U.S. Citizenship and Immigration Services

Questions and Answers

USCIS American Immigration Lawyers Association (AILA) Meeting, October 12, 2010

I. AILA Introduction

AILA welcomes the extensive outreach USCIS conducts and the wide range of opportunities to provide input it makes available to the served public, including outreach through various national and local stakeholder events and activities, posting for comment of policy documents on the USCIS website, and the establishment of community relations and public engagement offices in each USCIS location. We appreciate the opportunity to continue to meet with USCIS in the liaison setting in order to more thoroughly discuss issues of mutual concern

II. Questions and Answers

1. Request For Evidence (RFE) Task Force

AILA would appreciate additional information regarding the charge of the USCIS RFE Task Force. Is the Task Force engaged purely in quality review of the content of specific requests, or is it also addressing procedural aspects of the RFE process, such as the time given to respond to a particular RFE, or, where an RFE is confusing, the ability of a petitioner or applicant to obtain clarification on the requested information?

Response: The task force is engaged in the review of existing RFE and denial templates with the goal of modifying those templates for clarity, ease of use, and consistency throughout the Service Centers. Each phase of the RFE project begins with a stakeholder engagement announcing the Form types to be addressed. On April 4th 2010 USCIS held its first stakeholder engagement announcing the RFE project phase one for the O, P and Q non-immigrant classifications and the E11 immigrant classification. As each RFE template is revised, it is posted on the USCIS website for public comment. The comments are then reviewed and if appropriate, modifications are made to the template. The new template is then introduced to the officers at each center via training on the particular classification. The first new template to be implemented will be the Q visa RFE template which is scheduled for release and training sometime next month. The Office of Public Engagement will continue to accept general comments about the clarity and usefulness of the templates so that if additional revisions are necessary, the agency can make them. The RFE task force does not review or evaluate current pending case-specific RFEs.

a. Please advise who comprises this taskforce. Does it include ISOs or other Service Center adjudicators? Is it comprised of one group of people, or does it change based on the subject matter?

Response: The task force is comprised of Officers and attorneys from the field and from Headquarters.

b. Will USCIS advise stakeholders with respect to the training given adjudicators for "constructing" an RFE?

Response: The Office of Public Engagement will keep stakeholders advised of the status of RFE templates via the website. When a new template is ready for circulation and training, the OP&E will update the website to reflect that information.

c. Please inform us of the procedure used presently to determine whether a particular petition will receive a NOID versus an RFE, if there is a procedure in place, whether the Task Force will be reviewing the procedure, or, if there is no current procedure to determine whether to issue a NOID or an RFE, create a formalized process;

Response: The RFE task force is creating an SOP (standard Operating Procedure) that will address when to use an RFE versus when to use a Notice of Intent to deny. Currently adjudicators follow the Adjudicator's Field Manual.

d. Is the Task Force considering implementing procedures to ensure that RFEs address specific deficiencies in a petition in a clear/concise manner that identifies the particular shortcoming(s) perceived by the examiner and how the requested evidence relates to the shortcoming(s)? For example, the January 8, 2010 Memorandum from Associate Director, Service Center Operations, Donald Neufeld "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions" noted that "RFEs…must specifically state what is at issue…and be tailored to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient."

Response: Yes.

e. Does USCIS currently have in place a consistent policy for all USCIS Service Centers and Offices regarding supervisory review of RFEs before or after they are issued? If so, please describe that policy.

Response: There is no national policy. Service Centers and Divisions within the Centers make the determinations for supervisory review based on available resources, difficulty of form type and officer experience.

f. Would the Task Force develop a process to request clarification on RFEs where it is unclear what the examiner is requesting?

Response: It is the goal of USCIS that after the public has commented on the templates and the templates have become standard, that there will no longer be issues of clarity. However, as stated above, the OP&E will continue to accept comments regarding the templates in the future so that the RFE team can use them to make improvements as needed.

2. Notice To Appear (NTA) Taskforce

In follow up to Director Mayorkas' comments on the AILA Annual Conference in July 2010, please provide an update on the nature and status of the NTA Taskforce. Please advise who comprises this taskforce, whether the taskforce is reviewing USCIS' July 2006 Policy Memo on the issuance of NTAs, the goals of the taskforce, and whether it intends to engage stakeholders before drafting and publishing policy guidance.

Response: At this point in time the nature and status of the NTA Taskforce is under review both at the USCIS and DHS levels. Once the goals, membership and any concrete products have been developed or defined, we will provide AILA and other stakeholders with updated information.

3. Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending Applications or Petitions

On August 20, 2010, ICE Assistant Secretary Morton issued guidance to the field regarding the handling of removal proceedings of aliens with pending or approved applications or petitions. (See http://www.ice.gov/doclib/dro/pdf/aliens-pending-applications.pdf.) In that guidance, ICE stated that USCIS will be issuing guidance to complement the guidance from ICE. Please update AILA on the status of that guidance and when we can expect that it will be issued.

Response: We are committed to working with our DHS partners to promote maximum efficiency in removal proceedings. USCIS is in the process of reviewing draft guidance designed to complement that earlier issued by ICE on this topic.

4. Request for Update Regarding Implementation of the May 17, 2010, Draft Policy Memorandum on Surviving Relative Benefits Pursuant to INA §204(l)

AILA appreciates the clarifications provided in the May 17, 2010 draft memorandum entitled "Approval of Petitions and Applications after the Death of the Qualifying Relative; new INA § 204(l) updates the AFM with New Chapter 20.6 and an Amendment to Chapter 21.2(h)(1)(C)" regarding the way in which the agency will implement surviving relative benefits pursuant to INA §204(l). AILA provided a detailed comment to draft memorandum on June 1, 2010, noting several positive aspects of the memorandum, and adding constructive comment on points that could lead to confusion for applicants and adjudicators.

We are particularly concerned about the absence of guidance for INA §204(l) beneficiaries that qualify pursuant to employment-based petitions, refugee/asylees, and U and T nonimmigrants. This applies to a fairly limited number of people and the clear intention of Congress was to make the ameliorative effect as generous as possible.

AILA recommends that USCIS establish point-of-contact and a mechanism to facilitate the identification of cases eligible for treatment under INA §204(l).

Please update us on the expected timeline for publication of the final memorandum on INA §214(l).

Response: USCIS appreciates the substantive comments provided by AILA in response to the draft memorandum posted on May 17, 2010 providing guidance for new INA §204(l). USCIS received thoughtful comments from a number of internal and external stakeholders. The comments raised a number of issues requiring clarification, and also raised new questions that were not previously considered in the original drafting. Currently, operational, legal, and policy entities within USCIS are

making revisions in response to the comments and are working to issue a final memorandum as soon as possible.

5. Application of 8 C.F.R. §274A.12(b)(20) [the "240-day rule"]

8 C.F.R. §274a.12(b)(20) authorizes certain nonimmigrant classifications to continue employment with the same employer based on the timely filing of an extension of stay. The authorization is not to exceed 240 days, and begins on the expiry date of the authorized period of stay. This is referred to as the "240 day rule". The 240 day rule lists specific nonimmigrant classifications; however, it does not address classifications created after the promulgation of this regulation. Of particular concern are the H-1B1 and the E-3.

During our September 2006 meeting, USCIS indicated that it was putting together guidance on this issue. Please provide us with updates on the following:

a. H-1B1 Chilean/Singapore visa status

The regulation includes temporary worker or trainee status pursuant to 8 C.F.R. §214.2(h). Since the H-1B1 (Chilean and Singapore) visa category is governed by the eligibility requirements of 8 C.F.R. §214.2(h), does the Service agree that they are covered under the 240-day work authorization provision of 8 C.F.R. §274a.12(b)(20)?

Response: USCIS will review these issues as part of our Policy Review Working Groups.

b. E-3 (Australian) Status

AILA requests that E-3 nonimmigrants be afforded the benefits of the 240 day rule. Under INA §101(a)(15), nonimmigrants are grouped into "classes" with common characteristics. While each of the E classifications has specific substantive provisions, the common characteristic is that a beneficiary must be "an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation" in order to carry out three alternative activities: 1) trade, 2) investment or 3) solely to perform services in a specialty occupation. This evidences the intention to treat these classifications similarly vis-à-vis rules of general application to treaty based NIVs. The three categories are all equally subsumed under the umbrella of INA §101(a)(15)(E) except for the substantive qualification requirements; however, this is also true of the H and L visa classifications contained in INA §101(15)(h) and (l) respectively. The latter are treated identically with respect to non-substantive procedural treatment despite having dramatically different substantive qualification requirements. We posit that the 240 day rule is a non-substantive procedural treatment generally applicable to employment based NIVs and request the Service to recognize the same.

Response: USCIS will review these issues as part of our Policy Review Working Groups.

6. Status of multi-year combined work authorization and advance parole document and interim issuance of multi-year Advance Parole documents.

The Transformation Concept of Operations Report suggests that USCIS is considering the feasibility of a single multi-year document combining the temporary work authorization and Advance Parole travel authorization (See Page 44, Footnote 57). These documents are primarily used by individuals with pending applications for Adjustment of Status, many of whom are subject to multi-year backlogs due to

the annual numerical limitations in the issuance of immigrant visas. However, under its current fee schedule, USCIS collects no fees for issuance of renewals of such documents unless the underlying Adjustment of Status application was filed prior to the implementation of the current fee schedule in 2007 – something that applies to fewer and fewer cases.

We understand that a concern with the issuance of a multi-year Advance Parole document is that it would implicate the provision in INA §201(c)(4). This provision subtracts from the available annual allotment of family-based immigrant visas those who were paroled into the U.S. for over one year. AILA believes that the issuance of a multi-year Advance Parole document does not implicate this provision since the issuance of an Advance Parole document is not the same as being "paroled into the United States," and as such, would not trigger the statutory requirement to subtract these numbers. Rather, the need to subtract immigrant visa numbers can continue to be avoided by USCBP's current practice of limiting the stated period of parole upon admission to 365 days.

AILA requests an update on the current status of the proposed multi-year combination document. In addition, we request that in the meantime USCIS begin issuance of Advance Parole documents for a two-year validity period. This would benefit both the Service and its customers by reducing the number of filings for renewal of these documents.

Response: USCIS has been working on guidance that would allow USCIS adjudicators to simultaneously adjudicate concurrently-filed applications for employment authorization and applications for advance parole authorization filed by applicants for adjustment of status under 8 CFR 245 or to register status under 8 CFR 249. Pursuant to this draft guidance, if USCIS approves both applications, it will issue a single document, Form I-766, Advance Parole EAD.

7. Civil Surgeon Designation Process and Fee

In the proposed rule "U.S. Citizenship and Immigration Services Fee Schedule," USCIS seeks to establish a fee of $615.00 for a civil surgeon designation application. It also proposes to make more systematic the process of designating civil surgeons, which AILA welcomes, by requiring the submission of an application form. Presently, to apply for designation as a civil surgeon, the physician must present a letter to the District Director requesting consideration, a copy of a current medical license, and a current resume that shows at least 4 years of professional experience, not including residency or medical school, and two signature cards, showing the physician's name and signature. The Director then, must review the documentation to assure that the physician meets the statutory and regulatory requirements for a civil surgeon designation.

Although civil surgeons are expected to become familiar with the Technical Instructions of the CDC, as to their responsibilities, USCIS exercises limited oversight of civil surgeons. The Adjudicator's Field Manual provides the outline of a process for revocation of designation, and broadly states the grounds for revocation of designation as "his or her professional conduct is egregious to the extent that it endangers public health or safety, including lack of license." AILA has noted price gouging, poor treatment of clients seeking completion of the I-693, and misconduct on the part of civil surgeons.

The primary obligation to monitor doctors is the state licensing authority. However, civil surgeons receive this designation from USCIS for the purpose of performing a one-time service to applicants, which is not in the course of a doctor/patient relationship. AILA suggests that it would be appropriate for USCIS to establish a system for oversight of designated civil surgeons, to be funded from the application fee. USCIS, perhaps in conjunction with CDC, should develop a designation program that would include 1) a program to assure that the candidate for civil surgeon designation is familiar with the technical

requirements of the CDC; 2) a reporting mechanism with regard to the fee schedules established by the civil surgeons; 3) a re-designation process for civil surgeons, periodically (e.g. every five years) to create the necessary accountability and gather necessary data; and 4) the establishment of a system to receive complaints, conduct inquiries pursuant to those complaints, with an opportunity to be heard by the civil surgeon, and to revoke designation.

Response: USCIS is currently working on standardizing the civil surgeon process.

8. L-1B Adjudications and the L-1 Visa Reform Act of 2004

AILA is concerned that USCIS continues to cite the L-1 Visa Reform Act of 2004 as the basis for its current (restrictive) interpretation of specialized knowledge. There is nothing in the statute itself, or even in the legislative history, that alters the definition of the term "specialized knowledge" or mandates a re-examination of the way the term has been interpreted. Rather, the aim of the act was to prohibit the subcontracting of L-1 workers by toughening eligibility restrictions to require L-1 workers to be continuously employed with the company for at least one year prior to obtaining an L visa, and to be working under the supervision and control of the petitioner.

This was discussed at our March 2009 liaison meeting, during which the Service informed AILA that it was drafting policy guidance to clarify the proper standard of review for L-1B petitions based on various factual scenarios. Please advise on the status of that guidance, and if in draft, we respectfully request inclusion of the suggestions made in Addendum I.

Response: USCIS is developing guidance to address these issues. When it is drafted, it will be posted on our website for public comment.

9. AC21 H-1B Extensions for Spouses

AILA believes that § 106(a) of the American Competitiveness in the 21st Century Act ("AC21") applies to derivative beneficiaries. The 21st Century Department of Justice Appropriations Authorization Act ("21st Century DOJ Appropriations Act") liberalized the provisions of AC21 that permitted nonimmigrants in H-1B status to obtain one-year extensions beyond the normal sixth-year limitation. See Pub. L. No. 107–273, 116 Stat. 1758 (2002). Specifically, it amended the language of AC21 § 106(a) to permit an H-1B visa holder to extend her status beyond the sixth year if:

*1. 365 days or more have passed since the filing of **any** application for labor certification that is required or used by the alien to obtain status under the Immigration and Nationality Act ("INA") § 203(b), or*

2. 365 days or more have passed since the filing of an Employment-based immigrant petition under INA § 203(b). Id. (Emphasis added).

The language of this statute requires only that a labor certification was filed that "is required or used" by the alien. The statute does not require that a petition filed on that alien's behalf. If there is a qualifying labor certification or other petition pending on behalf of one spouse, the other should be permitted to benefit from that petition under the liberalized provisions of AC21, as amended by the 21st Century DOJ Appropriations Act, "365 days or more have passed since the filing of any application for labor certification." *See* Pub. L. No. 107–273, 116 Stat. 1758 (2002). Given that the derivative spouse will use this application upon its approval to obtain status pursuant to INA § 203(b), that spouse should be able to use this same application as the basis to his/her H-1B beyond 6 years.

We respectfully disagree with the Yates Memo, which suggests that an H-1B spouse must meet all the requirements independently of the H-1B spouse's eligibility for a seventh-year extension. William Yates, Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), Memo # USCIS HQPRD 70/6.2.8-P, May 12, 2005 ("Yates Memo") at 10. This memo essentially imposed an additional requirement for both spouses to independently pursue permanent resident status in order to benefit from AC21 § 106(a).

We understand that USCIS believes that the absence of INA § 203(d) in AC21 § 106(a) is dispositive. However, INA § 203(d) states that the spouse is "entitled to the same status, and the same order of consideration provided in the respective subsection (INA § 203(a), § 203(b), or § 203(c)), if accompanying or following to join, the spouse or parent." *See* INA § 203(d) [8 U.S.C. § 1153(d) (2006)]. Thus, the derivative spouse still immigrates under INA § 203(b). INA § 203(d), which was introduced by the Immigration Act of 1990 ("IMMACT90"), only confirms that a derivative immigrates with the principal. *See* Pub. L. No. 101-649, 104 Stat. 4978 (1990).

AILA respectfully requests that USCIS reconsider its position.

Response: Within the context of the H-1B policy review which was recently launched, USCIS will examine the AC21 extension issues for H-1B dependent spouses highlighted by AILA. USCIS also notes that we will consider AILA's position on this issue during our AC21 rulemaking effort.

10. Opportunity to Review Adverse Information Collected During Investigation

During our October 27, 2009 meeting, we discussed the use of information collected during an investigation by USCIS officers in adjudications. USCIS indicated that site inspectors only collect and report information, which is then analyzed by immigration officers (ISOs) who do have appropriate immigration law training (item # 6.h.). USCIS further noted that all adverse or derogatory information is provided in a Notice of Intent to Deny or Revoke (NOID/NOIR), and that the petitioner will be given an opportunity to respond to the Notice of Intent to Deny or Revoke as required per the regulations. (item # 6.i.). *See also* AFM Chapter 11.1(k).

In practice, we are receiving NOID/NOIRs that either do not articulate the evidence that triggered the (NOID/NOIR), or only include a summary of the adverse evidence, which is not the same as reviewing the actual statements made by the site investigator. Regulations at 8 C.F.R. § 103.2(b)(16) provide that an applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision. AILA suggests that meaningful implementation of this regulation required the disclosure to the petitioner of the actual report of the site investigator, not merely a summary.

In other immigration contexts, courts recognize that due process requires an opportunity to respond to adverse information prior to the adjudication. See *Circu v. Gonzales*, 450 F. 3rd 990 (9th Cir. 2006)(*en banc*)(Failure to give asylum applicant the right to rebut an Administratively Noticed report violates due process). Due process requires that the employer must have been afforded the opportunity to explain or rebut the out of record information relied upon by the officer, before the application was denied, particularly when that information is used as the sole basis of the officer's decision to deny an application. *See Shihao Guan v. Holder*, 2009 U.S. LEXIS 2135` (9th Cir. September 29, 2009)(Case remanded after an immigration judge based the denial decision on an article that was not in the record without affording the applicant an opportunity to explain).

Therefore, AILA requests that all adverse information be made available to petitioners. Specifically, to ensure due process, we request that actual copies of the allegedly adverse evidence be provided to the petitioner so that a meaningful response can be prepared.

Response: All NOIDs and NOIRs should articulate the triggering evidence, and this will be addressed as a training issue. USCIS will consider the operational impacts of releasing the full investigator reports as requested above.

11. Training

AILA appreciates Director Mayorkas' comments at the conference in March 2010 about collaborating with AILA on training. Please provide an update regarding how we can be involved.

Response: USCIS provides periodic training to its officers in conjunction with new field memoranda and new adjudicative tools. The best way for stake holders to get involved with our training efforts is to provide comments on agency memoranda and RFE templates as they are posted for public comment. This provides a valuable opportunity for USCIS to heat the concerns comments and insights from its stake holders and use that input when developing training modules. More direct engagement is under consideration.

12. Administrative Appeals Office

a. Procedure for Submitting Amicus Briefs

At our March 19, 2009 meeting at USCIS headquarters, AILA suggested that the AAO develop a process by which the AAO would reach out to AILA and other stakeholder organizations to invite amicus briefs on issues the AAO identifies as warranting broader input. [AILA noted that the Attorney General and BIA have reached out to AILA and other stakeholder organizations and, in so doing, have advanced jurisprudence and the interests of justice.]

The AAO responded that it would propose a formal process for requesting and accepting amicus briefs in an AAO proposed rule. Please provide an update on the issuance of the AAO rule that would address this process.

Response: The proposed Administrative Appeals Office regulation is in the Tier I category of USCIS proposed regulations, meaning we expect to have the review process completed and the regulation published within a year, hopefully before the end of 2010. We are currently working with DHS on the remaining issues before publication. The proposed regulation will establish a formal process for submission of amicus briefs.

At present the AAO allows submission of amicus briefs if the brief is submitted by the attorney or representative of record in a particular case. The amicus brief does not need to be authored by the attorney or representative of record, but the brief must be submitted through them.

b. Processing Times

I. The August 2010 AAO processing times show that many product lines are current. We note, in particular, that processing times for EB-1 extraordinary ability cases have greatly improved over the past 18 months. There are, however, still significant

backlogs in processing times for several product lines, including I-601 waivers (27 months), EB cases *other than EB-1 extraordinary ability cases* (up to 25 months in EB-3 skilled or professional worker cases) and H-1B petitions (13 months). Previously, the AAO indicated that it would request additional staffing after moving to a larger office to reduce backlogs. Please advise what additional staffing has occurred in the past year, and whether the AAO has been able to assign additional staff specifically to address the backlogs in these product lines.

Response: Budget constraints did not allow us to increase the number of staff members at the AAO during FY2010, but we anticipate being able to add staff members in FY2011 who can be assigned to help with the backlogs in the case types with longer processing times. As the September 2010 report will show, the AAO ended the fiscal year processing 31 of the 41 case types reported on average in six months or less.

II. On a related matter, but involving the Service Center side of this, AILA is concerned about the delays that occur at the Service Centers in forwarding petitions to the AAO, and asks that Service Centers be held to a specific timeframe (60 days) in which to forward cases. Otherwise, there is no way to predict the processing time for an appeal, leaving many in limbo. AILA requests that the AAO notify the attorney of record, petitioner, and/or applicant so that the date that the clock starts is transparent.

Response: We will take this request under advisement and report back with an answer.

III. AILA also requests that A files be timely returned to the Service Center, particularly when the petitioner requests withdrawal of the appeal.

Response: *We would request that attorneys bring delays to our attention if they are seeing significant delays in this area.*

c. EB Immigrant Case Denials

AILA members report a significant increase in denial rates of employment-based cases. Could the AAO address procedures currently in effect to provide oversight and quality control of employment-based case reviews? Also, please advise on the percentage of AAO appeals that sustained or overturned denials.

Response: Each decision issued by the AAO is reviewed by a supervisor and then by the particular branch manager overseeing the particular caseload. This same process applies to employment-based cases.

In response to requests from external stakeholders the AAO will soon begin reporting overall case statistics on a quarterly basis. We hope to have a definitive update on this issue by the AAO National Stakeholder Engagement being coordinated by the Office of Public Engagement, currently scheduled for October 20, 2010.

d. AAO Internal Tracking System

At our October 27, 2009 meeting at USCIS headquarters, AILA requested clarification on the handling of cases where the brief is sent separately to the AAO. The concern is the delay that often occurs when a USCIS office forwards an appeal to the AAO. In addressing this concern, the AAO responded that it creates a file for after-filed evidence and briefs. If the file remains on the shelf in the file room for six months, the AAO file room will request the appellate record from the originating office. AILA appreciates that the AAO tracks files in this manner. Given continued reports of delays in transmission from the originating USCIS office, would the AAO consider making its requests for the appellate record at four months instead of six months?

Response: The AAO will take this request under advisement and report back with an answer. Given the current demands on our existing staff we carefully consider the impact of any such request.

e. **AAO Published Decisions**

At the January 26, 2010 USCIS National Stakeholder meeting, AILA expressed concern about the practice of reliance on unpublished AAO decisions in the development and dissemination of benefits adjudication policies. In response, the USCIS indicated that it was working on making available all AAO opinions on the USCIS/AAO website. Please provide an update on when the AAO expects to have all decisions posted to its website, including a search function that would make case specific searches more user-friendly.

Response: As we have related this past year, this issue continues to be one of funding and the necessity of review by the FOIA Office before publication. Each decision is sent to the FOIA Office for review, redacted by them before posting, and then posted online. The current backlog of requests at the FOIA Office results in a delay of approximately six months from the time a decision is delivered to them until it is posted online.

The search function issue remains of concern to us. Although we understand that commercial entities may provide a more robust mechanism for searching posted decisions, we recognize that not everyone has access to these services. We are working internally to resolve this very legitimate concern.

13. The Lockbox

a. Lockbox processing and the transition to lockbox filing continues to be problematic. AILA appreciates the efforts of Lockbox Operations in resolving filing issues. However, members continue to report rejections, including rejections where the filing was submitted to the wrong filing location.

AILA urges USCIS to abandon its policy to reject applications submitted, and to return to the procedure in Adjudicators Field Manual (AFM) Chapter 10.1, which clearly states that a case may not be rejected merely because it submitted to an incorrect office; such cases should be receipted and routed to the appropriate office. We would appreciate an update on USCIS' efforts to comply with the AFM. [Chapter 10.1(a)(2) revised 01-19-2010].

Response: The Lockbox forwards applications that arrive at the wrong location to the correct location. If you have specific cases where this is not happening, please provide us with details and we will make any required corrections.

In addition to accepting petitions submitted to an incorrect office, we also ask Lockbox Operations to consider, for a limited time, accepting petitions with an incomplete field on the forms, petitions as long as they have the basic information required to fee in a case, correct signatures and the correct fee. This is consistent with the regulations at 8 C.F.R. § 103.2. We also request supervisory review of all petitions and applications prior to rejection to determine if the information missing may be available in CLAIMS and also to ensure that erroneous rejections are kept to a bare minimum

Response: The Lockbox accepts applications with information that is deemed critical to acceptance of the application. In many cases, this minimal information is required for ingestion into USCIS systems. Supervisory review of rejected cases is not possible. In FY 2010, the Lockbox processed over 5.6 million applications and rejected less than 9 percent of the applications received. The most common reasons for rejection are that the applications were not signed or the correct fees were not enclosed.

AILA is also concerned about the apparent disconnect between the USCIS' experience of this transition and most Stakeholder's experiences of the transition. We believe this was made apparent during the August 24 Stakeholder's call. For example, many are not receiving responses to lockboxsupport emails within 5 business days, there are continuing delays receipting in petitions, erroneous rejections of petitions, and there remains confusion about where to file various petitions (ie –file all I-140s at the lockbox except if its for a skilled worker, or Premium processing, or a stand alone I-140 that was e-filed.) Against this background, please advise on the following:

Response: As a result of the August 24 Stakeholders Call, we requested additional resources (staff) to assist with customer inquires. We have received approval to hire these resources and will begin to do so as soon as we have authority to begin hiring in FY 2011. In addition, we are exploring ways to not only make our responses timelier but to make them more useful.

b. Business Rules: (i.e. policy regarding required information to be included on the forms and in the filing in order to be accepted):

i. Please provide a copy of the business rules
ii. Please advise on the training the contractors receive to implement these business rules
iii. Will Stakeholders be given the opportunity to comment on the business rules?
iv. Have SCOPS and/or the individual Service Centers had the opportunity to review the business rules?
v. Would both SCOPS and Stakeholders have the opportunity to comment on the business rules before the Lockbox is expanded to other petition types: such as I-751s, I-907s, and "N" forms.

Response: The business requirements used by the Lockbox are developed by SCOPS and other USCIS stakeholders. The process to develop the business requirements employees is a very extensive and lengthy process that involves all of the vested offices within USCIS.

The business requirements are very comprehensive and complex. If you have any questions regarding a how or why a particular form is processed, please provide us with specific questions and we will respond.

The staff, USCIS and the Lockbox provider, at the Lockboxes are fully trained on these business requirements

c. Proper Order of Documents

vi. AILA reiterates its request for guidance on the order of documentation included with the petition

vii. When the documents are reorganized by the lockbox personnel, is this before or after they scan the documents in? If before, there's a concern that a document may be misplaced and will not show us having been received.

Response: When application packages arrive at the Lockbox, the contents are placed in an order specified by the business requirements prior to scanning. If you have any specific cases where you believe something was lost, please provide us with the details and we will investigate.

d. Lockbox Processing –

Please advise on the step by step process that occurs once a petition is received at the lockbox:

i. Who opens the envelope;
ii. Are the envelopes reviewed for the "ATTN SUPERVISOR" language
iii. Once the petition is removed from the envelope, what happens? Is it time/date stamped immediately?
iv. Who performs the initial review of the documents?
v. Who re-organizes the documents? What is done to make sure no documents are misplaced during this process?
vi. Is it scanned before or after review?
vii. If after and there is a problem, is it scanned before it is rejected?
viii. Is it reviewed by a supervisor before it is rejected? If yes, is there a backlog in the supervisor's queue?
ix. When would a petition go directly to the supervisor's queue?
x. At the May TSC Stakeholder's meeting, USCIS advised that scanners do not scan the reverse sides of documents – please confirm if this is the case, and if this can be changed.

Response: The Lockbox provider scans both sides of a document.
Applications arriving at the Lockbox go through the following process:

1. Envelopes are opened by the Lockbox provider.

2. Contents of the envelope are placed in a specified order based to facilitate running business requirements against each application.

3. The transactions are scanned by the Lockbox provider. At this point, we cease processing the paper applications. All processing from here on is electronic.

4. The electronic transactions go to data verification where the Lockbox provider ensures that the data has been correctly captured by the scanners. Data deemed critical to processing based on business requirements is double checked by the Lockbox provider to ensure that it has been entered correctly.

5. The electronic transactions are processed by the system business logic. The system logic, based on the business requirements, ensures that all critical data is present; for some applications, applies minimal prima fascia eligibility to file criteria; ensures that the application has been signed; and that the correct fee has bee attached.

6. If the applications have been completed correctly and the correct fees attached, the applications will be accepted.

7. If the applications have not been completed correctly or the incorrect fee has been attached, then based on business requirements, the applications may go to the Lockbox provider to try to resolve; may go to the USCIS Case Resolution Unit (CRU) to try to resolve; or may be rejected without any further review. Note that some applications, defective or not, will, by business requirement, go to the USCIS CRU for review.

8. If the applications are accepted, the applicants are mailed receipt notices and the paper applications are sent to the appropriate service center for further processing.

9. If the applications are rejected, the applicants are sent rejection notices and all of the documents sent by the applicants are returned to the applicants, including the payments.

We are exploring methodologies to identify applications that have been rejected more than once.

e. Receipt Dates

During the August 24 Stakeholder's call, Lockbox Operations indicated that the clock starts when the petition is date stamped as received. However, in practice this does not always occur. Please comment on what efforts are being made to ensure coordination between these two branches, and to ensure that the receipt date is given full effect. The following includes some of AILA's specific concerns:

1. I-765s adjudicated within 90 days of receipt
2. Petitions rejected in error given the original receipt date
3. Appropriate receipt for I-140 petitions when the labor certification validity is expiring

Response: The 90-day rule is based on when the I-765 is received at the Lockbox facility. This date is on the notice and it is also sent to the USCIS system for tracking.

We have experienced some issues associated with the business requirements and are in the process of making both procedural and system changes.

f. Recognition of G-28 forms -- AILA asks that the G-28 be respected in all filings. Rejected petitions should be returned to the attorney of record, rather than the petitioner/applicant and receipt notices for all filings should also be sent to the attorneys in addition to the petitioner/applicant.

Response: The USCIS procedure with respect to applications with accompanying, valid G-28s is as described above. However, we sometimes receive applications with G-28s that are not valid (e.g. not signed). In these cases, the G-28s are not honored and all further correspondence is with the applicants only.

g. Lockbox support – We understand that there is a high volume of emails, but many issues require a quick response. is there any way to escalate when there has been no response, and is there a way to request an expedited response

Response: As a result of the August 24 Stakeholders Call, we requested additional resources (staff) to assist with customer inquiries. We have received approval to hire these resources and will begin to do so as soon as we have authority to begin hiring in FY 2011. If a response has not been received in 5 days, please reach out to your USCIS Liaison who emails the Chief, Office of Intake and Document Production directly.

14. Transfer of files between Service Centers

At the AILA Annual Conference, Director Mayorkas noted that the transfer of files from one Service Center to another was an example of the increasing efficiency of the Service Center Operations. More recently, on the SCOPS-AILA August 25 call, SCOPS reiterated that the ability to transfer files is important to workload management. While we appreciate the need to balance workloads, petitioners, beneficiaries, and attorneys become very concerned when they receive a transfer notice and it is not clear why. Therefore, we request the following:

a. Advance notification that files are to be transferred and the reason for the transfer (ie – when all Adjustment applications that were pending security clearances were transferred to TSC to centralize these applications at one Service Center; when NIWs were transferred to NSC to ease the burden of TSC; when I-539s were transferred to CSC to assist VSC).

b. Timely notification to the attorney of record and the petitioner that the file is transferred, including the date of transfer and the Service Center to which it was transferred

c. Updates in CRIS on the status of the petition, and the office to which it was transferred. Often, following a transfer, the information in CRIS just confirms it was transferred. It does not include to which office it was sent, nor any updates on the status of the adjudication, nor the date it was received for processing. All of this information is critical to Stakeholders in tracking the case status.

Assurance that transferred petitions will have the original receipt date respected. Stakeholder experience is that transferred petitions go to the back of the line, and anything received already at that Service Center takes precedence. This has resulted in huge processing delays.

Response: File transfers between the centers can happen regularly when people move to new jurisdictions or in mass when SCOPS reassigns a workload. The system does not allow for early notification of a transfer between centers since the notice generates after the system is updated. SCOPS can notify the public if a workload shift is being planned so they can expect the transfer notice. The transfer notice will be mailed to the address of record for either the applicant or G-28 (if valid). Transferring a file in the system does update the history with a History Action Code (HAC), but as far as we know the transfer status will not appear in the case status online. The Service Centers shelve and process cases oldest mail receipt date first. Cases that are transferred

in from another office will be placed into the workflow according to the original mail receipt date.

15. Request for USCIS to Revisit and Clarify its Policy to Hold Subsequent Filings in Abeyance when the Initial Filing is on Appeal (AKA "the Norton Memo")

In the minutes of the October 2008 Stakeholder's liaison meeting, USCIS stated that it follows the field guidance in a February 8, 1989 memorandum entitled "Adjudication of Petitions and Applications Which Are in Litigation or Pending Appeal" and holds in abeyance subsequent filings when the initial filing has been denied and is on appeal. USCIS noted at that time, that it would review its current practice. Please provide an update, and please clarify this position for all types of pending applications, but particularly with respect to the adjudication of subsequently filed I-140 immigrant petitions.

USCIS explained that the primary basis for this policy is that "deferring adjudication of the later filing conserves limited resources and safeguards against 'forum shopping'." In light of the significant advances in information sharing within USCIS, as well as the implementation of bi-specialization, these concerns should not be as great as they may have been in the past. When weighed against the harm that results to petitioners when adjudication is held in abeyance, the equities weigh in favor of treating each filing on its own merits and rendering an adjudication.

The concerns of USCIS about "forum shopping" should no longer exist for most types of applications, including such frequently filed petitions as I-140s and I-129s. For I-140s, for example, there are only two service centers which will process an I-140 and the filing location is based upon the location of the job. It would be impossible for a petitioner to "forum shop" in connection with an I-140. The same is true with I-129s. Furthermore, USCIS has vastly improved its technology systems in the 21 years since the February 8, 1989 memorandum was issued, and the agency's CLAIMS system would immediately inform an adjudicator of any other pending applications. The adjudicator can take into account all of this information in adjudicating each case on its own merits.

Furthermore, there are legitimate reasons why another petition might be filed in the same category while an appeal is pending. In the I-140 context, for instance, since the permanent residence process is forward looking, potential changes in the role that a beneficiary will ultimately hold could necessitate that the company file another I-140 petition to capture the new role, but under current USCIS policy that new petition would be held in abeyance if there is a pending appeal on the initial filing. Other legitimate reasons that could necessitate another filing include, but are not limited to, priority date retention, ability to obtain additional H-1B time under AC21, and protection under the Child Status Protection Act (CSPA). These are particularly true in light of the continued very lengthy processing times at the AAO.

AILA requests that USCIS reverse its current policy that instructs adjudicators to hold subsequently filed petitions in abeyance while an initial filing is on appeal. Each application should, in exchange for the filing fee, be timely adjudicated on its own merits.

Response: USCIS will consider this issue as part of the Policy Review within the Customer Service working group. In the meantime, applications and petitions that might be affected by this issue should include a cover sheet from the petitioner identifying the issue, and the cover letter should explain why the filing should not be held in abeyance.

16. Regulations

a. AILA appreciates both Director Mayorkas' and Chief Counsel Bacon's comments on a "new streamline" procedure to promulgate regulations. Please provide details regarding the nature of this new procedure, what it entails and how it is expected to facilitate the promulgation of regulations.

b. Please provide an update on the AILA and status of regulations for the following:

i. AC21

ii. AAO

iii. CSPA

iv. Unlawful presence and bars under INA 212(a)(9)(b) and (c)

v. Authorization to travel on Advance Parole (without abandoning status) for E-1, E-2, E-3 and O-1 during pendency of adjustment while adjustment pending (April 2008 Liaison Minutes - Q25)

vi. The ability of B-1 domestics to work incidental to status without acquiring new EAD (October 2008/October 2009)

vii. Requiring permanent residents who hold non-expiring green cards to replace them.

Response: DHS publishes the Unified Agenda semiannually at www.reginfo.gov/public/do/eAgendaMain a list of rules with anticipated timeframes. Members of the public may access this list for information on USCIS rules.