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U.S. Citizenship and Immigration Services

Questions and Answers

USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Liaison Meeting

May 20, 2011

Overview

On May 20, 2011, the USCIS Field Operations Directorate hosted an engagement with AILA representatives. USCIS discussed issues related to operations and adjudications. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

Questions & Answers

Question 1: Appeal Procedures for I-130 Denials by USCIS Local Offices and USCIS Service Centers

Under 8 CFR §1003.1(b), the Board of Immigration Appeals (BIA) has appellate jurisdiction over the denial of an I-130 petition. According to Form EOIR-29, I-130 appeals must be filed with the local USCIS office or a USCIS service center having administrative control over the denied petition.

AILA members have reported extensive processing delays of I-130 appeals. In addition, inquiries made through InfoPass or to NCSC are not successful.

a. What are USCIS's procedures for processing Forms EOIR-29 filed in connection with a denied I-130?

USCIS Response: Form EOIR-29 must be filed directly at the Field Office having jurisdiction over the petition. The denial should list the field office and address where Form EOIR-29 and all required documents including the appropriate filing fee, should be filed. USCIS provides a receipt of filing. A USCIS memo, *Guidance on Uniform Denial Language Pertaining to Appeals to the Board of Immigration Appeals* (PM-602-0006) (August 26, 2010), states that all denial notices must inform the petitioner that the brief must be received no later than 30 days

from the date of filing the appeal. USCIS does not issue briefing schedules in I-130 visa petition appeals, and petitioners or their attorneys should not wait for a briefing schedule before submitting their appeal brief.

The Field Office, however, does not delay its consideration of the appeal by waiting for the brief beyond the 30-day period. If the Field Office determines that the appeal does not overcome the grounds for denial, the Field Office prepares a Record of Proceeding (ROP), which consists, among others, of the appeal and supporting documents filed by the affected party and evidence and documents relied upon by USCIS in making a decision. The Field Office then forwards the ROP to the Office of the Chief Counsel. Counsel, typically an Associate Regional Counsel located in the relevant District where the appeal was filed, reviews the ROP and prepares arguments on behalf of the government. After Counsel reviews the ROP, the packet is forwarded to the Board of Immigration Appeals (BIA).

b. If an I-130 appeal is not timely transferred to the BIA, what steps should the attorney of record take to facilitate transfer of the appeal to the BIA?

USCIS Response: Neither the INA nor relevant regulations state an explicit timeframe for the submission of the ROP to the BIA. The regulation states that the ROP "shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or expiration of the time allowed for the submission of such briefs." 8 CFR 1003.5(b) USCIS, however, endeavors to submit the briefs and ROP to the BIA as quickly as possible after receipt of the petitioner's brief.

The affected party may inquire about the status of their appeal through an INFOPASS appointment or via the Customer Service 1-800 number. Note that 8 CFR 1003.5 does not require an ROP to be submitted to the BIA within 45 days from the USCIS's receipt date for an EOIR-29. Rather, if USCIS believes a case should be reopened or reconsidered and then GRANTED, "[t]he new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs."

Question 2: Fee Collection for Form I-485 after Termination of Removal Proceedings

AILA seeks further clarification regarding fee collection for Forms I-485 after termination of removal proceedings. In the minutes from the January 7, 2010, Field Operations Directorate liaison meeting, AILA posed the following question (AILA Doc. No. 11021031):[1]

> Members report that some USCIS offices are requiring the payment of a filing fee once again where EOIR terminates proceedings so that an individual may file her adjustment application to the USCIS for adjudication. Would USCIS please confirm that when EOIR

[1] See AILA InfoNet Doc. No. 11021031, http://www.aila.org/content/default.aspx?docid=34452, or on www.USCIS.gov: http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Jan.%202011/AILA%20QandA%20%28FINAL%29%20%28jan%202011%29.pdf

terminates proceedings after the respondent has paid the adjustment of status filing fee that no additional fee is necessary?

USCIS provided the following response:

> If USCIS denies someone's Form I-485 application and places someone in proceedings, if the proceedings are terminated, the applicant will have to refile the Form I-485 application and pay the filing fee again (unless a fee waiver is granted or a fee is not required).

AILA respectfully requests that USCIS reconsider its response to this question.

When an application has been denied by USCIS and renewed before the IJ, pursuant to 8 CFR §245.2(a)(5)(ii), there is no fee event. The same application is simply considered by the court, which may complete the I-485 process and order the alien adjusted.

However, the August 20, 2010, Morton memorandum provides guidance to ICE counsel regarding cases where an application has been filed (and fee previously paid) and all parties agree that the applicant is eligible for adjustment and that proceedings should be terminated (AILA Doc. No. 10082561).[2] In these cases, the application is to be returned to USCIS for adjudication, and the applicant is not required to re-file.

No new or extra fee should be charged, since the applicant has not started a new process. The applicant is in a position similar to someone who has appealed their matter and won, and the Service can simply conclude the matter by processing the adjustment. Should the Service insist on fee payment, the purpose of the Morton memo would be frustrated--it is hard to imagine an alien or counsel who would agree to dismiss if they were then required to once again pay the substantial fee for adjudication of the same application.

USCIS Response: USCIS reaffirms its response to Question 7 in the January 7, 2011 Field Operations Directorate AILA Liaison Q&A. The applications referenced in your question do not fall within the Morton Memo's guidance because USCIS has rendered a decision on those applications.

Question 3: Communication with Field Offices

a. Members report problems communicating with the Miami Field Office on emergency matters and case follow-up. Attempts to gain access through InfoPass have proven unsuccessful, especially in matters where emergencies arise (i.e., the immediate need to reschedule an adjustment interview). Moreover, this office recently ended all attorney inquiries on pending cases. While many other field offices provide contact phone numbers and staff lists, requests for such information have been denied at this particular office. Members report a 30-day lag time prior to response, and communication is often nonresponsive or incorrect. Does USCIS encourage local offices to have liaisons in order to work out issues locally?

[2] See AILA InfoNet Doc. No. 10082561, http://www.aila.org/content/default.aspx?docid=32962

USCIS Response: Over the past several years USCIS has instituted several tools to assist customers in obtaining information about their case status. These tools include "My Case Status," the National Customer Service Center, and Infopass appointments. For general case status inquiries, all customers, including attorneys, should use these tools. Field Operations has discouraged the use of special email addresses for certain stakeholders as it provides unequal access and is fundamentally unfair particularly for applicants who file *pro se*. If you have an inquiry, we recommend that you submit your questions through established processes. If you feel that your inquiry was not responded to appropriately, you are encouraged to raise your concerns to a supervisor.

b. Where attorneys are scheduled for multiple interviews simultaneously, there appears to be no policy or procedure to communicate with the field office to work out a resolution and re-schedule appointments. When two interviews are scheduled for the same attorney on the same date, at the same time, what steps should the attorney take to notify the Field Office of the scheduling conflict? Will the field office reschedule the interviews to ensure that the attorney can appear with both clients?

USCIS Response: Please follow the instructions on the appointment notice to request that one of the interviews be rescheduled. You may also make a rescheduling request by contacting the National Customer Service Center (NCSC) at 1-800-375-5283.

c. Appointments are sometimes scheduled with only ten days notice between the mailing and notice date and the date of the interview. This leaves little time for the applicants to make any necessary arrangements to attend the interview (request time off from work, secure child care, etc.) and to adequately prepare for the interview. Is it possible to extend the period of notice for the interview to a more reasonable time?

USCIS Response: USCIS strives to process and adjudicate applications in a timely manner and we believe that customers appreciate these efforts. If an applicant cannot attend a scheduled interview, he or she may request that the interview be rescheduled. Please keep in mind, however, that a request to reschedule an interview may delay the processing of the case.

Question 4: Right to Effective Representation during Interviews of Applicants and Petitioners

a. Section 15.8 of the USCIS *Adjudicator's Field Manual* (AFM), "Role of Attorney or Representative in the Interview Process" states:

> *The attorney's role at an interview is to ensure that the subject's legal rights are protected. An attorney may advise his client(s) on points of law but he/she cannot respond to questions the interviewing officer has directed to the subject.*
>
> *Officers should not engage in personal conversations with attorneys during the course of an interview.*

Additionally, Subsection (b) of Chapter 15.4 provides that:

> An adjudicator may terminate an interview, even when all essential information has not been elicited, but when "[a]n attorney insists on responding to questions or coaching the person being interviewed."

However, 8 CFR §292.5(b) states:

> ***Right to representation***. *Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs.*

The regulation permits counsel to play a much broader role in the representation of clients during interviews than that set forth in the AFM. We respectfully request that this issue be studied with a view toward amending the AFM to better conform with the scope of the regulations.

USCIS Response: On April 23, 2011, USCIS Director Alejandro Mayorkas met with representatives from AILA and the American Immigration Council (AIC) to discuss this issue. The Agency respects the attorney-client relationship and asks that attorneys and accredited representatives likewise respect USCIS staff in the context of benefit and other interviews/ interactions. Attorneys or accredited representatives may voice objections to questions, point out errors on points of law, and provide a closing statement on behalf of their client. They may not, however, answer questions for their client unless requested to do so by the adjudicator, or impede proper questioning by the adjudicator. Where a private attorney or accredited representative believes that an interview is being conducted improperly or in disregard of the law, he or she may bring their concern to the attention of a supervisor as directed locally. Adjudicators are likewise responsible for reporting through proper supervisory channels behavior by an attorney or accredited representative that they believe is unethical or in violation of the law.

Future guidance will address how ISOs should report instances involving perceived inappropriate conduct by attorneys and/or accredited representatives and also the reverse (i.e., how attorneys and/or accredited representatives should report perceived inappropriate behavior by ISOs).

b. **Role of the Attorney**. We have received reports that some field offices restrict the involvement of the attorney during the interview process. The USCIS Milwaukee Field Office has stated that it follows AFM §15.8, which explains that the attorney's role at the interview is limited to advising his or her clients on points of law, and that the attorney may not respond to questions the interviewing officer has asked the applicant. The office has stated that after the interview, the attorney may follow-up with any concerns regarding the interview and interview questions, or may submit additional information in response to a Notice of Intent to Deny. While we understand the attorney may not answer any questions on

behalf of the applicant, there are often times where it is not only appropriate, but helpful to the examiner for an attorney to help clarify a point of confusion, provide prepared documents on a legal issue, or explain a complicated procedural issue in the applicant's immigration history that the applicant might not fully understand. What guidance, if any, in addition to the AFM, has been provided to USCIS examiners regarding the role of the attorney in the interview process?

USCIS Response: USCIS has spent a considerable amount of time training the ISOs on interview techniques. This training is provided at the field offices and at the ISO Basic training and includes information on the role of the attorney or representative in the interview. Also, as discussed at the meeting with AILA, AIC, and USCIS in April 2011, we welcome suggested language from AILA to potentially incorporate into any guidance USCIS creates regarding this topic.

c. **Attorney Seating**. We have been informed that during interview for immigration benefits, attorneys are sometimes instructed to sit in a corner of the room, behind or otherwise apart from the applicant. Examiners have remarked that this rule is to prevent attorneys from participating in the interview. Such a rule conflicts with the right to representation as provided under 8 CFR §292.5(b). Would Field Operations send clear guidance to the field offices stating that attorneys have a right to attend and represent their clients at interviews for immigration benefits, and should be permitted to sit next to their clients, or make other comparable arrangements if space does not easily permit, that would allow the attorney to properly observe the interview and provide appropriate legal assistance?

USCIS Response: Field Operations provided guidance to its offices regarding seating of attorneys during interviews in May 2010 and again in April 2011.

It is critical that USCIS respect the integrity of the attorney/client relationship. Attorneys and/or accredited representatives should, barring safety or security concerns, be permitted to sit next to their clients during interviews. In terms of safety and security, in directing seating during benefit interviews, adjudicators should ensure that:

- Officers have a full view of everyone in the room,
- No one in the room, other than the officer, is seated in view of a government computer/monitor screen, and
- Egress is not blocked for any of those present in the interview room.

Please understand that some interview rooms are not large enough to accommodate the applicant(s) and attorney all sitting in the same row. In these situations, an attorney may be asked to sit behind his or her client.

Question 5: Post-Interview Follow-up Notices Not Sent to Attorneys

Members have reported instances where USCIS concluded an interview with the G-28 attorney present, and USCIS has later contacted the applicant without notifying the attorney, to request

that the applicant return to USCIS for a second interview, to sign a sworn statement, or to request more evidence. Absent an attorney's written waiver of appearance or withdrawal of representation, what is the protocol for a field office to contact a represented individual without counsel present?

USCIS Response: ISOs should contact the attorney or representative of record; however, on occasion this does not happen. USCIS believes that these are isolated incidents and would welcome examples. We have asked field leadership to remind ISOs that represented applicants should not be contacted without first notifying the attorney and any notices or correspondence should also be sent to the attorney.

Question 6: Adjudications of Form I-751

At the January 2011 Field Operations Directorate Liaison Meeting, AILA asked if, in the wake of a series of reports of harsh treatment of petitioner interviewees under the I-751 hardship and abuse category, USCIS would establish training of officers interviewing these cases similar to that of the VAWA adjudicators at the Vermont Service Center.

While we understand that unprofessional conduct by an adjudicator may also be reported to a supervisor, we believe that an officer who adjudicates cases under this category is in a similar situation to those adjudicating I-360 petitions and should, therefore, have a heightened level of training in the effects of abuse which is afforded to the VAWA adjudicators. Could USCIS designate specific officers with training in that area to adjudicate these petitions?

USCIS Response: It is not always feasible nor is it efficient, particularly in smaller offices, to designate officers for specific types of cases. USCIS is working with the training division to develop a training module focusing on interviewing techniques for victims of abuse or trauma.

Question 7: Defense of Marriage Act Cases

Same-sex marriage is legal in many jurisdictions within the United States, and the Administration recently announced it will no longer defend the constitutionality of section 3 of the Defense of Marriage Act (DOMA) (AILA Doc. No. 11032830).[3]

a. After stating that USCIS would hold I-130 same-sex marriage cases in abeyance while awaiting judicial review, USCIS reversed its position and announced that these cases will move forward. What instructions have field offices received, or will they receive, on these cases, and in particular, how will USCIS adjudicate these I-130s in districts where federal courts have struck down DOMA?

USCIS Response: USCIS briefly held cases to await guidance; USCIS's actions regarding DOMA were misconstrued in the media. USCIS stated on March 28, 2011, "USCIS has issued

[3] See AILA Doc. No. 11032830, http://www.aila.org/content/default.aspx?docid=34956

guidance to the field asking that related cases be held in abeyance while awaiting final guidance related to distinct legal issues…USCIS has not implemented any change in policy and intends to follow the President's directive to continue enforcing the law." Cases were held for a few days while awaiting guidance, not judicial review, and because of the very short period between the time that some cases were held and when the guidance was issued, the processing of most cases was unaffected.

Field offices have been instructed to proceed with adjudicating these cases. Pursuant to Attorney General Eric Holder's announcement on February 23, 2011, the federal government, including USCIS, must still follow Section 3 of the Defense of Marriage Act and same-sex marriage cases will be adjudicated in accordance with current applicable laws.

USCIS is aware that on April 26, 2011, Attorney General Eric Holder vacated the decision of the Board of Immigration Appeals (BIA) in *Matter of Paul Wilson Dorman* and remanded it for the BIA to make specific findings with regard to the respondent's eligibility for cancellation of removal. USCIS will review its policy, if necessary, when the BIA renders a new decision in this case.

b. If an applicant is legally married to a same-sex partner and the marriage is recognized in that state or district, how should the applicant answer questions on immigration forms regarding their marital status?

USCIS Response: This question is currently under review.

c. Would the service consider hardship to a same-sex spouse as a factor for waivers of inadmissibility?

USCIS Response: A same-sex partner is not a qualifying relative under the law and therefore cannot be considered in reviewing a request for a hardship waiver. *See* INA §212(a)(9)(B)(v).

Question 8: Address Change Instructions for Individuals Subject to Special Registration and for F, J, and M Students

New language has been added to the USCIS forms page regarding the new filing location for the Change of Address Form.[4] The language indicates that Form AR-11SR cannot be filed online and must be mailed to USCIS. We thank you for the update and clarification as this will help individuals subject to special registration to comply with the change of address requirements. However, please note that at this time, the USCIS online address submission page contains no

[4] See www.USCIS.gov at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1bdd49c62ed6e210VgnVCM100000082ca60aRCRD&vgnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD and http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=427647a55773d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD

similar language warning individuals subject to special registration that they cannot submit the AR-11SR online.[5]

a. To ensure consistency in USCIS communications and compliance with change of address requirements, we ask that USCIS update the USCIS online address submission page on its website instructing individuals subject to special registration to submit their change of address forms via mail, and that they cannot submit the form online.

USCIS Response: USCIS will update the language on the Change of Address online page.

b. In addition, would USCIS also consider adding to all address change instructions and related communications that F, J, and M non-immigrants are not required to submit the AR-11 and can instead comply with the address change requirement by providing a change of address to their DSO/RO, who will then update SEVIS accordingly?

USCIS Response: We will make a note on the Change of Address information page[6] that F, M, and J nonimmigrants do not need to submit an AR-11 if they have notified their DSO or RO of the change and SEVIS has been updated accordingly. However, this information will not be included on the Change of Address online system homepage as students and exchange visitors may need to use this system to change their address on pending applications (e.g. Form I-765 for OPT).

c. Please also advise as to whether an F, J, or M nonimmigrant, who is subject to special registration and provides a change of address/school/employment to the RO/DSO has complied with the change of address requirements, or whether they are required to do a second paper update via the AR-11SR.

USCIS Response: An F, M, or J nonimmigrant special registrant who has notified his or her DSO or RO of a change of address within ten days of the change has satisfied the notification requirement and does not need to also submit an AR-11SR. *See* 8 CFR 264.1(f)(5).

Question 9: NTA Issuance for Adjustment Denials Based on Failure to Timely File for NSEERS

Although this question was raised in our January 2011 meeting, the problem persists at USCIS Field Offices (AILA Doc. No. 11021031).[7] We have received reports that requests for NTA issuance after an NSEERS-based adjustment denial are ignored, even after numerous requests. This leaves individuals without recourse for review of the denial before an immigration judge. Moreover, such denials are not appealable to the AAO. This scenario forces applicants to reapply for adjustment of status, which results in expenditure of significant administrative costs and is a poor use of resources. During an October 21, 2010, meeting with the Chicago District Office, it

[5] See www.USCIS.gov at: https://egov.uscis.gov/crisgwi/go?action=coa.Terms

[6] http://www.uscis.gov/addresschange

[7] See AILA Doc. No. 11021031, Question 10, http://www.aila.org/content/default.aspx?docid=34452

was stated that issuance of NTAs is a matter of discretion, and the field office reserves the right to issue NTAs as they see fit (AILA Doc. No. 10111550).[8] What guidelines are in place to ensure field offices will promptly issue NTAs under this scenario?

USCIS Response: Field Offices are not required to issue an NTA in this above scenario. With the exceptions of cases that require issuance of an NTA by law, regulation, or policy, Field Offices may exercise discretion with regard to the issuance of NTAs. Offices weigh the priorities and workloads of the office when considering whether to issue an NTA.

Question 10: Adjustment of Status for Alien Immediate Relatives Admitted Under the Visa Waiver Program

USCIS confirmed in liaison minutes from its April 7, 2011, meeting with AILA that while the agency is drafting final guidance, including an update to the Adjudicator's Field Manual (AFM), on the policy regarding the procedures for adjustment of status for Visa Waiver Program (VWP) applicants, currently all field offices have been instructed to adjudicate I-485 applications filed by VWP overstays (AILA Doc. No. 11040735).[9] In addition, AILA has received reports that at least one field office is still denying I-485 applications filed by VWP overstays solely based on the status of the applicant.

a. What is the timeline for the issuance of the final guidance referred to above, as well as the update to the AFM?

USCIS Response: This guidance and AFM update is still undergoing internal review and we are not able to provide a timeframe for completion at this time.

b. If a field office is non-compliant with HQ's directive, how should AILA and/or other stakeholders alert USCIS of the problem?

USCIS Response: USCIS has drafted guidance on procedures for adjusting applicants who entered the United States under the VWP. This guidance is going through the internal review process and will be released upon completion of this review and approval from the USCIS Director. If an office is not compliant with the guidance, please raise this with a supervisor at the office or the field office director.

[8] See AILA Doc. No. 10111550, Question 6, http://www.aila.org/content/default.aspx?docid=33617

[9] See AILA Doc. No. 11040735, Question 4, http://www.aila.org/content/default.aspx?docid=35068