U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529

U.S. Citizenship and Immigration Services

HQ 70/33.1
AD06-12

Interoffice Memorandum

To: Service Center Directors
District Directors
Regional Directors
Director, National Benefits Center
Director, Office of Refugee, Asylum and International Operations

From: Michael Aytes /S/
Acting Director, Field Operations

Date: January 11, 2006

Re: Alternate definition of "American firm or corporation" for purposes of section 316(b) of the Immigration and Nationality Act, 8 USC 1427(b), and the standard of proof applicable in most administrative immigration proceedings

Revision to *Adjudicator's Field Manual* (*AFM*) Chapter 11.1(c) (*AFM* Update AD06-12)
Revision to *Adjudicator's Field Manual* (*AFM*) Appendix 74-14 (*AFM* Update AD06-12)

This memorandum informs U.S. Citizenship and Immigration Services (USCIS) personnel of changes to the *Adjudicator's Field Manual* (*AFM*) regarding an alternate definition of "American firm or corporation" for purposes of section 316(b) of the Immigration and Nationality Act (the Act), 8 USC 1427(b), and the standard of proof applicable in most administrative immigration proceedings. These amendments are the result of the designation by Acting Deputy Director, Robert C. Divine, of the Administrative Appeals Office (AAO) decision in Matter of [redacted] as a USCIS Adopted Decision.

This guidance is effective immediately. Please direct any questions regarding this memorandum through appropriate channels to the Office of Program and Regulations Development.

The *AFM* is revised at Chapter 11.1 Submission of Supporting Documents and Consideration of Evidence by replacing paragraph (c) with:

(c) Burden of Proof and Standard of Proof.

The burden is on the petitioner to establish that he or she is eligible for the benefit sought.

Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). This means that if an alien seeking a benefit has not shown eligibility, the application should be denied. The government is not called upon to make any showing of ineligibility until the alien has first shown that he is eligible. You may contrast this in your mind with a criminal case or with a removal hearing in which the government must first prove its case.

Once an applicant has met his or her initial burden of proof, he or she can be said to have made a “prima facie case.” This means that the applicant has come forward with the facts and evidence which show that, at a bare minimum, and without any further inquiry, he or she has initial eligibility for the benefit sought. This does not mean that your inquiry is over. An alien may have established initial eligibility, but it is up to you to determine if there are any discretionary reasons why an application should be denied, or if there are any facts in the record (including facts developed during the course of the adjudicative proceedings, such as during an interview) which would make the applicant ineligible for the benefit. If such adverse factors do exist, it is again the applicant's burden to overcome these factors.

The standard of proof should not be confused with the burden of proof. *See* Appendix 74-14. The standard of proof applied in most administrative immigration proceedings is the “preponderance of the evidence” standard. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The preponderance of the evidence standard of proof, however, does not apply to those applications and petitions where a higher standard is specified by law. The statute provides for a higher standard in some cases, such as the “clear and convincing evidence” standard required to rebut the presumption of a prior fraudulent marriage pursuant to section 245(e)(3) of the Act and to determine citizenship of children born out of wedlock pursuant to section 309(a)(1) of the Act.

Additionally, the “preponderance of the evidence” standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation. Therefore, if the regulations require specific evidence, the applicant is required to submit that

evidence. *Cf.* 8 CFR section 204.5(h)(3) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

The *AFM* is revised at Appendix 74-14 to include the text of a memorandum from the Acting Director of USCIS to all offices dated [memorandum date].

Appendix 74-14 Administrative Appeals Office (AAO) Decision and General Counsel Opinions Affecting Eligibility For Naturalization: Sections 316(B) And 319(B).

The following is the text of a memorandum from the Acting Director of USCIS to all offices dated January 11, 2006:

As Acting Deputy Director, I hereby designate the attached decision of the Administrative Appeals Office (AAO) in [redacted] a USCIS Adopted Decision. This AAO decision held that, for purposes of section 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1427(b), a publicly-held corporation may be deemed an "American firm or corporation" if the applicant establishes that the corporation is both incorporated in the United States and trades its stock exclusively on U.S. stock exchange markets. If the applicant is unable to establish by a preponderance of the evidence that the employer is both incorporated in the United States and trades its stock exclusively on U.S. stock markets, then the applicant must meet the requirements of *Matter of Warrach,* 17 I&N Dec. 285, 286-87 (Reg. Comm. 1979). As such, the nationality of the firm would be determined i

nstead by the nationality of those who own 51 percent or more of the corporation. *Id*. The reasoning in this decision may also be applied in determining the nationality of a publicly-traded foreign corporation, where such a determination is required and not in conflict with existing law and/or regulations pertinent to the classification sought.

Finally, this Adopted Decision reemphasizes the preponderance of the evidence standard of proof applicable in most administrative immigration proceedings. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). USCIS adjudicators are reminded, however, that this standard of proof does not apply to those applications and petitions where a higher

standard is specified by law, such as the clear and convincing standard required to rebut the presumption of a prior fraudulent marriage pursuant to section 245(e)(3) of the Act and to determine citizenship of children born out of wedlock pursuant to section 309(a)(1) of the Act.

USCIS personnel are directed to follow the reasoning in this decision in similar cases.

The following is the text of a memorandum from the Office of Examinations to all offices dated June 11, 1996:

The Office of the General Counsel has recently issued two opinions (Attachments 1 and 2) which have a bearing on certain individuals applying for naturalization.

Attachment 1, issued in letter form by the General Counsel, answers an inquiry regarding brief and casual absences for persons applying for naturalization under section 316(b) of the Immigration and Nationality Act (INA). Counsel notes that *Matter of Graves* (19 I&N Dec. 337 (Comm’r 1985)), in which the Commissioner rejected the applicant’s argument that his departures from the United States for business were sufficiently insignificant so as to not interrupt the one year uninterrupted physical presence requirement for naturalization, is still the accepted decision for use in section 316(b) naturalization adjudications. Accordingly, all district adjudication officers shall continue to use the Graves decision as precedent for section 316(b) naturalization adjudications.

Attachment 2 addresses a question from the Buffalo District Office regarding applicants for naturalization under section 319(b) of the INA. The question involved here stems from the definition of the phrase “American firm or corporation” as it is used in section 319(b). In the instance presented at the Buffalo district, a complete history of the corporate ownership found that the ultimate owner of the alien spouse’s company was a foreign corporation, incorporated abroad, and more that 50 percent of the company’s stock was owned by foreign nationals. In situations such as this, Counsel found that the spouse’s company is not an American firm or corporation, thus making the alien spouse ineligible for expedited naturalization under section 319(b).

In light of this opinion by the General Counsel, it will henceforth be policy for district adjudications officers to adjudicate section 319(b) expedited naturalization requests based upon the ultimate ownership of the American firm or corporation. It will be incumbent upon the applicant to outline the corporation’s ultimate ownership if the applicant is seeking an

expedited naturalization based upon the provisions of section 319(b).

Both opinions will have an effect on certain individuals applying for naturalization. All field adjudications officers involved with naturalization cases should be aware of and abide by these opinions and should be provided copies of the attachments to this memorandum. Field questions can be directed to the Office of Program and Regulations Development through appropriate channels. [Location to which field questions can be directed revised as of 01-11-2006.]

Louis D. Crocetti, Jr.
Associate Commissioner

Attachment 1 - Text of a Letter from the General Counsel to Attorney Endelman

SEP -7 1995

Gary E. Endelman, Esq.
AMOCO Corporation
Post Office Box 3092
3200 Southwest Freeway
Houston, TX 77253-4310

Dear Mr. Endelman:

In your May 26, 1995, letter, you request an opinion concerning whether the effect of a “brief and casual” absence from the United States on an alien’s ability to preserve his or her residence for purposes of naturalization, while employed abroad, INA section 316(b), 8 USC section 1427(b), is controlled by *Matter of Copeland*, 19 I&N Dec. 788 (Comm’r 1988) and *Matter of Graves*, 19 I&N Dec. 337 (Comm’r 1985) or by INS INTERP 316.1(c)(3)(i). An alien must have been in the United States for an uninterrupted period of at least one year before applying for this benefit. INA section 316(b), 8 USC section 1427(b). INTERP 316.l(c)(3)(i) purports to excuse “brief and casual” absences. Following the decision of the Supreme Court in *INS v. Phinpathya*, 464 U.S. 183 (1984), however, the Commissioner held in Graves that section 316(b) does not authorize this exception. The Commissioner adhered to Graves in Copeland. In adjudicating applications under section 316(b), all Service officers must follow the Graves decision. 8 CFR section 103.3(c).

Alternate definition of “American firm or corporation“ for purposes of section 316(b) of the Immigration and Nationality Act, 8 USC section 1427(b), and the standard of proof applicable in most administrative immigration proceedings;

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Revision to *Adjudicator’s Field Manual* (*AFM*) Appendix 74-14 (*AFM* Update AD06-12)

Sincerely,

Attachment 2 - General Counsel Opinion 95-21

The *AFM* Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read**:**

AD 06-12 [Insert date of signature]	Chapter 11.1(c) and Appendix 72-13	This memorandum revises section (c) to Chapter 11.1 and Appendix 72-13 of the *Adjudicator’s Field Manual* (*AFM*)