "A file" is forwarded to the AAO in order to keep the "A file" intact. If the appeal is eventually sustained, will the USCIS reopen the denied Forms I-485 on its own motion?

Response: When a Form I-140 is appealed to the AAO, the entire A file is forwarded to the AAO. If the decision to deny the I-140 is later overturned upon appeal, USCIS may motion to reopen and reconsider the associated Forms I-485 at that time. This policy was set forth in the William R. Yates, Deputy Executive Associate Commissioner, INS, policy memorandum "Procedures for concurrently filed family-

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http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0fec088dbb8f2310VgnVCM100000082ca60aRCRD&vgnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD

based or employment-based Form I-485 when the underlying visa petition is denied," HQADN 70/23.1, February 28, 2003.

f) *Kazarian* Amicus Curiae
AILA thanks the Administrative Appeals Office for the opportunity to have stakeholders act as *Amicus Curiae* on the nature of the "final merits determination" discussed in *Kazarian v. USCIS*. (AILA Doc. No. 11081830).[18] When will the AAO be issuing a decision on this matter? Will this be a precedent decision?

Response: We hope to issue a decision on this particular case soon, but have not determined whether or not to offer it for consideration as a precedent decision.

8. Stakeholder/Customer Service Issues

a) AILA thanks USCIS for inviting comment on the RFE I-129 L-1 Intracompany Transferee L-1A Manager or Executive Template (AILA Doc. No. 12010573).[19] Since the comment period ended February 3, 2012, please advise as to the status of the implementation of the RFE template and training to USCIS Officers on this issue?

Response: We are reviewing stakeholder comments on this template before determining how and when to implement it.

b) AILA thanks USCIS for inviting comment on the RFE I-129 L-1 Intracompany Transferee L-1A New Office (First Year) Template (AILA Doc. No. 12010571).[20] Since the comment period ended on February 3, 2012, please advise as to the status of the implementation of the RFE template and training to USCIS Officers on this issue?

Response: We are reviewing stakeholder comments on this template before determining how and when to implement it.

c) Date of "Actual" Receipt
Members continue to report that petitions and applications submitted to USCIS service centers often are not treated as "received" on the date of delivery to addresses (PO Box and physical addresses) appearing on the USCIS website or in forms instructions.

8 C.F.R. §103.2(a)(7) states in pertinent part:

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[18] *AAO Requests Amicus Briefs on the Appeal of a Denied I-140 Based on Kazarian*, AILA Doc. No. 11081830, http://www.aila.org/content/default.aspx?docid=36676 & *AILA Files Amicus Brief in EB-1 Kazarian AAO Case*, AILA Doc. No. 11110261, http://www.aila.org/content/default.aspx?docid=37498

[19] *USCIS Draft RFE Template for L-1A Manager or Executive,* AILA Doc. No. 12010573, http://www.aila.org/content/default.aspx?docid=38108

[20] *USCIS Draft RFE Template for L-1A New Office Petitions,* AILA Doc. No. 12010571, http://www.aila.org/content/default.aspx?docid=38106,

(i) General. An application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted.

At the end of that section it also states that petitions taken to a Field Office for biometrics and then sent to the Service Center are deemed filed when "physically" received at the Service Center. This latter language indicates that the regulation differentiates between "physical" and "actual" receipt. "Actual" receipt is not further defined in the regulation but, in order to give meaning to the term "physical" receipt, "actual" receipt has to be something other than "physical" receipt.

USCIS lists filing locations on its website. However, as USCIS has indicated at liaison meetings, an application timely sent to that filing location (e.g. a U.S. Post Office or USCIS physical location) is not deemed received until the Service Center physically picks up the mail and takes it to the Service Center's facility. Apparently, unbeknownst to stakeholders, this physical mail pick-up only occurs once a day, often in the morning. A timely filed petition may therefore not be recognized as "timely received" if the Service Center is delayed in picking up the mail or if the petition arrives at the filing location after the service center picks up the mail from the USPS facility. Clearly, this can have devastating consequences to petitioners, beneficiaries, and applicants. As such, would USCIS consider the following:

1. Adopt a policy of mail pick-up that includes an end-of-day pick-up rather than, or in addition to, a morning pick up.

2. Change the existing policy to accept all filings signed for by the service as filed on the date they were signed for when addressed to the proper filing location indicated on the Service's website and if actually timely delivered to that filing location.

3. Until the Service adopts the above changes to practice and policy, clearly post an announcement on the USCIS website that mailings sent via USPS – even if sent to the physical address of a particular service center – are actually being sent to the post office and not the address on the mailing, and will not be considered "received" until they are picked up by the Service Center from the post office, which may not occur on the actual date on which the mailing is delivered by USPS.

Response: USCIS thanks AILA for your comment. We will look into your concern further in terms of the feasibility of implementing end-of-the-day mail pick up. In the interim**,** we will clearly post your suggested announcement on our website. Mailings sent via the US Postal Service (USPS) – even if sent to the physical address of a particular service center – actually are delivered to the post office and not the address on the mailing. Therefore, they will not be considered received until they are picked up by the Service Center from the post office. This may not occur on the actual date on

which the mailing is delivered by USPS; however, it will occur no later than the next business day.

d) Prima Facie Determinations of Naturalization Eligibility

At the October 5, 2011 meeting, AILA provided a memorandum and proposal for a process by which a respondent in removal proceedings who claims eligibility for naturalization would be able to obtain a *prima facie* determination of eligibility for naturalization. Would USCIS please provide feedback on this proposal?

Response: There have been no recent developments on this issue. USCIS will keep AILA informed.

e) Inaccurate Posted Processing Times and Processing Delays

There continues to be a significant difference between posted USCIS processing times and actual USCIS processing times. Stakeholders rely on the USCIS website to check the status of the immigration petition and processing times. The processing times and their anticipated accuracy, are relied upon by employers for their project planning and workforce staffing, by individuals who have international travel plans, and by individuals whose immigration status is expiring. Needless to say, accurate reporting of real-time processing times is a benefit to all stakeholders.

i) For example, O-1 processing times at both California and Vermont Service Center are posted at two weeks. However, calls to NCSC indicate that such processing times are closer to four months. As a result, a status inquiry will not be taken and the petition remains pending well beyond posted processing times. Please comment on efforts to ensure that NCSC is working from the most up-to-date and public processing times.

Response: The USCIS Service Center Operations Directorate (SCOPS) in consultation with the Office of Performance and Quality (OPQ) routinely monitors and tracks the administration of Service Center case processing in an effort to ensure timely decision of immigration benefit requests received while safeguarding the integrity of the immigration system. A fundamental aspect of delivering immigration services in a manner that satisfies the needs of the customer is through the posting of processing time information that is current and accurate. USCIS strives to publish processing time information that is current and accurate, but recognizes that existing legacy information technology systems preclude posting processing times that are case specific and real time, which causes customer dissatisfaction. USCIS is working to modernize case processing through the introduction of the USCIS Electronic Immigration System (USCIS ELIS), which when fully deployed will more fully meet customer processing time information needs. In the meantime, SCOPS and OPQ continue to make every effort to ensure processing time information provided on the uscis.gov website represents the most accurate information available.

ii) Similarly, Form I-140 processing times at TSC are well in excess of the four month goal, and are continually moving backwards. What efforts are being

made to reduce this backlog?

Response: As of the posting date of March 20, 2012, the processing time for all Form I-140 cases is four months. Thus, USCIS does not have a backlog as it is currently meeting its goal of a four month processing time. Our Form I-140 processing times were 3.4 months, 3.6 months, and 4.1 months in October, November, and December, respectively. USCIS management is aware that the Texas Service Center has cases which are outside of the average 4 month Processing even though the processing time is accurate. We are currently working with the Texas Service Center on reviewing the oldest cases in its inventory and will work on ensuring that the cases which are outside of the 4 month processing time are reviewed.

iii) In addition, please discuss efforts to publicly post accurate USCIS processing times. This information is vital to all stakeholders.

Response: The Office of Performance and Quality (OPQ) is responsible for collecting operational data from all Service Centers and Field Offices for end-of-month performance reporting. The data collected is provided to the USCIS Customer Services Directorate for publication on the uscis.gov website. However, prior to its posting, the data undergoes review by USCIS field leaders, which takes time. Based upon current USCIS legacy automated systems, and the inherent data reporting limitations these systems possess, the OPQ is unable to reduce the time delay required to make processing time information available to the public.

f) CRIS

Stakeholders continue to report serious problems with the Customer Relationship Interface System (CRIS) where the system does not recognize valid case numbers or the system offers incorrect and/or vague information. For instance, in many instances, the system either does not reflect a case transfer or does not indicate the current location of he file, which makes submitting a case liaison inquiry extremely difficult. In December 2010, USCIS advised AILA that a scheduled update to CRIS would correct problems of this nature (AILA Doc. No. 10122078).[21] Unfortunately, problems continue to persist.

i) Will USCIS provide a system update so that CRIS offers accurate information?

Response: In February 2012, USCIS deployed another system update that should ensure that data is updated more quickly and efficiently and there should be fewer instances of data not getting updated. We will continue our work on this.

ii) How should attorneys or applicants alert USCIS to CRIS errors, such as not recognizing valid case numbers?

[21] *AILA Practice Alert: USCIS on Problems with Online Case Tracking*, AILA Doc. No. 10122078, http://www.aila.org/content/default.aspx?docid=33942

Response: If a customer doesn't receive information from Case Status on Line (CSOL), he or she should call the NCSC. The Customer Service Representative at Tier 1 will transfer the call to Tier 2, and a Tier 2 Immigration Service Officer will provide the customer with his or her case status information. The supervisors at Tier 2 have been instructed to promptly email these cases to the attention of the Customer Service Directorate (CSD). CSD alerts the CRIS team who in turn immediately populates CSOL.

iii) Additionally, when a file is transferred from one Service Center to another or to a field office, the CRIS system is updated to indicate that the "file has been transferred." However, it does not indicate to which office it has been transferred, making follow up difficult. More disconcertingly, it does not provide any further updates on the application status. As with the example above, if an RFE is issued on that case and CRIS is not updated, the applicant may have no way to know. When will CRIS be updated to indicate to which USCIS office a file has been transferred?

Response: There are no plans to update CRIS with this information. In most cases, a file is moved for mission needs. USCIS typically transfers files to another Office/Service Center because there are available resources and the application/petition can be adjudicated faster. In many, but not all, instances a notice will be generated and the appropriate parties will be notified when a case is moved to another USCIS facility. The effect of these transfers should be transparent to the applicant/petitioner and not adversely affect the adjudication process in any way. When responding to an RFE, the applicant should always respond to the address provided on the notice. Any questions should be directed to the National Customer Service Center.

g) Lockbox Concerns

i) During a Lockbox/TSC engagement, Lockbox officials reported that due to technical limitations, only 50 pages of any submission can be scanned. Is this report on the technical limitations correct?

Response: There are no technical limitations on the number of supporting documents scanned by the Lockbox facilities. With the exception of two forms, all supporting documentation is scanned with the application/petition with which it is received. The only supporting documents that are not scanned are medical documents. The Forms I-140 and I-526 are the only two filing types that are limited based on directions provided by USCIS. The I-140 and I-526 filings are received with many supporting documents and often have been tabbed by the attorney; it is our practice to keep the files tabbed together. The only supporting documentation that is scanned with the I-140 and I-526 is the attorney letter (if applicable).

ii) If so, does the USCIS adjudicator also receive the original submission along with the scanned portions from the Lockbox so that he/she can view the entire

application with supporting documentation?

Response: The USCIS adjudicator receives the original physical submission, including the entire application/petition with all supporting documents. The adjudicators may view the images scanned by the Lockbox via our Electronic Document Management System (EDMS) receipting module.

iii) Additionally, stakeholders have heard that in the mailroom, petitions are separated by Lockbox contractors and then must be reassembled by the examiners, even when submitted according to the preferred order as previously described by the Service. Further, AILA members report an increase in RFEs requesting basic documents that were originally submitted with the initial filing, such as birth certificates with translations.[22]

What mechanisms are in place to ensure that every part of a file is fully transferred from the mailroom to the examiner? Why are stakeholders reporting a pattern of RFEs for documents originally submitted?

Response: The Lockbox provider assembles the files based on established USCIS requirements. The examples provided by AILA were concurrently filed Forms I-485, I-765, and I-131. In these cases the I-765 and I-131 are assembled separately from the I-485, and all three forms and their supporting documents are then rubber banded together.

[22] See SRC1290011354, SRC1290011348, SRC1290011351, SRC1290011357, and LIN1190982013.