



# Questions and Answers

## USCIS Meeting with the American Immigration Lawyers Association (AILA)

October 23, 2013

### Overview

On October 23, 2013, the USCIS Service Center Operations Directorate hosted an engagement with AILA representatives. USCIS addressed questions related to DOMA, provisional waivers and TPS grantee applications among several other topics. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

### Questions and Answers

#### Post-DOMA Questions

As always, we appreciate the agency's hard work and the dedication of Service employees since our last meeting and would like to particularly recognize USCIS's proactive stance in anticipating and reacting to the Supreme Court's decision in *United States v. Windsor*, striking down Section 3 of the Defense of Marriage Act (DOMA). Identifying the universe of affected petitions in advance of the decision, immediately putting a process in place to provide benefits and information to those who were impacted, and communicating effectively with the public all show a commitment to your mission.

It has been less than three months since the Supreme Court's decision and it has been gratifying to see how expediently USCIS has acted to ensure that adjudicators move forward in adjudicating same-sex marriage cases. In addition, the agency's reopening of previously-denied I-130s has been appreciated both by stakeholders and AILA. Moreover, many questions have been answered through extensive outreach by USCIS. However, we would appreciate some additional discussion on a few outstanding questions:

**Response:** USCIS appreciates AILA's recognition of USCIS's efforts in implementing the *Windsor* decision. We also appreciate AILA's questions, which raise unique issues relating to the administration of immigration benefits to same-sex spouses now that Section 3 of DOMA has been struck down. At this time, we are unable to provide answers to questions 3, 4, and 5. We are working to develop additional guidance to supplement that which we have already published, and expect to answer these and other important *Windsor*-related questions in the near future.

Our responses to AILA's remaining questions are set forth below.

1. Often, individuals in same sex marriages will not have the same type of documentation as individuals in other types of marriages. For example, depending on the state, an individual's same-sex spouse might not be able to name his or her partner as a beneficiary to health insurance or retirement funds, or individuals might not have gathered photographs together out of fear of being discovered by family members or co-workers who do not approve. What type of training have USCIS officers received with regards to recognizing bona-fide same-sex marriages?

**Response:** USCIS routinely decides immigration cases that involve a variety of unique situations and backgrounds. As a result, our officers are trained to be sensitive to everyone's individual situation. USCIS is currently developing materials to specifically train our officers about recent changes that affect the processing of marriage-based petitions, including documentary evidence in the context of same-sex marriages.

2. In many cases, it may be more difficult for a spouse in a same-sex marriage to prove that he or she is a victim of domestic violence. Studies show that same-sex domestic violence cases result in the arrest of both of the parties at a much higher rate than those involving parties of the opposite sex. Will USCIS ensure that VAWA adjudicators receive adequate guidance and training to recognize legitimate VAWA claims given the realities of arrest practices and other unique factors in cases involving same-sex domestic abuse?

**Response:** VAWA adjudicators already receive guidance and training to recognize legitimate VAWA claims given the realities of arrest practices. USCIS will be providing additional guidance and training with respect to unique factors in cases involving same-sex domestic abuse.

3. Under 8 CFR §204.2(b)(1), the surviving spouse of a U.S. citizen may self-petition under INA §204(l) within two years of the death of the U.S. citizen spouse. This section of the regulations was "backdated" to allow an extended filing period for spouses who were widowed more than two years before the regulation was effective. Given that DOMA prohibited the approval of a petition until the Supreme Court declared Section 3 unconstitutional, will USCIS consider allowing an extended filing period for survivors whose spouses died more than two years ago, but who were prohibited by DOMA from having a petition approved?

**Response:** See initial response above.

4. In general, INA §208(b)(3) permits individuals granted asylum to obtain derivative benefits for their spouses who are accompanying or following to join them when an I-730 is filed within two years of the grant of asylum. However, under 8 CFR §208.21(b), the spousal relationship must have existed at the time the asylum application was approved. Because most LGBT asylees come from countries which do not have marriage equality, it is unlikely they will have been able to marry the partners that were left behind. In such cases, the only viable option is for the asylee to seek lawful permanent residence, wait four years to naturalize, and then file a fiancé(e) petition. In order to alleviate such lengthy separations and unnecessary hardships, will USCIS issue humanitarian parole guidance to include long-term partners of LGBT asylees?

**Response:** See initial response above.

5. Individuals who enter the U.S. without inspection are ineligible for adjustment of status under INA §245(a). Generally, such individuals must instead apply for an immigrant visa in their home countries. Our concern stems from the persistent and well-documented persecution of and discrimination against LGBT individuals in many foreign countries. If an individual is eligible for an immigrant visa through his or her same-sex spouse but has a legitimate fear of persecution in his or her home country, returning there for consular processing may not be a viable option. Under the general parole authority provided by INA §212(d)(3), will USCIS consider granting parole in place to such individuals to allow them to apply for adjustment of status?

**Response:** See initial response above.

6. In cases where foreign nationals traveled in and out of the United States on a nonimmigrant visa, but also maintained a relationship with a same-sex partner or spouse who resided in the United States, please confirm that such foreign nationals won't be held to the traditional standard regarding nonimmigrant intent given the unique circumstances facing these individuals prior to the Supreme Court's decision in *Windsor*?

**Response:** Decisions with respect to nonimmigrant intent are made on a case-by-case basis. While it is often more difficult for an individual with a spouse in the U.S. to establish nonimmigrant intent, both same-sex and opposite-sex partners and spouses regularly demonstrate nonimmigrant intent, are issued visas, and travel in and out of the U.S. USCIS considers the totality of the circumstances in rendering decisions.

7. If a same-sex foreign national spouse listed him/herself as "single" on a visa application (perhaps as an F-1 student) because the United States did not recognize their marital relationship with someone of the same sex, please confirm that misrepresentation/fraud won't be an issue given the unique circumstances that same-sex couples faced pre-*Windsor*?

**Response:** Listing marital status as "single" on an immigration form before June 26, 2013, would not by itself be considered to have been a misrepresentation if the individual was in a same-sex marriage not recognized for immigration purposes under the DOMA at that time.

### **Provisional Waivers**

8. Has USCIS reconsidered the standards and process that adjudicating officers are to use when conducting their "limited review" of I-601A waiver applications to determine if the Service has "reason to believe" the applicant may be inadmissible for reasons other than unlawful presence since receiving the August 6, 2013 AILA memorandum to USCIS on provisional waiver adjudications?

**Response:** This issue is currently under consideration by the agency.

9. Will USCIS consider issuing requests for evidence (RFEs) to provide applicants with notice of potential grounds of inadmissibility and an opportunity to respond?

**Response:** This issue is currently under consideration by the agency.

## Adjustment Applications of TPS Grantees within the Sixth Circuit

10. On June 4, 2013, in the case *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), the Court of Appeals for the Sixth Circuit held that a Honduran citizen who initially entered the United States without inspection and subsequently was granted TPS status, satisfied the “inspected and admitted” eligibility requirement of INA §245(a) because of the grant of TPS. This decision is the law of the Sixth Circuit (Michigan, Ohio, Tennessee, and Kentucky) and as such, it is binding on all cases that arise within that circuit. Is USCIS adhering to this decision in the Sixth Circuit? If so, would USCIS consider giving broad recognition of this decision in the rest of the country as well? Please advise us about steps that have been taken to implement the decision, including any guidance that has been issued and any training that has taken place.

**Response:** USCIS recognizes that *Flores* applies in the 6th Circuit and is in the process of issuing formal guidance to its field offices regarding implementation. There are no plans at this time to give broader recognition to this decision.

## Nonimmigrant Petition Adjudications

11. AILA continues to receive examples of denials of H-1B petitions where the Occupational Outlook Handbook (OOH) states that there may be more than one field of study that can prepare the individual for a career in the occupation and that therefore, the position is not a “specialty occupation.” AILA renews its objection to this analysis as contrary to established law, and notes that AILA’s position has been supported by at least one federal district court. On April 4, 2012, AILA presented a detailed memorandum to USCIS on the interpretation of “specialty occupation” and has raised the issue with USCIS in previous liaison meetings. Please provide an update on the development of policy guidance in this area.

**Response:** USCIS is continuing to review current policy on the interpretation of “specialty occupation.” USCIS is developing updated guidance that will be included in the publication of the H-1B Policy Manual volume.

12. H-1B petitions involving IT consulting firms appear to have a much higher rate of RFEs that request specific information and documentation without addressing the deficiencies in the submitted materials. For example, recent cases were denied because of the lack of a statement of work (SOW) or master service agreement (MSA), notwithstanding the fact that the H-1B employee would be supervised by the petitioner’s own onsite manager. The denials in these cases seem to assert that the petitioner should have provided a copy of the MSA and/or SOW as exclusive evidence to demonstrate a proper employer-employee relationship. In accordance with the preponderance of the evidence standard, USCIS should review the evidence in its entirety and should not require specific types of evidence without weighing other relevant evidence. Examples: WAC1311850120; WAC1310050325. Please comment on guidance or training with regard to petitions involving third party placements.

**Response:** SCOPS instructs adjudicators to refer to the January 8, 2010 USCIS memo, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitioner, Including Third-Party Site Placements,” and the June 3, 2013 FDNS Directorate memo on Revised H-1B Anti-Fraud Operational Guidance.

Adjudicators review the evidence within the record of proceeding in its entirety and do not require specific types of evidence, but rather weigh all relevant evidence submitted by the petitioner. In accordance with the preponderance of the evidence standard, adjudicators look to the sufficiency and totality of evidence to determine if the petitioner has established that a valid employer-employee relationship will exist for the duration of the requested validity period.

- 13.** Under the Department of Labor regulations, the “area of intended employment” means the area within a normal commuting distance of the place of employment. No new LCA is required if the employee moves within the same “area of intended employment.” Please confirm that a move within the same area of intended employment is not a “material change” that requires the filing of an amended H-1B petition. Please also confirm that field auditors have been instructed not to treat changes of location within the same area of intended employment, without other factors, as “material” for purposes of requiring the filing of an amended petition or petition extension.

**Response:** USCIS assumes that the “move” being referenced in this question is a move in the place of employment and not the place of residence of the employee. Generally, in a case where a beneficiary remains employed by the original petitioner, a change in the “place of employment”, as used in 20 CFR 655.715, of a beneficiary to a location in the same Metropolitan Statistical Area (MSA) listed on the controlling Labor Condition Application (LCA) certified to the U.S. Department of Homeland Security with respect to that beneficiary alone is *not* a material change in the terms and conditions of employment and therefore would not require the filing of an amended H-1B petition.

- 14.** AILA has raised concerns with USCIS regarding the interpretation of “specialized knowledge” in the L-1B context a number of times in past liaison meetings, including the October 9, 2012 and April 11, 2013 liaison meetings. In addition, AILA on January 24, 2012, AILA submitted to USCIS a detailed memorandum on the interpretation of “specialized knowledge.” A long-expected policy memorandum containing updated guidance on the adjudication of L-1B “specialized knowledge” petitions has not yet been released, and Service Centers continue to use RFE templates and deny petitions based on adjudicatory standards that are not consistent with the Act and regulations. Please discuss the policy considerations being weighed in the development of this memorandum and what is being done to ensure L-1B adjudications are consistent with precedent decisions.

**Response:** The issue remains in the review process.

#### **Eligibility of J-2 Derivatives for other Nonimmigrant Classifications**

- 15.** Has USCIS reconsidered its position with respect to the legal effect and scope of an INA §212(e) waiver for certain J-2 dependents of J-1 physicians who have been granted “Conrad 30” INA §214(l) waivers? AILA presented a detailed memorandum to USCIS on this issue on May 16, 2013. What steps has USCIS taken to return to its longstanding position on this issue, which was to permit a J-2 dependent of a J-1 waiver physician to change status to any visa classification for which he or she was otherwise eligible, once the J-1 waiver is granted to the J-1 principal?

**Response:** To clarify, USCIS has not changed its policy pertaining to such cases. Under the statute and the regulation, J-2 spouses of waiver recipients under INA 214(l) are only eligible to change to H-4 status while the waiver recipients are working towards fulfilling the terms and conditions of the waiver. [See 8 CFR §§ 212.7(c)(4), (c)(9)(iv) and (vi)(D); 8 CFR § 248.2(a)(3); and 8 CFR § 245.1(c)(2).] USCIS recently revised Form I-129, *Petition for a Nonimmigrant Worker* (see Part 4, Questions 11a

and 11b), and Form I-539, *Application to Extend/Change Nonimmigrant Status* (see Part 4, Question 3h), to specifically request previously uncollected information regarding an applicant's J nonimmigrant status history to help ensure that applicants fulfilled the foreign residence requirement, if applicable, or any applicable waiver requirements (e.g., a waiver recipient's 3-year employment obligation). As a result, J-2 spouses who prior to the form revisions might have been granted a change to H-1B status in error are now having their H-1B status requests denied. Please note that USCIS is currently reviewing this issue and exploring whether a proposed regulatory change, authorizing employment for this class of H-4 nonimmigrants, would be both viable and beneficial.

### **Prioritizing Petition Adjudication**

**16.** We recognize that USCIS resources are not unlimited, and that workload must be continuously reallocated and balanced. Following our in-person meeting in April 11, 2013, we have noted, and very much appreciate, that the processing time for petitions for immediate relatives has been drastically reduced. However, there are certain types of applications and specific situations where delays in adjudications create a substantial hardship for USCIS customers.

- While the processing times for I-130s for immediate relatives have dropped, processing for FB-2A (spouses and minor children of Permanent Residents) continues to extend into years. We are not certain if this is related to the fact that the priority dates have moved forward, and indeed come current for several months. In October, 2013, the priority date is backlogged a mere three weeks. Given the availability of immigrant visas in this category, will USCIS consider allocating resources to bring processing times for this type of petition forward so that the beneficiaries may take advantage of the current priority dates?
- Motions for reconsideration of nonimmigrant petition denials in time limited employment cases become useless when processing times to consider the motions exceed the requested time periods.

We are interested in your thoughts as to how we can work together to address these processing deficiencies and to identify additional petition types and situations where USCIS would be willing to allocate additional resources to alleviate similar problems.

**Response:** USCIS is committed to processing all applications and petitions as quickly and efficiently as possible. Due to operational needs and to balance overall workloads, USCIS occasionally will transfer cases from one location to another. We will continue to monitor workload volume across the agency to ensure we are utilizing our resources in the most effective way possible.

**17.** Section 203(e) of the INA requires that visa numbers be allocated in priority date order. A priority date is established only with a petition's approval, but relates back to the filing date of the petition (or labor certification).

The State Department allocates visa numbers when notified by USCIS that it is completing an adjustment of status application, or when a consul indicates that an applicant is about to receive an immigrant visa. Priority dates are advanced to utilize the available visa numbers in each category in a given fiscal year as permitted and required by law.

We are interested in how USCIS prioritizes adjudication of pending I-485s to assure compliance with

INA §203(e) when priority dates advance substantially. For instance, in August this year, EB-2 for India moved almost four years, from 9/1/2004 in July to 6/15/2008 in September.

- What steps does USCIS take to assure that visa numbers are first requested for pending cases with the oldest priority dates?

**Response:** At both the NSC and TSC, cases are generally processed under FIFO based on receipt dates. There are a number of circumstances which can occur such as missed or rescheduled ASC appointments, security check issues, etc. which might take a case outside of FIFO order. Each month, all visa-available adjudication-ready EB I 485s are reviewed by ISOs. If the case is approvable, a visa is requested in IVAMS. If the visa is not immediately available; the visa request will be placed in a queue in IVAMS until the priority date becomes current.

- Please describe the process of “sweeping” shelves to identify applications ready to process when visa availability advances and the process for determining the order that these cases are assigned.

**Response:** When the visa bulletin is issued, the electronic records for NSC and TSC EB I-485 inventory are queried to identify those applications that will have current priority dates at the beginning of the next month. These cases are staged for adjudication to begin on the first of the month. Additionally, the inventory is queried periodically throughout the month to identify EB I-485s that have become adjudication ready. Each month, all adjudication-ready cases are assigned to officers for review

## G-28

18. When a G-28 is found to be ‘defective’, neither the attorney of record nor the petitioner are notified. It is only when notices fail to appear or communication with USCIS is prevented that the attorney learns that there is a problem. AILA requests that rejected G-28s be returned to the attorney of record with an explanation of the deficiency, and a routing sheet to allow a properly executed G-28 to be easily matched with the file.

**Response:** When a G-28 is found defective (i.e., invalid) at the Lockbox, the standard procedure is not to recognize it and move the case on for processing. The G-28 is placed face-down in the hardcopy file folder and no data related to the G-28 is transmitted to USCIS systems. The Lockbox does not send any notice to the attorney when the G-28 is invalid. When a case is rejected and the G-28 is defective (i.e., invalid) only the applicant/petitioner will receive the rejected application/petition and notice, but we do not notify the applicant/petitioner that their G-28 is invalid.

Attorneys or accredited representative should follow-up with the Service Center or National Benefits Center with jurisdiction of the case. When filing a follow-up G-28, be sure to include the Receipt Number of the associated application/petition on Form G-28 in Part 3, Question 7.

The National Customer Service Center has access to the Lockbox system to address case inquiries from attorneys that are not on file.

19. It is currently very difficult to have a new G-28 matched to a pending application or petition. Would USCIS consider providing a routing sheet with the petitioner's copy of the receipt notice to facilitate this process?

**Response:** Creating a routing sheet with the petitioner's copy of the receipt notice is not a practical option to match a new G-28 to pending petitions/applications considering the amount of pending cases at the center. We do not generally encounter difficulties in matching a new G-28 to a pending application/petition.

#### I-94 Automation

20. USCIS announced on April 30, 2013, that U.S. Customs and Border Protection (CBP) started implementation of the Form I-94 automation at all U.S. air and sea ports of entry. In this same announcement, USCIS indicated that it would accept the electronic Form I-94 in paper format obtained from CBP's website ([www.cbp.gov/I94](http://www.cbp.gov/I94)). The Service noted that "this document is the equivalent of the paper versions of Form I-94 issued by CBP and USCIS. In lieu of submitting the electronic Form I-94 in paper format, USCIS will also accept photocopies of the passport pages that contain the individual's biographical information, visa and admission stamp."

AILA members have reported instances where clients and unrepresented foreign nationals are unable to obtain a paper copy of the Form I-94 from CBP's website, even after confirming that the data was entered correctly in the CBP system. People having trouble retrieving their I-94s are advised to try the following techniques:

- Enter the first and middle name in the *First Name* field;
- Switch the order of the first and last names;
- Enter multiple first names or multiple last names without spaces;
- Check for multiple passport numbers;
- Refrain from entering the year if the year is included in the passport number;
- Check and compare the designated classification on the visa with the designated classification on the admission stamp;
- Call or visit a CBP Deferred Inspection office for assistance in obtaining a paper copy of Form I-94.

Please advise whether additional guidance has been or will be issued to USCIS field offices to supplement the April 30, 2013 USCIS announcement concerning the automation of Form I-94. Are there any instances where a photocopy of the passport pages that contain the individual's biographical information, visa, and admission stamp will not be acceptable as an alternative to a print-out of the I-94 information from the CBP website?

**Response:** USCIS does not anticipate issuing additional guidance to supplement the April 30, 2013 guidance. However, USCIS is in the process of revising the form instructions of benefit request forms (e.g., Forms I-821 and I-129) to include more information regarding Form I-94 in light of CBP's Form I-94 automation. A photocopy of the biographical page(s) of the passport, the visa (if applicable), and the admission stamp would be acceptable in most cases as an alternative to a print-out of the I-94 information from the CBP website. USCIS may request additional evidence if necessary.