Specialty Occupation as Described in VSC H-1B Guide

"Specialty Occupation" Criteria

8 CFR 214.2(h)(4)(iii)(A) requires for H-1B petitions involving a "specialty occupation" that the position meet one of the following criteria:

A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that only an individual with a degree can perform it;

The employer normally requires a degree or its equivalent for the position; OR

The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

NOTE: It is not sufficient that the position merely requires attainment of a bachelor's degree. The degree must be in a "specific specialty" and must be required so that the employee may apply a "body of highly specialized knowledge" to the occupation. The key factor is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the INA. [Section 214(i)(1) of the INA]

Industry-wide Standards

In addition to the above-listed criteria, USCIS will look to industry-wide standards to determine whether a position is a specialty occupation, and whether a bachelor's degree in a specific specialty is normally the minimum prerequisite for the position.

In certain professions, it will be very clear that this is the case. For example, a bachelor's degree in Accounting is normally a minimum prerequisite for a Certified Public Accountant position with an accounting firm. In a case where a bachelor's degree is less directly related to the occupation in question, it would be beneficial for the petitioner to list:

Relevant course work of the beneficiary in order to further establish the direct relevance of the degree to the position, and

Show that the position is indeed professional in nature.

Job Duties

While both the job and the beneficiary must meet the above stated requirements, the mere fact that the beneficiary meets the requirements of the position does not necessarily mean that the duties to be performed require an individual of that caliber.

The petitioner must provide a detailed description of the job duties to be performed.

Occupational Outlook Handbook

If the detailed description does not persuade you that the job offered meets the requirements of a "specialty occupation", useful guidance may be found in the Reference Library or on-line. A good reference is the Department of Labor's Occupational Outlook Handbook (OOH). The OOH outlines the duties normally performed and basic educational and experience requirements.

- The OOH may be accessed through the Internet at the following location: http://www.bls.gov/oco/home.htm

- The OOH may also be accessed from the VSC Adjudications ECN page under the Reference Link.

When using the OOH, make sure the job title researched accurately reflects the job duties to be performed. Look at each case individually; do not get in the habit of classifying "job titles."

POSITION REQUIREMENTS from VSC H-1B Training

Job Criteria 8 CFR 214.2(h)(4)(iii)(A):

1. Bachelor degree is normally minimum requirement;
2. Degree requirement is common to industry or position so complex/unique that it requires the associated degree;
3. Employer normally requires; OR
4. Nature of employer's duties so specialized and complex.
5. It is not sufficient that the position merely requires attainment of a bachelor's degree.
   The degree must be in a "specific specialty" and must require the theoretical and practical application of a body of highly specialized knowledge as minimum for entry into the occupation.
6. The petitioner must provide a detailed description of the job duties to be performed.
7. You may request a description in non-technical terms.
8. You should consider all information provided when making your decision.

Determining Specialty Occupation

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

- Refer to the Occupational Outlook Handbook for a
- description of the typical duties and the education
- and experience requirements associated with the
- position.

2) The degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can be performed only by an individual with a degree

- Common evidence may include job postings for
- similar positions within other companies, expert
- opinion letters or evidence from the petitioner to
- explain how their position is unique or complex.

3) The employer normally requires a degree or its equivalent for the position.

- Sufficient evidence could include copies of
- payroll records and degrees of all
- employees that hold/have held the position,
- or other company records.

4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

- Sufficient evidence may include expert
- opinion letters or evidence from the petitioner to
- explain how their position is unique or complex.

Sections of the VSC H-1B Guide: Foreign Degree Equivalency Assessing Education/Specialized Training/Progressively Responsible Experience

Foreign Degree Equivalency

Because many beneficiaries are educated outside the United States, you must ascertain whether the beneficiary's foreign education is equivalent to a U.S. degree. Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a U.S. bachelor's degree. Therefore, professional education evaluations are often used to determine the level of education attained by the beneficiary.

Education Only Evaluations

An advisory evaluation of the beneficiary's credentials may be necessary to determine the level and major field of educational attainment, in terms of equivalent education in the United States.

USCIS will only accept evaluations from credentialing companies when they are evaluating education only. Normally, evaluators from these companies do not have the authority to grant college-level credit in the specialty at an accredited college or university, which has a program for granting such credit based on an individual's training and/or work experience pursuant to 8 CFR § 214.2(h)(4)(iii)(D)(1). The scope of an evaluation from a credentialing company is limited to evaluating education only, not training or work experience.

NOTE: USCIS does not endorse or recommend evaluators. Many private individuals, organizations and educational institutions provide this service.

Education Evaluation Requirements

An acceptable evaluation of formal education should:

- Consider formal education only, not practical experience,
- State if the collegiate training was post-secondary education, i.e., whether the applicant completed the U.S. equivalent of high school before entering college,
- Provide a detailed explanation of the material evaluated rather than a simple conclusive statement, and
- Briefly state the qualifications and experience of the evaluator providing the opinion.

Formula

Refer to the table below for the general formula to apply in determining education equivalence:

To be equivalent to the following education:	The beneficiary must have the following experience:
Any college education credit	Specialized training or work experience must be in a professional position
one year college credit	3 years
a bachelor's degree	12 years
master's degree	bachelor's + 5 years
PhD	no substitute

IMPORTANT: Ordinary experience alone cannot be equated with a college degree. Experience, which is substituted for education, must include the theoretical and practical application of specialized knowledge required at the professional level of the occupation. It cannot be concluded that any on-the-job experience related to a professional activity may be substituted for academic education. [*See Matter of Sea, Inc.*, 19 I&N Dec. 817]

Evaluator Requirements for Combination Evaluation of Education and Experience

USCIS will only accept evaluations of a combination of education, training and/or work experience if the evaluator meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1) in that he or she has the authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

If the evaluator of a credentialing company also meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1), then USCIS would find the evaluation acceptable for consideration.

NOTE: Evaluations are advisory in nature. USCIS may still disagree with the finding.

Criteria for Professional Evaluation of Education and Experience

A professional evaluation of education and experience must meet certain criteria to be useful to USCIS. An evaluation should consider that:

1. The beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty.
2. The claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty.
3. The beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

Recognition of expertise in the specialty occupation by at least two recognized authorities in **the same specialty occupation**,
Membership in a recognized foreign or United States association or society in the specialty occupation,
Published material by or about the alien in professional publications, trade journals, or major newspapers,
Licensure or registration to practice the specialty occupation in a foreign country, or
Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[8 CFR 214.2(h)(4)(iii)(D)(5)]

Officer's Determination

Ultimately, the officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired:

Through a combination of education, specialized training, and/or work experience in areas related to the specialty, and
The alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

From:
Sent: Friday, June 14, 2013 5:30 PM
To:
Subject: RE: H1B Evaluator question

The regulatory requirement at 8 CFR 214.2(h)(4)(iii)(D)(1) for an evaluation from someone who has the authority to grant college level credit only applies in cases where the beneficiary is trying to qualify for the offered job through a combination of education, vocational training and/or experience. An evaluation of foreign education only may be made by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials pursuant to 8 CFR 214.2(h)(4)(iii)(D)(3).

With that being said, if we have reason to question the evaluation service regarding its qualifications to make the evaluation, we are not precluded from asking. In fact, 8 CFR 214.2(h)(4)(ii) states that an opinion from a recognized authority must state:
(1) The writer's qualifications as an expert;
(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
(3) How the conclusions were reached; and
(4) The basis for the conclusions supported by copies or citations of any research material used.

Commonly Seen EE Scenarios 12/17/13

SCENARIO (Each scenario is inclusive of only the documentation listed.)	RFE	COMMENTS
RTC Established for the Validity Period Requested		
The record contains sufficient evidence to establish RTC such as the following: beneficiary had been working overseas for an entity of the petitioner, there is an employment contract between the petitioner and the beneficiary showing a sign-on bonus for relocating to the United States, relocation expenses, medical, dental, and 401K benefits. There is no end client validation. There is no history of fraud or fraud indicators. Added 09/05/13	N/A	The totality of evidence establishes RTC. Approve for the time requested. Added 09/05/13. Revised 12/16/13.
There is evidence of continued employment with the petitioner, evidence of medical, dental, and 401K benefits to establish RTC. There is also an MSA that is more than five years old and is not supported by a recent end client letter or work order. For example, the MSA is six years old and is open-ended, or the MSA is expired, and there is no work order or end client letter to cover the dates requested. There is no history of fraud or fraud indicators. Revised 09/05/13 and 12/16/13		
There is evidence of continued employment with the petitioner, evidence of medical, dental, and 401K benefits to establish RTC. There is an MSA that refers to a SOW, but no SOW is in the record. There is no history of fraud or fraud indicators. Added 12/16/13		
The record contains sufficient evidence to establish RTC and the end client documentation, such as an MSA, is open ended. There is no history of fraud or fraud indicators. Revised 07/10/13 and 12/16/13		
RTC Established for a Limited Validity Period		
The record contains sufficient evidence to establish RTC. There is an end client letter or other end client documentation specifying the period of work, even though the MSA may appear open ended or is one that will expire during the dates specified in the end client letter. Revised 07/10/13 and 12/16/13	N/A	Approve for the amount of time RTC has been established or 1 year, whichever is greater (as long as otherwise approvable).
RTC Not Established		
The record contains a heavily redacted contract. The scope, terms, and validity are redacted. No other evidence of right to control provided. Revised 07/10/13 and 12/16/13	2100, 2110, modified 2103 or 2104	RTC not established. Send RFE addressing that RTC is not established for the validity period requested because of the redacted information.

Commonly Seen EE Scenarios 12/17/13

There is an MSA that is more than five years old and is not supported by a recent end client letter or work order. For example, an open-ended MSA is six years old, or the MSA is expired, and there is no work order or end client letter to cover the dates requested. No other evidence of right to control is provided. Added 12/16/13	2100, 2110, and modify 2103 or 2104.	RTC not established. Send RFE. Identify the documents provided, the dates issued, and explain that the MSA is expired or that the MSA was executed more than 5 years ago and it is not evident that the agreement is still valid.
The petition and LCA indicate the address where the beneficiary will be placed but there is no other info about the employer at that address. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2101	RTC not established. 2101 address the fact an address has been provided but no other evidence to indicate who the employer at that address is.
The petition and LCA indicate the beneficiary will be placed directly at an end client but no other info about employment with the end client. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2102	RTC not established. 2102 addresses the name of the end client provided and that no evidence was submitted to establish RTC.
The petition, LCA and support docs indicate the beneficiary will be placed at a named end client through one or more vendors. The record contains no info from end client. No evidence of right to control is provided. Revised 12/16/13	2100, 2110 insert 2104	RTC not established. 2104 address the name of end client, acknowledges the vendor and indicates there is no evidence of RTC with end client.
Other Scenarios		
Petitioner specifically indicates beneficiary will work on an in-house project but no evidence submitted to document the project, or the description of the work/project is not persuasive compared to information about the company. Note in-house projects do not mean an automatic RFE. Revised 10/23/13 and 12/16/13.	2100, 2135	2135 requests evidence to establish sufficient specialty occupation work for the requested period. This should be applied to IT/IT and SOF filings. N/A to large H1B dependent companies.
The petition and LCA indicate the beneficiary will work at the petitioner's location. The nature of the petitioner's business is consulting and providing clients with their IT needs. The beneficiary's duties are vague and mention "user" or "client" needs/requirements.	2100, 2109, 2135, 2110	2109 should be modified to indicate the itinerary is unclear based on nature of business and beneficiary's duties; 2135 add that the petition and LCA indicate the beneficiary will work in house; 2110 add lead in to state based on nature of business and beneficiary duties it appears the beneficiary may be placed off site.
Self-Petitioner	Send to EIR Group	Send to the EIR Group. 2118 is the self-petitioner RFE. Officers should also be sure to address specialty occupation, if applicable.
General Information regarding additional standards used with RTC		
**For same/same filings	2119, 2107	2119 to address the fact it is same/same but additional evidence is needed; 2107 for maintenance of prior EE relationship when applicable.

	2101	Insert for 2110 when an address or city and state has been provided but no other information regarding the employer at that address.
	2102	Insert for 2110 when the petitioner has indicated a direct end client, but provided no documentation to establish RTC with the end client
	2103	Insert for 2110 when the petitioner has submitted documentation from the end client, but the documentation does not establish RTC.
	2104	Insert for 2110 when the petitioner has indicated a vendor(s) and the end client, but provided no documentation to establish RTC with the end client

Sections of the VSC H-1B Guide on Validity Periods

Cap Exempt Concurrent Employment

USCIS does not require that an alien who is cap-exempt be counted towards the cap if they accept concurrent employment with a non-exempt employer. [Section 214(g)(6) of the INA]

As soon as the alien is no longer employed by the cap-exempt employer, that alien will then be subject to the cap.

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H-1B alien beneficiary is still employed in a cap-exempt position.

The validity dates on the concurrent employment petition may be granted for the time requested and do not need to be limited to the dates of the cap-exempt employment.

[*See* Neufeld Memo of May 30, 2008, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277*]

Admission as a "new" H1B alien or readmission for remainder of 6-year period.

Refer to the table below to determine if the alien is seeking admission as a "new" H1B alien or readmission for remainder of the 6-year period.

If the alien is seeking...	**And the petitioner...**	**Then the alien is eligible for...**
Admission as a "new" H1B alien, **NOTE:** The alien is subject to the H-1B	• DID NOT complete parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement and • Provided documentation to establish that the alien has been, or will be, outside the United States for more than one year as of the requested start	The full six year validity period.

CAP unless he or she otherwise qualifies for a cap exemption.	date… NOTE: Although INA § 214(g)(7) states that the alien would need to be eligible at the time of filing, guidance received from OCC on 3/21/13 indicates that the alien should be considered to be eligible at the time of filing if he will have been outside the United States for more than one year as of the requested start date. This interpretation accounts for the fact that petitions can be, and for the H-1B CAP usually must be, filed six months before the start date.	
Readmission for the remainder of the initial 6-year period, **NOTE**: The alien is not subject to the H-1B CAP unless his or her previous entry was H-1B Cap exempt.	• Checked parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement, • Indicated in a cover letter that the beneficiary is electing the "remainder" option, and • Submitted evidence to show the alien previously held H-1B status…	The time he or she has not used in the previously granted H-1B status.

Validity Period and the LCA

The validity period of the petition may be approved as follows: [8 CFR 214.2(h)(9)(iii) and Section 214(g)(8)(C) of the INA]

Classification	Validity Limitation
H-1B1	• Up to 3 years, but • May not exceed validity period endorsed by DOL on LCA.
H-1B2	• Up to 5 years. • **NO** LCA required.
H-1B3	• Up to 3 years. • May not exceed validity period endorsed by DOL on LCA.
HSC	• Up to 1 year, but • May not exceed validity period endorsed by DOL on LCA.

NOTE: It is the policy of VSC to give a 3-year validity period as 3 years "minus 1 day," e.g., 10/1/09 to 9/30/12, even if the LCA is certified from 10/1/09 to 10/01/12. According to *timeanddate.com*, if we gave from 10/1/09 to 10/1/12 for validity dates, this would calculate to 3 years plus 1 day, which is more than the allowable 3 years. The same "minus 1 day" practice should be applied to 1-year and 5-year validity periods.

Determining the Validity Period Right to Control

The validity period may be limited to the amount of time for which right to control is established, or one year, whichever is greater. Refer to the table below for guidance when certain conditions are present.

If right to control...	Then ...
Has only been established for a portion of the requested validity period, and additional evidence is required to establish other eligibility criteria,	• RFE for other eligibility criteria, and • Address right to control full requested validity period.
Has only been established for a portion of the requested validity period, and all other eligibility criteria has been established,	• Approve with a limited validity period.
Is established with an open ended contract and/or end-user,	• Approve for full requested validity period.

Expiring Licenses

Full licenses, to include wallet size or web verified, may include an expiration date. The license must be valid at the time of filing.

In many occupations an alien's license, though not a limited license, will not be valid for the entire length of time requested by the petitioner. Licensed

professionals must renew their full license every few years. The validity dates of an approved petition should not be limited simply because the alien's license will expire prior to the requested ending employment date.

[*See* Brown Memo *Validity Period of I-129 Petition* 7/10/95]

Temporary Licenses One-Year Limit

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H classification may be granted.

Where licensure is required in an occupation, the petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer. [8 CFR 214.2(h)(4)(v)(E)]

IMPORTANT: If the file does not contain a temporary or permanent license and the state does not tell you that the person is eligible to practice immediately in that state without a temporary or permanent license, then do **NOT** approve the petition.

No License Required if Working Under Supervision of Licensed Professional

If the alien can perform the duties of the proffered position without licensure because he or she will work under the supervision of a licensed professional as permitted by State law, then the validity period of the petition will not be limited despite the lack of a permanent license.

Example 1.

A Medical Resident working under the supervision of a licensed physician in New York State is not required to have a license and thus, the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 2.

Medical Residents in Connecticut do not need a license when working under the supervision of a licensed physician in a Connecticut hospital. The hospital must send a list of those who will be obtaining their residency with the hospital to the Connecticut licensing authority. Although the licensing authority issues a permit for all of the residents on the list, an individual permit is not issued to the resident. While the permit list is valid for one year, it is automatically renewed when the hospital requires an extension for the residents to obtain subsequent year(s) of training. Thus, the permit that is required for residents to work in Connecticut hospitals is not a license and the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 3.

A Civil Engineer hired to design the construction of a public building (not to be confused with a Software Engineer) generally requires a license; however,

if the petitioner submits evidence to demonstrate the beneficiary will work under the supervision of a licensed engineer, then no license is required.

H-1B Process for LPRs

Refer to the table below to determine the action to take on an H-1B petition when the beneficiary adjusts to lawful permanent resident (LPR) status.

<table>
<tr><th>If the beneficiary...</th><th>Then...</th></tr>
<tr><td>Adjusts to LPR status after the requested start date on the H-1B petition,</td><td>Grant H-1B validity up to date of adjustment.</td></tr>
<tr><td>Adjusted prior to the requested start date, and
Seeks consular notification,</td><td>Adjudicate on merit. Notate the KCC copy to indicate the alien is an LPR.</td></tr>
<tr><td>Adjusted prior to requested start date, and
Seeks EOS/COS,</td><td>Send an RFE questioning the alien's intent to be a nonimmigrant or immigrant.
<table>
<tr><th>If the response indicates...</th><th>Then...</th></tr>
<tr><td>Intent to abandon LPR status,</td><td>Change the petition to consular notification, and
Indicate on the KCC copy that the alien will abandon LPR status at the consulate.</td></tr>
<tr><td>No intention to abandon LPR status,</td><td>Deny the EOS portion of the petition.</td></tr>
</table>
</td></tr>
</table>

Validity Periods (AC21)

Requested extensions made on validity periods previously granted beyond the 6-year period will be honored so long as they meet the requirements under AC21.

Since any time spent outside the United States while an alien holds H-1B status can be recaptured, an alien's H-1B period is not confined within a continuous six-year timeframe.

Validity Dates (AC21)

Refer to the table below to determine how long to grant the approval for.

If the case is a…	Then grant approval for…
First request for Section 106 of AC21 (i.e., a 7th year extension),	1 year, plus Any amount of time remaining in the initial 6-year period, not to exceed a maximum validity period of 3 years.
Second or subsequent request for Section 106 of AC21 (e.g., an 8th year extension),	A maximum of 1 year.

Starting and Ending Dates

Use the below table to determine the starting and ending validity dates of the H-1B petition. Note: if the requested validity dates have expired, then refer to the section on Expired Dates on page 13.

If...	Then starting validity date should be...	And ending validity date should be...
New employment, or Initial H-1B1, H-1B2, or H-1B3 request (Consular notification),	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.[1]
Change of Status,	Date of approval, Start Date Requested, or the beginning ETA 9035 or ETA 750 period, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.
Change of Employer,	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.[2]
Extension of same employer,	Day after expiration of previously approved H-1B for that company, or date requested, whichever is earlier, provided LCA supports the date.[4]	Date requested on petition or expiration on LCA, whichever is earlier.[2]
Amended petitions where there was a USCIS error with the original notice,	Same start date as initially approved petition.[3]	Same expiration date as initially approved petition.[3]
Amended petitions where there has been a change in the employment conditions,	Date of approval, date requested, or LCA "from" date, whichever is later.[4]	Same expiration date as initially approved petition, if no additional time is requested.
		Date requested on petition or expiration on LCA, whichever is earlier[2], if additional time is requested
New concurrent employment,	Date of approval or date requested, whichever is later, provided LCA supports the date.	Date requested on petition or expiration date on LCA, whichever is earlier.[2]
Same employer, Change in employment conditions,	Date of approval, date requested, or LCA "from" date, whichever is later.[4]	Date requested on petition or expiration date on LCA, whichever is earlier.[2]

[1] Ensure that beneficiary has not been granted H-1B status within previous 12 months. If so, do not exceed a total of 6 years of H-1B status unless eligible for exemption.

[2] Ensure that beneficiary is not granted more than a total of 6 years in H or L status unless HSC or eligible for exemption.

[3] Does not apply if amendment is due to incorrect validity dates.

[4] If the beneficiary's status has expired or will expire prior to the date that you selected as the "from" date, AND the petition was filed by the same employer, then backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.

Jowett, Haley L

From: Oppenheim, Jennifer R
Sent: Wednesday, February 25, 2015 2:17 PM
To: Oppenheim, Jennifer R
Subject: FW: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Attachments: USCIS Issue Paper - H-1B Visa Program (7-17-2014).docx

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From: Cummings, Kevin J
Sent: Tuesday, November 25, 2014 10:49 AM
To: Tynan, Natalie S; Doumani, Stephanie M
Cc: Levine, Laurence D; Parascandola, Ciro A; Viger, Steven W; Angustia, Kathleen M; Oppenheim, Jennifer R
Subject: RE: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!

Thanks!

--Kevin

Kevin J. Cummings
Chief, Business & Foreign Workers Division
USCIS Office of Policy and Strategy
Department of Homeland Security

From: Tynan, Natalie S
Sent: Tuesday, November 25, 2014 10:21 AM
To: Doumani, Stephanie M
Cc: Levine, Laurence D; Cummings, Kevin J
Subject: FW: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Stephanie – OP&S has comments on the H-1B paper. OLA wants consolidated comments, so I am passing ours along to you since you are lead on the paper. Please let us know if you have any comments.

Thank you,
Natalie

From: Cummings, Kevin J
Sent: Tuesday, November 25, 2014 7:01 AM
To: Tynan, Natalie S; Prelogar, Brandon B; Hamilton, Cristina A; Parascandola, Ciro A
Cc: Levine, Laurence D
Subject: RE: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Thanks Natalie. A couple of suggested edits in redline in the two attachments.

--Kevin

Kevin J. Cummings
Chief, Business & Foreign Workers Division
USCIS Office of Policy and Strategy
Department of Homeland Security

From: Tintary, Ruth E
Sent: Monday, November 24, 2014 4:17 PM
To: Correa, Soraya; Meckley, Tammy M; McMillan, Howard W; Lotspeich, Katherine J; Henry, Laura R; Renaud, Daniel M; Monica, Donald J; Redman, Kathy A; Colucci, Nicholas V; Harrison, Julia L; Kendall, Sarah M; Mooney, Matthew C; Zellen, Lorie A; Emrich, Matthew D; FDNSExecSec; Neufeld, Donald W; Velarde, Barbara Q; Arroyo, Susan K; Rigdon, Jerry L; Langlois, Joseph E; Higgins, Jennifer B; Lafferty, John L; Kim, Ted H; Stone, Mary M; Schwartz, Claudia R; Perry-Elby, Diana D; Strack, Barbara L; Valverde, Michael; Chiorazzi, Anne; Tomlyanovich, William J (Bill); Busch, Philip B; Jaddou, Ur M; Carpenter, Dea D; Cox, Rachel M; Hinds, Ian G; OCC-Clearance; Renaud, Tracy L; Vanison, Denise; Levine, Laurence D; Tynan, Natalie S; Stanley, Kathleen M; Patterson, Katherine R; Rhew, Perry J; Garner, David C; McConnell, James E; Moore, Joseph D; Reilly, Richard M; Roman-Riefkohl, Guillermo; Smith, Alice J; Ooi, Maura M; Cantor, Esther R
Cc: Rodriguez, Leon; Scialabba, Lori L; Choi, Juliet K; McCament, James W; Atkinson, Ronald A; Wooden, Janeen R; Powell, Paul; Rodriguez, Miguel E; Brown, Katherine H; Francis, Gregory I; Dalal, Ankur P (Andy); Walters, Jessica S; Torres, Marina A; Amaya, John G; Torres, Marina A; Guttentag, Lucas; Inouye, Shinichi (Shin); Nino, Teresa; Beppu, Jennifer M; Irazabal, Luz F
Subject: URGENT: S1's Upcoming Hearings - Updates to Issue Paper/Q&A Tasking - DUE Tomorrow, 11/25 at 3pm!
Importance: High

Colleagues,

The House Homeland Security Committee has announced a December 2, 9:00 a.m. Hearing on "Open Border: the Impact of Presidential Amnesty on Border Security". Secretary Johnson has been invited to testify "on the federal response and preparation for the change (President's executive action) in policy". Additionally, the House Judiciary Committee has also called for a hearing on December 2, but has not specified a time or the DHS witness. (There is a possibility that D1 could be called as a witness however).

Per the Director's Office, we are proactively updating the USCIS Issue Papers (attached), in preparation. Note that the attached issue papers were either updated at the end of August for an S1 hearing or in July for D1's oversight hearing.

As you are updating these papers please keep in mind that these IPs should reflect the President's Executive Action.

Please know that we continue to follow the DHS guidance that: ***"ALL issues papers be no more than 2 pages, followed separately by 2-5 Q&As. The issue paper should be brief, clear and "to the point" – using bullets when possible. The paper should start with a concise set of talking points followed by any relevant background. These documents should be marked FOUO and should be titled using the titles given below in the tasking."***

I apologize for the incredibly tight turnaround, but please send your updated (and note who in OCC re-cleared it) issue paper to ME no later than 3:00pm, TOMORROW, Tuesday, November 25th. Given the upcoming holiday, please adhere to the due date and time because there are additional levels of clearances and interagency coordination required by DHS.

2

We ask the appropriate component to provide an updated Issue Paper on:

- **Anti-Fraud Efforts (FDNS)** ***(should include the Asylum Fraud paper and be tasked to FDNS)***
- **Asylum Fraud (~~RAIO/Asylum Division~~)** ***(should be merged with overall Anti-Fraud Efforts paper above)***
- **Credible Fear and Expedite Removal (RAIO/Asylum Division)**
- **EA Fact Sheets and Memo will substitute the CIR IP (OLA)**
- **Deferred Action for Childhood Arrivals-DACA (DACA Working Group/SCOPs)**
- **EB-5 investor visa program (IPO)**
- **E-Verify/SAVE Programs (ESD)**
- **Fee Structure and Process (CFO)** ***(given the EA announcement, how will you implement all of these programs?)***
- **H-1B Visa Program (SCOPS)** ***(given the EA announcement this should be merged with O IP and now include Ls and STEM focus- Highly Skilled Business and Workers)***
- **O Visa Program (SCOPS)** ***(given the EA announcement this paper should be merged H1B IP and now include Ls and STEM focus)***
- **Provisional Unlawful Presence (Form I-601A) Waiver Process (OCC/OP&S)** ***(in light of EA, should now be Expanded I-601A program)***
- **Refugee Screening Process (RAIO/RAD)** ***(Should now be focused on the In-Country UAC Program Refugee Screening Process)***
- **Temporary Protected Status (TPS) (OP&S)** ***(include the Ebola countries)***
- **Terrorist Related Inadmissibility Grounds (TRIG) (OCC)**
- **UACs and Asylum, USCIS' role in the Border Crisis (RAIO/Asylum)**
- **Transformation (FOD/OTC)** ***(in light of the EA announcement)***
- **Workload Balancing/Backlogs (MGMT)** ***(in light of the EA announcement, please partner with SCOPs to create a paper reflecting the larger/agency-wide Workload Balancing/Backlogs Impact)***

I apologize if I've overlooked any key recipients. Please feel free to share this with them.

Best,

Ruth E. Tintary
Associate Chief
Legislative Branch
Office of Legislative Affairs
U.S. Citizenship and Immigration Services
Dept. of Homeland Security
[redacted] (b)(6)
ruth.e.tintary@uscis.dhs.gov

3

FOR OFFICIAL USE ONLY

H-1B NONIMMIGRANT VISA PROGRAM

BACKGROUND:

- The H-1B nonimmigrant classification is for aliens coming to the United States temporarily to perform services:
  - in a specialty occupation which requires a theoretical and practical application of a body of specialized knowledge, who hold a U.S. bachelor's degree or its equivalent, and, generally, if otherwise required by state or local law, a license, as a minimum requirement for entry into the occupation within the United States;
  - of an exceptional nature requiring exceptional merit and ability relating to certain types of projects administered by the U.S. Department of Defense; or
  - as a fashion model of distinguished merit and ability who has attained national and international acclaim.

- There is a congressionally-mandated numerical limitation of 65,000 per fiscal year for new employment with some exceptions, including:
  - the first 20,000 petitions approved by USCIS where the beneficiary has obtained a U.S. master's degree or higher from a nonprofit or public U.S. institution of higher education;
  - petitions filed on behalf of beneficiaries who will work at nonprofit or public U.S. institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations; and
  - petitions filed between now and December 31, 2014 on behalf of beneficiaries who will work only in Guam or the Commonwealth of the Northern Mariana Islands.

- Petitions filed on behalf of current H-1B workers who have been counted previously against the ~~cap~~ numerical limitation (cap) within the past six years also do not count towards the congressionally mandated annual H-1B cap. This includes petitions to extend the amount of time a current H-1B worker may remain in the United States; petitions to change the terms of employment for current H-1B workers; petitions to allow current H-1B workers who have been counted against the cap to change employers; or petitions to allow current H-1B workers to work concurrently in a second H-1B position.

TALKING POINTS:

- On April 7, 2014, USCIS received a sufficient number of petitions to reach the statutory cap for Fiscal Year (FY) 2015. On the same day, USCIS also received more than 20,000 H-1B petitions on behalf of persons exempt from the cap under the U.S. advanced degree exemption. On April 10, 2014, USCIS used a computer-generated random selection process (commonly known as a "lottery") to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the U.S. advanced degree exemption limit.

- USCIS continues to accept H-1B1 Chile and Singapore cap cases, as well as H-1B cap-exempt cases.

- The initial and extension periods of validity for H-1B specialty occupation petitions are issued in increments of up to three years. Validity issuance is not to exceed the maximum of six years, with certain exceptions under American Competitiveness in the Twenty-First Century Act of 2000 (AC21). For both initial filings and extensions, the validity period

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Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

issued to the beneficiary should not exceed the period listed on the Labor Condition Application (LCA).

- AC21 allows beneficiaries of H-1B petitions to extend their H-1B status beyond the maximum limit of 6 years and, in certain circumstances, to change employers while their permanent residence process is pending in either increments of one year or three years.

- General fees associated with the filing of an H-1B petition include a base petition fee of $325, an American Competitiveness and Workforce Improvement Act (ACWIA) fee of either $1,500/ $750 (required for initial petitions and first extensions for certain beneficiaries), and a Fraud Prevention and Detection fee of $500 (required for initial petitions and change of employers; no exceptions). Additionally, the Public Law 111-230 fee of $2,000 is required for initial petitions or change of employer petitions if the employer has 50 or more employees in the United States and more than 50% of those employees are in H-1B, L-1A, or L-1B status.

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QUESTIONS and ANSWERS:

Question: Is USCIS on track with processing H-1B extension of stay cases within the 60-day window at the California Service Center and the Vermont Service Center?
RESPONSE: The California Service Center is processing H-1B extensions of stay within the 60-day processing goal. The Vermont Service Center is working diligently to reach the goal as soon as possible.

Question: Has there been a change in policy regarding guidelines for determining employer-employee relationships and third-party placement?
RESPONSE: No. Our guidelines for determining eligibility center around the regulations and our most recently issued 2010 memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements." We have not had a recent change in policy. ~~We remind stakeholders that the~~The burden is on the petitioner to demonstrate a need for a 3-year validity period. ~~However, if a stakeholder encounters an RFE that appears to be outside the scope of our regulations and current guidelines, we ask that such requests be brought to our attention through our established customer service protocol.~~

Comment [KJC1]: Not needed for this audience.

Question: Has USCIS issued new guidance regarding defining "Specialty Occupation" and "Body of Highly Specialized Knowledge"?
RESPONSE: USCIS is currently reviewing its policies and practices related to H-1B adjudications, including the interpretation of the terms "Specialty Occupation" and "Body of Highly Specialized Knowledge".

Question: What is the current status of the proposed employment authorization for certain H-4 dependent spouses of principal H-1B nonimmigrants?
RESPONSE: On May 12, 2014, DHS published a proposed rule in the Federal Register which would extend the availability of employment authorization to certain H-4 dependent spouses of principal H-1B nonimmigrants. The extension was limited to H-4 dependent spouses of principal H-1B nonimmigrants if the H-1B nonimmigrants are either the beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140) or have been granted an extension of their authorized period of admission in the United States under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended by the 21st Century Department of

Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

Justice Appropriations Authorization Act. ~~Commentary was~~was Approximately 13,000 public comments were submitted during the 60-day comment period, which closed on July 11, 2014. USCIS is currently analyzing the comments and determining what, if any, revisions are needed. While we do not have an estimated date of publication, this rule is an agency priority.

Prepared by: Stephanie Doumani, USCIS/SCOPS, *Stephanie.M.Doumani@uscis.dhs.gov*, (202) 272-1524
Date: *July 14, 2014*

Jowett, Haley L

From: Oppenheim, Jennifer R
Sent: Wednesday, February 25, 2015 2:13 PM
To: Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004
Attachments: FW: State Licensure; Cardin Letter US CIS Licensing Requirements.pdf; Johns Hopkins Letter.pdf; MBOP Letter to USCIS.PDF; MD Atty Gen Office Letter.pdf; MD Code Physician Licensing Exceptions.pdf; St. Agnes Hospital Letter.pdf

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From: Angustia, Kathleen M
Sent: Thursday, February 19, 2015 11:50 AM
To: Bump, Micah N; Miran, Maria Y
Cc: Cummings, Kevin J; Parascandola, Ciro A; Viger, Steven W; Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Maria and Micah,

I realize in my haste of sending the email, I didn't attach all documents relevant to Senator Cardin's inquiry (attached to this email). Also, I should have pointed out that OLA has requested that we provide a response by COB, Friday, February 20th. We may respond that we continue to look into this matter, as we determine the best approach moving forward.

(b)(6)

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division
USCIS Office of Policy and Strategy | Department of Homeland Security
[redacted] Kathleen.M.Angustia@uscis.dhs.gov

From: Angustia, Kathleen M
Sent: Wednesday, February 18, 2015 1:02 PM
To: Bump, Micah N; Miran, Maria Y
Cc: Cummings, Kevin J; Parascandola, Ciro A; Viger, Steven W; Oppenheim, Jennifer R; Lomax-Larson, Nikki L
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Micah and Maria,

Senator Cardin's office contacted us about truncated H-1B approvals. Service Centers, supported by local OCC, approved medical resident H-1B petitions to one year instead of the requested three years. The petitions requested a future start date and state law did not require the physicians to register to practice medicine at the time of filing, and permits registration for a period of up to 90 days after commencing employment under contract. The Service Centers cut short the approval based on the lack of registration. The issue is that this requirement is for the chief of the institution providing the clinical training and not the H1B physician. OP&S questions whether USCIS should be limiting these approvals to one year. Attached is email traffic and the applicable MD law about registration.

Please let us know if you need anything from OP&S.

Kate

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division
USCIS Office of Policy and Strategy | Department of Homeland Security

202.272.0912 | Kathleen.M.Angustia@uscis.dhs.gov

From: Viger, Steven W
Sent: Wednesday, February 18, 2015 12:27 PM
To: Cummings, Kevin J; Parascandola, Ciro A
Cc: Oppenheim, Jennifer R; Angustia, Kathleen M; Lomax-Larson, Nikki L
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

It appears that CSC and VSC are enforcing a registration requirement (on advisement by local counsel) for petitions requesting a future start date and not required to register at the time of filing. The issue is that this requirement is for the chief of the institution providing the clinical training and not the H1B physician. i don't believe that we should be limiting these approvals to one year.

Steven Viger
Adjudications Officer (Policy)
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529
P: [redacted] (b)(6)
F: (202) 272-8518
steven.w.viger@dhs.gov

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 11:40 AM
To: Viger, Steven W; Angustia, Kathleen M
Cc: Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Steve,

Please see the attached email with printouts from the Maryland Board of Physicians.

Thanks,
Stephanie

From: Viger, Steven W
Sent: Wednesday, February 18, 2015 11:34 AM
To: Doumani, Stephanie M; Angustia, Kathleen M
Cc: Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Thanks Stephanie.

Can you find out the specific Maryland law that requires registration? Thanks.

Steven Viger

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Office of Policy and Strategy
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Department of Homeland Security
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Washington, DC 20529
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steven.w.viger@dhs.gov

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 10:58 AM
To: Angustia, Kathleen M
Cc: Viger, Steven W; Oppenheim, Jennifer R; Sweeney, Shelly A
Subject: RE: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Kate,

I have attached my correspondence with the CSC regarding the issue brought up by Senator Cardin's office. This issue initially came up as a question during one of our AILA teleconferences last year (August of 2014). As you will see from the attached correspondence, VSC and CSC local OCC agreed that if a petitioner files the H-1B for a medical resident to work in Maryland with a future start date and they indicate that they do not need to register them now, but will do so later as required by Maryland law, USCIS cannot deny them and an approval would be warranted for a limited one-year validity period as our regulation only requires submission of the license or registration if it is required to fully perform the job (and in Maryland, it is not -at least for the first 30 days).

I think it may be worth bringing this issue up to HQ OCC to see if they are in agreement with the validity limitation. Thoughts?

Please feel free to give me a ring so we can further discuss.

--
Thanks,
Stephanie

From: Angustia, Kathleen M
Sent: Friday, February 13, 2015 12:36 PM
To: Doumani, Stephanie M
Cc: Viger, Steven W; Oppenheim, Jennifer R
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi Stephanie,

I can't remember if I needed to forward this to you or not-apologies if you have already received this! It was nice chatting with you yesterday.

Kate

Kate Angustia | Adjudications Officer (Policy) | Business and Foreign Workers Division

USCIS Office of Policy and Strategy | Department of Homeland Security
202.272.0912 | Kathleen.M.Angustia@uscis.dhs.gov

From: Parascandola, Ciro A
Sent: Thursday, February 12, 2015 1:59 PM
To: Viger, Steven W; Angustia, Kathleen M; Oppenheim, Jennifer R
Cc: Cummings, Kevin J
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Hi H-1B Team –

Please see attached and below and coordinate with SCOPS as necessary. Due 2/20. Don't worry about OCC clearance, OLA can do that. Thanks!

Ciro Parascandola
Deputy Chief, Business and Foreign Workers Division
USCIS Office of Policy and Strategy, DHS
Office [redacted] (b)(6)

From: Levine, Laurence D
Sent: Thursday, February 12, 2015 1:50 PM
To: Cummings, Kevin J; Parascandola, Ciro A
Subject: FW: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

Here ya go

Larry Levine
Senior Advisor to the Chief
Office of Policy & Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
[redacted] (b)(6)

From: Weller, Angela V
Sent: Thursday, February 12, 2015 1:36:33 PM
To: Levine, Laurence D; Tynan, Natalie S; Policy-Clearance; Graziadio, Josie; Kvortek, Steven P (Steve); SCOPS-Clearance; Arroyo, Susan K; Cox, Sophia
Cc: Rodriguez, Miguel E
Subject: [USCIS Congressional Correspondence] Senator Cardin (HIB medical residents) 114-009004

OP&S (cc: SCOPS),

Senator Cardin wrote to the Director regarding concerns about the CSC's limits on H1B sponsorship of medical residents. Please draft a response, coordinate your response with SCOPS as needed, and submit your response to me by **COB Friday, February 20**. The response will be for USCIS OLA's signature.

If you have any questions or concerns, please feel free to let me know.

Thank you,

Angela V. Weller
Writer/Editor
Office of Legislative Affairs
U.S. Citizenship and Immigration Services
Desk [redacted] (b)(6)
Mobile [redacted]
angela.v.weller@uscis.dhs.gov

Jowett, Haley L

From: Doumani, Stephanie M
Sent: Wednesday, February 18, 2015 10:37 AM
To: Doumani, Stephanie M
Subject: FW: State Licensure
Attachments: Registration 1.pdf; Registration 2.pdf

From: Fierro, Joseph
Sent: Wednesday, August 13, 2014 5:45 PM
To: Doumani, Stephanie M
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Stephanie:

I'm talking about registration.

We are aware the medical residents are exempt from licensure, however, in practice we have been ensuring they meet any other authorization which may be required by the state in accordance with 214.2(h)(4)(viii)(A)(1)-(2). We have never receive any evidence that demonstrates that state registration is not required for the resident to practice medicine.

When I reviewed the inquiry I started questioning whether we were applying this regulation correctly by requiring evidence of registration.

I attached the registration requirements for the state of Maryland for medical residents for your review. The question I had when it was raised to me is are the medical residents required registration to practice medicine? This is what counsel is reviewing.

(A) Beneficiary's requirements. An H-1B petition for a physician shall be accompanied by evidence that the physician:

214.2(h)(4)(viii)(A)(1)-(2)

(1) Has a license or other authorization required by the state of intended employment to practice medicine, or is exempt by law therefrom, if the physician will perform direct patient care and the state requires the license or authorization, and

---

From: Doumani, Stephanie M
Sent: Wednesday, August 13, 2014 1:03 PM
To: Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Hi Joe,

Thanks for the update. When you say register, do you mean obtain a license? If my understanding is correct, you're stating that the petitioner did not provide evidence of a license at the time of filing but then later did, correct? We ask because the question uses this case example after indicating that certain states do not require individual licensure for medial residents because the residents are covered under the institutional l license of the accredited institution where they are performing their training. The question goes on to claim that even when documentation of state law was provide, H-1B petitions were denied based on "insufficient evidence" of state authorization to practice medicine as a medical resident. If this case example does not support such a claim, which from the sounds of it doesn't, we want to indicate as much in our response.

Again, I really don't think one case (if it relates to the issue at hand) represents a trend, but can you speak to whether you've seen an uptick of denials regarding licensure? It sounds like you are waiting to hear back from OCC regarding this issue before touching base with adjudications during round tables and trainings.

Thanks,
Stephanie

From: Fierro, Joseph
Sent: Wednesday, August 13, 2014 11:57 AM
To: Doumani, Stephanie M
Cc: Sweeney, Shelly A; Haskell, Alexandra P; Baltaretu, Cristina G
Subject: RE: State Licensure

Stephanie:

I remember this case where the state licensure came up concerning interns who want to practice medicine in Maryland. The petitioner believes they do not need to register in order to practice medicine before approval and feel they can register later or after approval, while we have been requiring them to register before they are approved since it appears to be a state requirement.

We asked local counsel to review the issue to see if they think we are correct in asking for registration before we made a final denial since the petitioner was very adamant that they do not need to register before they are approved. Counsel said they agree with us so went forward with the denial .

The petitioner ultimately registered and provided the proof that they registered the beneficiary after it was denied, so we decided to do a service motion to reopen and granted the case.

Even though they provided the evidence of registration and the case was ultimately approved , I asked local counsel to review the issue again to confirm we are on the right track. They are still reviewing the issue and we are awaiting their opinion.

Joe

From: Baltaretu, Cristina G
Sent: Wednesday, August 13, 2014 8:17 AM
To: Doumani, Stephanie M; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

Hi Stephanie,

No worries – thank you for providing the correct receipt number. We are looking into it and will get back to you.

Cristina

From: Doumani, Stephanie M
Sent: Wednesday, August 13, 2014 6:56 AM
To: Baltaretu, Cristina G; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

(b)(6)

Cristina,

I'm really sorry! I put in the wrong receipt number below. The receipt number referenced by AILA was [redacted]

Thanks,
Stephanie

From: Baltaretu, Cristina G
Sent: Tuesday, August 12, 2014 7:10 PM
To: Doumani, Stephanie M; Fierro, Joseph
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: RE: State Licensure

(b)(6)

Hi Stephanie,

Joe had to leave a little earlier, so we followed up with an SISO on his team who had this petition. She mentioned there is no licensure issue with receipt [redacted] rather this case involves the ONET LCA-SOC code issue.

Can you please double check and confirm the receipt number for case referenced below by AILA?

Thanks,
Cristina

From: Doumani, Stephanie M
Sent: Tuesday, August 12, 2014 2:50 PM
To: Fierro, Joseph; Baltaretu, Cristina G
Cc: Sweeney, Shelly A; Haskell, Alexandra P
Subject: State Licensure

Hi Joe,

We had one other question from the AILA agenda regarding state licensure. (Last one!) (b)(6)

AILA indicates that they have received denials for cases based on "insufficient evidence" of state authorization to practice medicine as a medical resident. In their example, they referenced [redacted] and indicate that the state in question did not require individual licensure for medical residents. CLAIMS shows that while the case was originally denied, it was re-opened and approved. In general, we don't feel that one case represents any sort of trend. However, we just wanted to touch base with you to see if you've noticed an influx in denials relating to state licensure and if the issue of state licensure has been mentioned in any round table discussions.

Thanks in advance for your help!

Stephanie

MARYLAND BOARD OF PHYSICIANS

Registration Instructions for Unlicensed Medical Practitioners ("UMP")

REGISTRATION INSTRUCTIONS

Chief of Service- Responsibility

The Maryland Annotated Code, Health Occupations §14-302 (1) allows a medical school graduate in an accredited postgraduate clinical training program to practice medicine without a license while performing the assigned duties at any office of a licensed physician, hospital, clinic or similar facility. This medical school graduate is otherwise referred to as an "Unlicensed Medical Practitioner" ("UMP").

The Chief of Service of the institution providing the accredited postgraduate clinical training program, or the Chief's designee has the responsibility to ensure the proper registration of each Unlicensed Medical Practitioner with the Maryland Board of Physicians.

The hospital Chief of Service must also register an UMP who has a training program contract with an out-of-state institution, but who is on rotation in a Maryland facility. The Maryland facility must have a written training program agreement with the out-of-state institution **indicating that the rotation is part of the postgraduate training program.** In addition, the training program in the out-of-state institution should be accredited by the Accreditation Council for Graduate Medical Education.

An UMP who has been registered by a Maryland hospital Chief of Service for the current contract year and who will be on rotation in another Maryland institution within the said contract year does not have to be registered by the Chief of Service of the second institution.

Completing the Registration Form for the Registration and Re-registration of UMPs

1. **Part A**-The Unlicensed Medical Practitioner ("UMP") completes Part A.

   - **Initial or Re-registration:** UMP application: Please indicate if the application is an initial or a re-registration application.

   - **Re-registrations:** All UMP's keep the same UMP number while in training, regardless of the program, program location, or institution affiliation. Therefore, if you have previously been issued an UMP number, provide that "original UMP number" when completing the re-registration form.

   - **Current Registration Period:** This period refers to either (a) the full contract year or (b) the duration of an official rotation for which an UMP will be registered in order to practice medicine under COMAR 10.32.07. All applications must have a contract start date and a contract end date.

   - **Character and Fitness questions-**"Item 11"- **all "yes" answers must be accompanied by additional documentation as specified on the application. (See application for details).**

2. **Part B**-The "Chief of Service or the Chief of Service's designee" completes Part B.

- The Chief of Service or the Chief of Service's designee must be a physician currently licensed to practice in the State of Maryland.

3. **Institutions -forwarding the registration forms to the Board of Physicians.**

   - UMP applications should be sent to the Board's post office box through one institutional office to ensure proper procedures are followed. Please send the completed application form along with the required fee of $100.00 per UMP, by check or money order, payable to the Maryland Board of Physicians. The check must state "UMP registration" and be accompanied by a complete list of each UMP that is covered by the enclosed check or money order.

   - Make sure that the fee matches the number of applications times $100.00. Otherwise, there will certainly be delays in the registration both at the bank and the Board office.

Registration deadline:

- Initial UMP registrations-the completed application and fee, must be received no later than 30 days from the contract start date between the accredited training program and the UMP.

- Re-registration of an UMP-the completed application and fee must be received no later than 60 days from the contract start date between the accredited training program and the UMP.

- Please mail all UMP applications, including the correct registration fee (number of applications times $100.00 each) and the list of UMP's to:

Maryland Board of Physicians
P.O. Box 37217
Baltimore, Maryland 21297

- To help speed up the registration process, also please e-mail the list of UMP's to mhigby@dhmh.state.md.us using the attached format.

- Institutions may duplicate the registration form and the regulations which are available on the Maryland Board of Physician's website at www.mbp.state.md.us (select Download Forms, Physician Forms, and choose the Registration and Re-registration of Unlicensed Medical Practitioners form).

Please do not send any applications for UMP's to the Patterson Avenue address.

Failure to meet the deadlines may result in a violation of Md. Code (Health Occupations Article Section 14-404(a) (3) and (a) (18) and COMAR 10.32.07.04F.

Revised: 03/26/2007
MTA:kmb

Attachment

Unlicensed Medical Practitioner-registration spreadsheet.

To assist the Maryland Board of Physician (MBP) in registering applicants as Unlicensed Medical Practitioners, in addition to the paper registration forms, please send the applicant's information in a spreadsheet to the attention of Mr. Mark Higby at mhigby@dhmh.state.md.us

Use the following format:

Column	Description
A	Registration number (leave blank for initial registrations)
B	Applicant's last name
C	Applicant's first name
D	Applicant's middle initial
E	Date of applicant's birth (mm/dd/yyyy)
F	Applicant's social security number (###-##-####)
G	Applicant's sex (M or F)
H	Applicant's ethnicity (Oriental/Asian, Black, White, Hispanic, Amer. Ind.)
I	Applicant's medical school name
J	Applicant's date of graduation from medical school (mm/dd/yyyy)
K	Degree earned (MD, DO, MBBS, MD, PhD, etc)
L	Department/Division
M	Institution's name
N	Institution's street address
O	Institution's city
P	Institution's state
Q	Institution's zip code
R	Institution's telephone number
S	Institution's facility code as issued by MBP
T	Appointment start date
U	Appointment end date
V	Section 11 (Y or N)
W	ACGME number
X	Director's Name
Y	Director's License Number
Z	Director's phone number
AA	Program (area of concentration)

Remember: The Board of Physicians cannot register or re-register an individual as an unlicensed medical practitioner unless both the complete application and payment has been received by the bank, reviewed at the Board, and entered into the Board's system.

MARYLAND BOARD OF PHYSICIANS

P.O. Box 37217
Baltimore, Maryland 21297
(410)764-4777

FOR BANK USE ONLY

DATE:____/____/200__

CHECK NUMBER:_____

AMT PAID: $ _____

NAME CODE:_____ APPID: 33

For Board use only

Date registered:_____

UMP number: P _ _ _ _ _

UNLICENSED MEDICAL PRACTITIONER APPLICATION

PART A: Circle one: Initial Registration; Re-registration UMP Number P_____

1) Last name and generational indicator (Jr., III, etc.)

First name and Middle Initial

2) Date of Birth: (month) (day) (year) **3) Social Security Number:**

4) Gender: F or M (circle one) **5) Race: (circle one)** White Black Native American Oriental/Asian Hispanic Other

6) Medical Degree Received From: _____ **Date of Graduation:**

7) Have you ever been licensed by a medical board? (circle one) Maryland Y N If yes, list license number_____ Other Y N If yes, list state(s) and license number_____

8) Degree: (MD, DO)

9) Local Address of Accredited Training Program: (This is your address of record with the Board.)

Department:

Name of Maryland Institution:

Address:

City/County **State:** **Zip Code Plus 4**

Daytime Phone:

10) Current Contract Year of Registration: This should not precede the starting date of your current contract year.

From:____/____/____ **To:**____/____/____

11) Answer the following questions. If you have had any legal actions taken against you, provide a complete explanation and supporting documentation such as copies of all complaints, malpractice claims, adverse or disciplinary actions, arrest pleadings, judgements or final orders. Sign and date all pages submitted.

Yes	No		
☐	☐	a.	Do you have a physical or mental condition that could impair your ability to practice medicine or that would cause reasonable questions to be raised about your physical, mental, or professional competency including drug and alcohol abuse?
☐	☐	b.	Has any licensing or disciplinary board of any jurisdiction or an entity of the armed services ever denied your application for licensure, registration, certification or limited licensure, reinstatement or renewal, or taken any action against your license, registration, certification or limited licensure, including but not limited to reprimand, suspension, revocation, a fine, or nonjudicial punishment?

Yes	No		
☐	☐	c.	Have you ever surrendered or allowed your medical or any other healthcare license, registration, certification, or limited license to lapse, or have you ever withdrawn an application for any of the above, while you were under investigation by any licensing or disciplinary board of any jurisdiction or an entity of the armed services?
☐	☐	d.	Have any complaints, investigations, or charges ever been brought against you or are any currently pending in any jurisdiction by any licensing or disciplinary board, or an entity of the armed services?
☐	☐	e.	Have you pled guilty, nolo contendere, been convicted of, received probation before judgement or other diversionary disposition for any criminal act?
☐	☐	f.	Have you committed an offense involving alcohol or controlled dangerous substances to which you pled guilty or nolo contendere or for which you were convicted or received probation before judgement? Such offenses include, but are not limited to, driving while under the influence of alcohol and/or controlled dangerous substances.
☐	☐	g.	Excluding minor traffic violations, are you currently under arrest or released on bond, or are there any current or pending charges against you in any court of law?
☐	☐	h.	Has a malpractice claim or legal action for damages been filed, settled or awarded against you in any jurisdiction?
☐	☐	i.	Has any hospital, HMO, or other related healthcare institution, or military entity denied your privileges, denied any application for privileges, failed to renew your privileges, or limited, restricted, suspended or revoked your privileges for any reason except for medical record tardiness or non-payment of staff dues?
☐	☐	j.	Has your employment by any hospital, HMO, other healthcare institution, or military entity been terminated for any disciplinary reasons?
☐	☐	k.	Have you ever voluntarily resigned from any hospital, HMO, healthcare institution, or military entity while under investigation by that institution for disciplinary reasons?
☐	☐	l.	Has any postgraduate residency or fellowship training program ever denied your application, failed to renew your contract, or terminated any contract or appointment for any disciplinary reasons or while you were under investigation for any disciplinary reasons?
☐	☐	m.	Have you voluntarily terminated any postgraduate residency training program or fellowship contract or appointment while under investigation by that program or related institution for any disciplinary reasons?
☐	☐	n.	Have you been suspended, placed on probation, formally reprimanded or asked to resign while in a postgraduate residency training program or fellowship?

12) **Affirmation:** I have read COMAR 10.32.07 and will comply with the regulations. I affirm that the information I have given in this application, including that given in response to questions in Item 11, is true and correct to the best of my knowledge and belief.

Signature:_____ Date:_____

PART B: FOR COMPLETION BY THE MARYLAND INSTITUTION CHIEF OF SERVICE OR DESIGNEE

13) Is the applicant in an ACGME accredited program? ☐ Yes ☐ No ACGME Accreditation Number_____

14) Name of Maryland Hospital, Maryland Medical School, or Maryland Facility: _____

Medical Staff Coordinator:_____ **Phone #:**_____

15) **Attestation:** I attest that I have read COMAR 10.32.07 and will notify the Maryland Board of Physicians of any termination of a contract other than by natural expiration, and the reasons for the termination.

Signature:_____ Title:_____ Date:_____
(Chief of Service or Designee)

Name in Print:_____

Phone #:_____ Maryland License Number: ☐☐☐☐☐☐☐☐

(9) "Postgraduate training program" means a clinical medical training program for medical school graduates including, but not limited to, internships, residencies, and fellowships.

(10) "Unlicensed medical practitioner" means:

(a) A medical school graduate practicing medicine in a postgraduate training program who is not licensed to practice medicine in this State; or

(b) A medical school student practicing medicine in a clinical clerkship in this State.

10.32.07.02

.02 Clinical Clerkships.

A. A medical student may engage in a clinical clerkship training program in Maryland if:

(1) The medical student participates only in:

(a) An accredited training program which has an affiliation, expressed in writing, with the student's medical school for the express purpose of providing clinical training to the medical student, if at least one department in the hospital has a formal affiliation with an LCME-accredited medical school, or

(b) A hospital, hospital department, clinic, or similar facility that is affiliated with an LCME-accredited medical school, which may include training in the office of a physician affiliated, by faculty appointment or other written agreement, with the accredited medical school for the purpose of teaching the medical student;

(2) All medical students of the same educational level engaged in clinical clerkships at that physician's office, hospital, hospital department, clinic or similar facility train under the same conditions, with the same privileges and limitations; and

(3) The physician's office, hospital, hospital department, clinic or similar facility will cease to train medical students if the American medical school with which it is affiliated is no longer accredited by the LCME, or if the postgraduate training program is no longer ACGME-accredited.

B. A medical student practicing medicine outside the scope of the provisions of §A of this regulation is considered to be practicing medicine beyond the scope of Health Occupations Article, §14-302, Annotated Code of Maryland.

10.32.07.03

.03 Postgraduate Programs.

An unlicensed medical school graduate may practice medicine only in an accredited training program, and only under a written training program contract with the providing institution.

.05 Exemption for Practitioners in Federal Programs.

An unlicensed medical school graduate in a postgraduate training program under the jurisdiction of the federal government is exempt from these regulations while performing duties incident to that training program

10.32.07.06

.06 Fee.

The Board shall establish a fee for registration and reregistration to be paid by the unlicensed medical school graduate but collected and forwarded by the institution providing the postgraduate training program with the registration form.

10.32.07.07

.07 Prohibited Conduct, Hearings, and Appeals.

A. The Board or its designee shall investigate all complaints alleging prohibited conduct and other information obtained regarding an unlicensed medical practitioner, according to the Board's procedures.

B. For any of the causes constituting a ground for discipline, subject to the hearing provisions of Health Occupations Article, §14-405, Annotated Code of Maryland, on the affirmative vote of a majority of its fully authorized membership, the Board may:

(1) Reprimand an unlicensed medical practitioner;

(2) Place an unlicensed medical practitioner on probation;

(3) Suspend or revoke the registration of an unlicensed medical practitioner; or

(4) Take other action against the individual including, but not limited to:

(a) Limiting the privilege to practice,

(b) Requiring further education, or

(c) Admonishing the individual.

C. The following causes constitute grounds for discipline:

(1) Physical, mental, or professional incompetence;

(2) An act or omission that resulted in disciplinary action against the unlicensed medical practitioner in connection with the postgraduate training program;

(3) Physical or mental illness that adversely affects the ability to practice in the postgraduate training program;

(4) Immoral or unprofessional conduct of the unlicensed medical practitioner in the practice of medicine;

(5) Practicing medicine beyond the authorized scope of practice;

(6) Abandonment of a patient;

(7) Practicing medicine while:

(a) Under the influence of alcohol, or

(b) Using any narcotic or controlled dangerous substance as defined in Criminal Law Article, Annotated Code of Maryland, or other drug that is in excess of therapeutic amounts or without valid medical indication;

(8) Willfully making or filing false reports or records in the practice of medicine;

(9) Willfully omitting to file or record, or willfully impeding or obstructing the filing or recording, or inducing another person to omit to file or record, medical reports required by law;

(10) Willfully misrepresenting treatment;

(11) Offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine;

(12) Failing to furnish details of a patient's care to physicians, hospitals, or the Board upon proper request;

(13) An act or omission which has resulted in disciplinary action against the unlicensed medical practitioner by the licensing or disciplinary authority, court, or sponsoring institution in another state, territory, or country for an act that would be grounds for disciplinary action under this regulation;

(14) Fraud or deceit in gaining admission to the postgraduate training program;

(15) Promotion of the sale of drugs, devices, appliances, or goods provided for a patient in such a manner as to exploit the patient for financial gain of the unlicensed medical practitioner;

(16) Division of fees, or agreeing to split or divide fees received for professional services, with any person for bringing or referring a patient;

(17) Agreeing with clinical or bioanalytical laboratories to make payments to these laboratories for an individual test or a test series for a patient, unless the unlicensed medical practitioner discloses on the bills to the patient or third-party payer the name of the laboratory for the individual test or test series and the amount of the procurement or processing charge, if any, for each specimen taken;

(18) Grossly overutilizing health care services;

(19) Willfully submitting false statements to collect fees for services not rendered;

(20) Violation of any regulation promulgated by the Board regarding the practice of medicine by unlicensed medical practitioners;

(21) Knowingly failing to report suspected child abuse in violation of Family Law Article, §5-704, Annotated Code of Maryland;

(22) Except in an emergency life-threatening situation when it is either infeasible or impracticable, failing to comply with the Centers for Disease Control's guidelines on universal precautions;

(23) Failing to cooperate with a lawful investigation conducted by the Board; and

(24) Refusing, withholding from, denying, or discriminating against an individual with regard to the provision of professional services for which the unlicensed medical practitioner is registered and qualified to render because the individual is HIV positive.

D. Crimes Involving Moral Turpitude.

(1) The Board shall order the suspension of the registration of an unlicensed medical practitioner if the practitioner is convicted of or pleads guilty or nolo contendere with respect to a crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside.

(2) After completion of the appellate process, if the conviction has not been reversed or the plea has not been set aside with respect to a crime involving moral turpitude, the Board shall order the revocation of the unlicensed medical practitioner's registration subject to the statutory mandate of Health Occupations Article, §14-404(b)(2), Annotated Code of Maryland.

10.32.07.04

.04 Registration.

A. The chief of service of the institution providing the postgraduate clinical training program, or the chief's designee, shall register with the Board each unlicensed medical school graduate within 30 days of the effective date of the training program contract between the institution and the unlicensed medical school graduate.

B. Registration shall be on a form supplied by the Board, which may include for the unlicensed medical school graduate applicant:

(1) Name of the applicant;

(2) Local address;

(3) Date of birth;

(4) Social Security number which the Board shall use only for evaluation and identification of applicants and licensees but may not disclose in any other context;

(5) Character and fitness questions;

(6) Name and address of the medical school attended;

(7) Date of graduation from medical school;

(8) Name and address of the institution and department directly responsible for the postgraduate training program;

(9) Name and address of the chief of service and supervisor of the postgraduate training program; and

(10) Beginning and ending dates of the contract.

C. Registration shall remain valid for the term of the contract, as stated on the registration form.

D. Reregistration by the chief of service of the institution acting on behalf of the unlicensed medical school graduate is required for each renewal or extension of the postgraduate training program contract.

E. The chief of service of the institution providing the postgraduate training program shall notify the Board, within 30 days, and any termination of a contract, other than by natural expiration, and of the reasons for the termination.

F. Unprofessional Conduct in the Practice of Medicine. Health Occupations Article, §14-404(a)(3), Annotated Code of Maryland, includes the failure of a physician to comply with the regulations governing the duty of the chief of service to timely register unlicensed medical practitioners under the chief's charge.

Unlicensed Medical Practitioner-registration spreadsheet Guidelines.

To assist the Maryland Board of Physician (MBP) in registering applicants as Unlicensed Medical Practitioners, in addition to the paper registration forms, please send the applicant's information in a spreadsheet to the attention of Mr. Mark Higby at mhigby@dhmh.state.md.us

Use the following format:

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B	Applicant's last name
C	Applicant's first name
D	Applicant's middle initial
E	Date of applicant's birth (mm/dd/yyyy)
F	Applicant's social security number (###-##-####)
G	Applicant's sex (M or F)
H	Applicant's ethnicity (Oriental/Asian, Black, White, Hispanic, Amer. Ind.)
I	Applicant's medical school name
J	Applicant's date of graduation from medical school (mm/dd/yyyy)
K	Degree earned (MD, DO, MBBS, MD, PhD, etc)
L	Department/Division
M	Institution's name
N	Institution's street address
O	Institution's city
P	Institution's state
Q	Institution's zip code
R	Institution's telephone number
S	Institution's facility code as issued by MBP
T	Appointment start date
U	Appointment end date
V	Section 11 (Y or N)
W	ACGME number
X	Director's Name
Y	Director's License Number
Z	Director's phone number
AA	Program (area of concentration)

Remember: The Board of Physicians cannot register or re-register an individual as an unlicensed medical practitioner unless both the complete application and payment has been received by the bank, reviewed at the Board, and entered into the Board's system.

10.32.07.03

.03 Postgraduate Programs.

An unlicensed medical school graduate may practice medicine only in an accredited training program, and only under a written training program contract with the providing institution.

- E-2C still being held.

- Noting still be more than one weeks held for T/P

- validity dates: backdating of any sort should be removed.

STATE OF MARYLAND
DHMH Board of Physicians
Maryland Department of Health and Mental Hygiene
4201 Patterson Avenue • Baltimore, Maryland 21215-2299
Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

August 27, 2014

US CIS
California Service Center
Laguna Niguel, CA 92677

To Whom It May Concern:

I am the Executive Director of the Maryland Board of Physicians (MBOP). I understand that you are questioning how Maryland licensing laws apply to medical residents participating in residency programs in Maryland. The attached letter (Exhibit A) from our attorney, Noreen Rubin, Asst. Attorney General, dated July 16, 2014, accurately states the law. The law and regulations concerning licensure provide exceptions, including one for medical residents who are participating in residency programs, such as the Internal Medicine program at St. Agnes Hospital, which are accredited by the Accreditation Council for Graduate Medical Education. Medical residents who are in such programs are not required to secure a Maryland medical license. These accredited programs are approved pursuant to our regulations. See Section 10.32.07.01 and Section 10.32.07.03 in the Code of Maryland Regulations ("COMAR"). The MBOP does not issue discrete and individual approvals of any residency programs but instead has done so via these regulations. See Ms. Rubin's letter for further confirmation and clarification.

I understand that you have also inquired about the 'written training program contract with the providing institution' mentioned in COMAR 10.32.07.03. Training programs satisfy this requirement by using written contracts of employment such as "Medical Residency Agreements" or other sorts of written contracts that confirm the basic terms of the program. The MBOP does not ask for or receive copies of these agreements. It is a requirement imposed on the facility offering the training program that we expect the facility to honor. If a facility does not comply with this requirement, it does not mean that the resident needs a Maryland medical license. It means that the offending facility could be subject to sanctions or penalties.

I also understand that you have asked for evidence that a beneficiary resident "has been approved by the Maryland Board of Physicians to practice as an unlicensed physician in the State of Maryland." The MBOP does not approve or disapprove of any residents to participate as unlicensed medical practitioners in Maryland. If a resident is participating in an accredited residency program in Maryland, he or she does not need a medical license, per the Maryland code sections identified in Ms. Rubin's letter dated July 16, 2014.

Toll Free 1-800-492-6836 • 410-764-4777 • Fax 410-358-2252
Web Site: www.mbp.state.md.us

Once residents are selected for programs, the programs or facilities offering the programs are obligated to comply with certain requirements, including registering the residents with the MBOP within thirty (30) days of the program's effective date or the date the resident starts in the program, whichever is later. This registration does not mean that the registered residents are "approved" to work as unlicensed medical practitioners; it simply means that the facility has provided us with information the MBOP requires. If a facility/training program fails to register a resident, the facility is subject to sanctions or penalties for failing to meet the regulatory requirements, but that failure does NOT mean that the unregistered resident needs a Maryland medical license.

Again, the MBOP does not 'approve' any resident for participation in any residency program. A request for evidence that a particular resident has been "approved by the Maryland Board of Physicians to practice as an unlicensed physician in the State of Maryland" appears to be founded on a misunderstanding of Maryland licensing laws and the MBOP's regulations.

I trust that this clears up any questions or confusion you may have concerning these programs in Maryland and hope it will enable the applications for medical residents in Maryland to be processed more efficiently.

Yours truly,

Christine A. Farrelly

Christine A. Farrelly
Executive Director

SAINT AGNES
HOSPITAL

January 23, 2015

The Honorable Ben Cardin
100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD 21201

Dear Senator Cardin:

We would like to request your assistance with a longstanding problem with the United States Citizenship & Immigration Services (CIS), and in particular with the CIS's California Service Center (CSC). The CSC randomly and arbitrarily shortens the H-1B approval period for certain of our medical residents, making the process needlessly expensive and inefficient. We will appreciate your help in ensuring that the CSC stops this practice and follows the law.

Some years ago, St. Agnes Hospital began sponsoring its medical residents for H-1B status; some residents are expected to participate in our programs for one year, while others are expected to participate for three or more years. Taking these factors into account, St. Agnes, through its counsel, Frances O'Connell Taylor, has prepared and submitted paperwork to the CIS's California Service Center (CSC), as required by CIS jurisdictional directives. Each petition has requested the appropriate period of stay up to the permitted three years, based on the particular resident's anticipated period of participation in the program. Again, some are for one year, while others are expected to participate for a full three year period, and the petitions reflect these expectations. In some cases, the CIS has approved the requested three year period, while in others, the CSC has approved only one of the three years requested. When asked why there was a different result in otherwise identical cases, the CSC officers have routinely stated to counsel that the abbreviated period was given so that the resident could obtain Maryland medical licensure.

This view ignores Maryland law. Under Maryland law, medical residents are NOT required to secure medical licensure in order to participate in a medical residency program. See the enclosed extract from the Maryland Code as well as the letters from the Maryland Attorney General's office and from the Maryland Board of Physicians. All this evidence was submitted to the CSC this past spring/summer and was promptly ignored when a one year approval period was given to a resident whose petition had requested the full three years intended for her program.

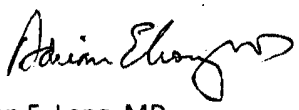
The CSC's ignoring this evidence has caused and is causing problems for St. Agnes and for our residents, i.e., uncertainty, expense, and wasted time and effort, among other things. St. Agnes has to file new petitions when it ought not be required to do so; residents are uncertain as to the legality of their status and often have to apply for new visa stamps to reflect the extended periods of stay.

When we tried a number of years ago to appeal two cases in which the approved period of stay was truncated, our effort was rejected by the CIS because our cases had not been denied, but had been approved, albeit for a shortened period of time. In effect, the CIS's refusal to abide by Maryland law on licensure is unreviewable except in US District Court. Rather than go to litigation, we are hoping that you can require CIS to explain its actions and to honor Maryland law on licensure.

Given the evidence submitted to date that medical residents in Maryland are not required to be licensed or 'approved' in any fashion by the Maryland Board of Physicians, we are at a loss as to why the CIS and its CSC persist in issuing approval notices with abbreviated periods of stay. We welcome your assistance and hope that you will be able to ensure that the CSC's officers are properly trained and that they stop making this process needlessly complex and arbitrary for Maryland employers. We will welcome the chance to discuss this with you and ask you to contact our counsel, Frances O'Connell Taylor, if you have any questions. We are prepared to meet with you and with representatives of CIS, if it will help solve this problem.

Thank you again for your assistance. Please let us know if you have any questions. We hope to hear from you soon as the coming year's residency season will soon be underway and we will, no doubt, suffer the consequences of the CIS's arbitrary adjudication this year unless some corrective measures are implemented.

Yours truly,



Adrian E. Long, MD
Executive Vice President
Chief Medical Officer

BENJAMIN L. CARDIN
UNITED STATES SENATOR
MARYLAND

United States Senate
Washington, DC 20510–2004

February 10, 2015

Mr. Leon Rodriguez
Director
U.S. Citizenship and Immigration Services
425 I Street N.W.
Washington, D.C. 20530

Dear Director Rodriguez:

I am writing regarding a problem involving the USCIS California Service Center and its limits on the H1B sponsorship of medical residents. I have received correspondence from St. Agnes Hospital, and Johns Hopkins University, both stating that the CIS California Service Center has been truncating the approval periods for medical residents by asserting that they require a Maryland medical license in order to participate in the residency program. My constituents argue that this view is not supported by any legislation or regulations, and that the practice has led to inefficiency, needless expenses, and a routine misapplication of the law.

An enclosed extract from the Maryland Code confirms that Maryland law does not require medical residents to secure medical licensure in order to participate in residency programs. I have also enclosed letters from the Maryland Attorney General's office and from the Maryland Board of Physicians, both establishing that its state's medical residents do not need to obtain medical licensure.

Please provide me with a written response to the concerns of my constituents, as well as the expected corrective actions that your agency plans to take. Thank you for your assistance with this request.

Sincerely,

Ben Cardin

Benjamin L. Cardin
United States Senator

Enclosures: 5

Reply To:
☒ 509 Hart Senate Office Building
Washington, DC 20510–2004
(202) 224–4524
www.cardin.senate.gov

Reply To:
☐ Tower 1 Suite 1710
100 S. Charles Street
Baltimore, MD 21201
(410) 962–4436

SAINT AGNES
HOSPITAL

January 23, 2015

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100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD 21201

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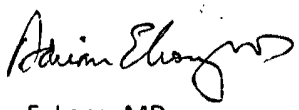
Thank you again for your assistance. Please let us know if you have any questions. We hope to hear from you soon as the coming year's residency season will soon be underway and we will, no doubt, suffer the consequences of the CIS's arbitrary adjudication this year unless some corrective measures are implemented.

Yours truly,



Adrian E. Long, MD
Executive Vice President
Chief Medical Officer

JOHNS HOPKINS UNIVERSITY | Office of International Services

January 15, 2015

100 S. Charles Street
Tower 1, Suite 1710
Baltimore, MD, 21201

Honorable Senator Cardin:

We would like to request the assistance of your office with an issue that we are having with the USCIS California Service Center when we request H-1B visa sponsorship for our Medical Residents.

The California Service Center is limiting the H1B sponsorship of our Medical Residents to 1 year instead of the 2 or 3 years we are requesting in the petition on the grounds that the Resident does not have a permanent medical license.

Clearly, the physician licensure requirements outlined in 8 CFR 214.2(h)(4)(viii)(A) are not intended for Medical Residents. Medical Residents cannot have a permanent medical license in Maryland as they are "in training". They operate under the Medical License of the Residency Program Director and the law is clear that they are not required to secure their own license.

The practice of granting the H-1B for only one year is a financial burden for our institution and a great strain on our personnel as we are forced to apply for H1B status every year.

We appreciate any assistance you can provide in resolving this difficult situation.

Sincerely

Jennifer L. Kerilla

Director, International Scholars
Office of International Services @ JHMI
1620 McElderry Street, Suite 405
Baltimore, MD 21205
jkerill1@jhmi.edu
+1 410-502-7305 (P)
+1 410-955-0871 (F)
http://ois.johnshopkins.edu/index.html

Md. HEALTH OCCUPATIONS Code Ann. § 14-302

*** Current through JR 2 and Ch. 2 of the 2012 General Assembly ***

HEALTH OCCUPATIONS
TITLE 14. PHYSICIANS
SUBTITLE 3. LICENSING

Md. HEALTH OCCUPATIONS Code Ann. § 14-302 (2012)

§ 14-302. Exceptions from licensing -- In general

Subject to the rules, regulations, and orders of the Board, the following individuals may practice medicine without a license:

(1) A medical student or an individual in a postgraduate medical training program that is approved by the Board, while doing the assigned duties at any office of a licensed physician, hospital, clinic, or similar facility;

(2) A physician licensed by and residing in another jurisdiction, while engaging in consultation with a physician licensed in this State;

(3) A physician employed in the service of the federal government while performing the duties incident to that employment;

(4) A physician who resides in and is authorized to practice medicine by any state adjoining this State and whose practice extends into this State, if:

(i) The physician does not have an office or other regularly appointed place in this State to meet patients; and

(ii) The same privileges are extended to licensed physicians of this State by the adjoining state; and

(5) An individual while under the supervision of a licensed physician who has specialty training in psychiatry, and whose specialty training in psychiatry has been approved by the Board, if the individual submits an application to the Board on or before October 1, 1993, and either:

(i) 1. Has a master's degree from an accredited college or university; and

2. Has completed a graduate program accepted by the Board in a behavioral science that includes 1,000 hours of supervised clinical psychotherapy experience; or

(ii) 1. Has a baccalaureate degree from an accredited college or university; and

2. Has 4,000 hours of supervised clinical experience that is approved by the Board.

HISTORY: An. Code 1957, art. 43, § 122; 1981, ch. 8, § 2; ch. 183; 1982, ch. 644; 1988, ch. 109, § 1; 1990, ch. 6, § 11; 1993, ch. 627, § 2; 1994, ch. 620, §§ 1, 2.

Jowett, Haley L

From: Fierro, Joseph
Sent: Tuesday, March 01, 2011 3:16 PM
To: #CSC Division I
Cc: Prince, Rose M; Goodman, Lubirda L; Arganoza-Franciliso, Carmen U; McMahon, Gerald K; Oliver, Jamie D; DeJulius, Robert W; Brokx, John B; Helfer, Wayne D; Mikhelson, Jack; Cameron, Felicia M; Phan, Lethuy; Onuk, Semra K; Dewitty-Davis, Janine L; Robinson, Christopher M; Gooselaw, Kurt G; Lee, Danielle L; Mink, Christine; Abram, John P; Chau, Anna K
Subject: FW: H-1B Guidance for consistency of adjudication

Div 1:

Please see below for guidance pertaining to the adjudication of IBM India and all H-1B petitions.

Thanks,

Joe

From: Richardson, Gregory A
Sent: Tuesday, March 01, 2011 12:36 PM
To: Renaud, Daniel M; Melville, Rosemary; FitzGerald, Karen L; Johnson, Bobbie L
Cc: Canney, Keith J; Laroe, Lisa A; Fierro, Joseph; Sun, Catherina C; Velarde, Barbara Q; Harton, Frank A; Sweeney, Shelly A; Tamanaha, Emisa T; Cox, Sophia
Subject: H-1B Guidance for consistency of adjudication

Service Center Directors,

During recent discussions with both the Vermont and California Service Centers, and after reviewing several IBM India (IBMi) cases, we provide additional clarification on a variety of issues and scenarios that have been presented relative to the IBMi filings.

(b)(7)(e)

Background

[redacted] While these issues have been identified in the context of IBMi adjudications, we want to emphasize that the guidance provided here applies to the adjudication of all H-1B petitions.

Case by Case Adjudication

Adjudicators are reminded that each case must be adjudicated on its own individual merit. While many filings may look similar, especially when filed by the same petitioner, each petition is a unique petition for a separate beneficiary and for differing types of employment. While it is important for adjudicators to be cognizant of fraud patterns for referral to the fraud unit, an adjudicator must carefully examine each petition on its merits and must look at the petition and the evidence submitted in its totality. Adjudicators should resist the urge to formulate hard and fast bright line standards. In one case, a certain piece of evidence might be sufficient to establish eligibility, whereas in a subsequent filing there may be material

1

discrepancies within the record which will require the adjudicator to ask for additional evidence to resolve such discrepancies.

Standard of Proof

Absent a statute to the contrary in a particular context, the standard of proof that adjudicators must use in the adjudication of employment-based petitions is preponderance of the evidence. If the petitioner submits relevant, probative, and credible evidence that leads the adjudicator to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. The preponderance of the evidence standard does not require the petitioner to provide clear and convincing evidence nor does a mere scintilla of evidence meet the burden. It is a balancing act. Meaning, adjudicators should avoid applying standards that are either too high/rigid or too low/loose. Please refer to the January 11, 2006 memo titled *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 and the Adjudicators Field Manual for further clarification.*

Objectivity

USCIS must *fairly* adjudicate each case on its merits. All petitioners should be held to the same regulatory and statutory requirements that are applicable to them. An adjudicator cannot begin to make assumptions based merely on the size of a petitioning entity and then effectively waive evidentiary requirements because the petitioner is a recognized entity. Again, the nature and extent of the required documentation will depend upon the record in its totality.

Third-party placements (b)(5)

[redacted]

Specialty occupation

Each H-1B petition must be accompanied by documentation to establish that the beneficiary will be engaged in a specialty occupation. Thus, an adjudicator must be able to determine from the evidence submitted whether 1) the employment being offered is in fact a specialty occupation and 2) whether specialty occupation work is available for the validity period. Both of these issues are of particular importance when the beneficiary will be working at a third-party client

location. Adjudicators are reminded to look at each petition on a case by case basis to ensure that both prongs of the specialty occupation requirement are met.

Thank you,

Greg Richardson
Chief Adjudications Division,
Service Center Operations, USCIS

3

Chong, Jenny

From: Fierro, Joseph
Sent: Thursday, September 19, 2013 8:18 AM
To: Chong, Jenny; Clark, Wendy S; Powell, Trevor; Lugo, Neil I; Galang, Jennifer S; Avetyan, Kurt H; Harvey, Mark E
Subject: FW: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal
Attachments: AAO CSC H-1B Sustained.pdf

From: Tamanaha, Emisa T
Sent: Wednesday, September 18, 2013 6:57 PM
To: Fierro, Joseph; Baltaretu, Cristina G
Subject: FW: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal

FYI

From: Abram, John P
Sent: Wednesday, September 18, 2013 6:51 PM
To: Tamanaha, Emisa T; Fisher, Sheila C; Ammerman, Michael J; Luna, Maria P (Pilar); Vinet, Richard G; Burford, Mary H
Cc: Campagnolo, Donna P
Subject: AAO Disagrees with CSC on Degree Equivalency in H-1B Petition and Approves Appeal

AAO approved an H-1B petition for an in-house Forensic Alcohol Criminalist, stating that the beneficiary's combination of a three-year bachelor's degree and more than ten years of work experience makes him qualified to perform the duties of the proffered position. Courtesy of Camiel Becker. AILA Doc. No. 13091743.

John Patrick Abram
Chief of Staff
California Service Center
U.S. Citizenship and Immigration Services
Telephone: [redacted]

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 04 2013 Office: CALIFORNIA SERVICE CENTER FILE: WAC [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

CAMIEL BECKER
BECKER & LEE LLP
220 SANSOME ST., #310
SAN FRANCISCO, CA 94104

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

www.uscis.gov

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker, describes its business as a "Law Practice." The petitioner states that it was established in 1997, currently employs 8 personnel in the United States, and reported a gross annual income of approximately $[redacted] when the petition was filed. It seeks to employ the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining that the petitioner: (1) had not established that the proffered position is a specialty occupation; and (2) had not established the beneficiary's eligibility to perform the duties of a specialty occupation.

Upon review of the entire record, we find that the petitioner has overcome the director's grounds for denying this petition. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The totality of the evidence presented in this particular record of proceeding establishes that the duties of the proffered position are so complex or unique that their performance can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has also established that the position proffered here otherwise meets the requirements of a specialty occupation as that term is defined by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In addition, we have reviewed the qualifications of the beneficiary and find sufficient evidence that he is qualified to perform the duties of the proffered position.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has sustained that burden.

ORDER: The appeal is sustained. The director's January 14, 2013 decision is withdrawn, and the petition is approved.

2. The Beneficiary's work experience and educational background have also been found equivalent by credible college-level equivalency examinations and thus satisfy the regulatory requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

In response to the RFE, the petitioner submitted two evaluations from Dr. and , both of whom have authorization to issue college credit based on a combination evaluation of educational and work experience of students in all fields of study for credited universities. USCIS wrongly disregarded these evaluations based on a finding that the evaluators are not authorized to grant college-level credit for training and work experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1). See January 14, 2013 Notice of Decision, p.12. USCIS erroneously found that these credible evaluators do not possess the necessary qualifications to evaluate foreign degrees pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1). A fair review of the record evidence indicates that, contrary to the USCIS denial, Dr. and are authorized to assess and issue credit based on a combination of the beneficiary's academic credentials and his work experience.

The Service ignored its own guidelines and the record evidence. Contrary to USCIS's decision, Dr. "is authorized (by the University) to grant credit" based on evaluations of a student's combined educational and work experience. The Adjudicator's Field Manual clarifies that an official must be "formally involved with the college or university's official program for granting credit based on training and/or experience to have the required authority and expertise to make such evaluations." See Adjudicator's Field Manual,

31.3 Section (h). USCIS failed to follow this guidance when it refused to recognize Dr. evaluation based on a combination of the beneficiary's work and educational background.

Professor is head of the University's foreign credential evaluation service and has supplied over 2000 expert opinions on educational credentials. See Exh. 1. His evaluation was accompanied by a letter from the University confirming the following: "(1) That University has a policy of awarding experiential learning credits for professional work experience; (2) That professors, including Professor evaluate such credentials and determine whether University is to award credit based on a student's professional experience; and (3) That Professor , an University faculty member since 2007, is highly proficient and knowledgeable in this process." See Exh. 1. This same letter confirms that Professor holds a Doctorate in Education, but has authorization to issue the above-mentioned equivalency evaluations "in all academic fields as a cross-disciplinary faculty member." Id.

Similarly, USCIS erred when it refused to consider the combination evaluation from possesses similar qualifications, and has trained with granting college-level credit based on educational background and experience combined. See Exh. 2. USCIS ignored a letter included with Ms. 's equivalency which confirms that she holds a professorship at U . and that she is "permitted to evaluate students on behalf of the university ... and issue college credit for work experience in all fields offered at the University." See Exh. 2. Also included with her equivalency evaluations is proof that Mr. helped institute a university program to grant college-level credit for experiential learning following the USCIS 3-for-1 rule. Id. Her evaluation for the beneficiary specifically states that she used the 3-for-1 rule pursuant to 8 CFR 214.2(h)(4)(iii)(D) to reach her findings. She explains:

> "For every three years of relevant and comparable work experiences, we granted up to one year of university study, or 12 years of work experience . . . is considered to be equivalent to a US Regionally Accredited Bachelor's degree . . . The resume listings and the employment verification letters attest a progressively more responsible experience with increasingly complex duties including in the field of forensic (alcohol) criminology for a total of 17 years." Id.

's educational evaluation found Mr. s "combined education and professional experience [to be] equivalent in standing in our opinion to the degree of Bachelor of

Science degree with major in forensic (alcohol) criminology, from a university in the United States of America." See Exh 1 and RFE Response, Exh. L. found the following: "In reviewing s academic history and progressive work experience, it is evident that has satisfied the requirements that are substantially similar to those of an accredited institution of higher education in the United States." See Exh. 2; and RFE Response, Exh. K.

In light of the above, it is clear that and are qualified to evaluate the beneficiary's academic credentials and work experience. USCIS' decision to discard their expertise and their evaluation is clear error and contradicts a plain reading of the regulations.

3. By approving an H-1B petition for this beneficiary in 2009, the Service made a determination that the beneficiary's degree and work experience equates to a four-year degree in criminology, thus satisfying 8 CFR § 214.2(h)(4)(iii)(D)(5).

In 2009, the USCIS Vermont Service Center ("VSC") approved an H-1B petition for this beneficiary filed for a similar position and relying on the same combination of educational background and work experience. See Exh. 3. Approximately three years later, in early 2013, the USCIS California Service Center ("CSC") found that the beneficiary's educational background cannot qualify him for an H-1B. The CSC itself acknowledges that the beneficiary can establish that his degree and experience shall be found equivalent to a US bachelor's degree if the Service determines that the degree and experience are equivalent. CSC, however, failed to acknowledge in its denial that in 2009, the VSC already found the beneficiary's education and work experience sufficient to satisfy the regulatory requirements. It is an abuse of discretion for the Service to make a finding of equivalency in one filing and then contradict its own finding without explanation in a subsequent filing.

In its January 14, 2013 decision, USCIS concluded that it was unable to undergo its own de novo review of the beneficiary's educational background and experience because nothing more than the beneficiary's resume was provided. See January 14, 2013 Notice of Decision, pages 14 and 15. But as discussed above, the record is replete with evidence the USCIS ignored, including the following: (1) A detailed resume documenting many years of progressive experience in the field; (2) Course-by-course transcripts from all university programs; (3) All

degree certificates; and (4) Certificates of completion from various police colleges and police services for multiple training courses demonstrating the beneficiary's progressive experience in the field. In addition, the petitioner filed the following in response to the RFE: (1) Two degree equivalency evaluations from reputable college-degree issuing experts; (2) A more detailed resume of the beneficiary; & (3) Letters of support documenting the beneficiary's progressive experience and recognized expertise in the field. In light of the abundant documentation and evidence submitted, it is puzzling that USCIS was unable to undergo its own determination of degree equivalency. Also, if the Service wanted further evidence to establish the beneficiary's progressive work experience other than what was requested and already provided, it should have requested such evidence in the RFE.

The Service also incorrectly found that the petitioner failed to submit evidence to establish the five criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Per this regulation, USCIS to must make its own independent assessment of degree equivalence, if evidence of at least one of the following is provided:

> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner filed ample evidence to establish 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i),(iii) and (v).

The petitioner filed support letters from industry experts verifying that the beneficiary is a recognized expert in the field. Dr. a professor of Neurology and Pharmacy who has been "often called upon to review a purported expert's professional experience in this field," stated in one letter that he "can personally attest to [the beneficiary's] knowledge and expertise as a Forensic Alcohol Criminalist." Basing his opinion on Mr. 's CV and a professional knowledge his work, Dr. explained:

"Mr. . demonstrates that he has continuously held progressively responsible positions with regard to Forensic Alcohol Criminology. He has continued to obtain education, training and experience very relevant to this field. Over the past decade, Mr. has served as an expert witness for increasing number of law firms, in increasingly higher profile cases. He has gained national recognition as a leader in his field both through his work in criminal cases and through the various educational programs he provided." See RFE Response, Exh. M.

Addressing Mr. s contributions to the field of forensic alcohol criminology, Dr. states:

"Mr. can be said to have made significant contributions to the field of forensic alcohol criminology. He himself has written several articles and publications on Breath Alcohol Testing. These articles and publications have been included in leading industry media. Mr. has also given numerous presentations on the recent developments in forensic alcohol criminology. The issues he discusses often shape the way the forensic alcohol criminalists carry their job." Id.

Another recognized expert and legal consultant for matters involving drugs and alcohol, Dr. also confirmed that USCIS ignored Mr. s recognized expertise in his field:

"Mr. is an expert in the area of alcohol breath testing. He possesses knowledge in the area of the technology and theoretical considerations of the instruments. It is my professional opinion that Mr. is an expert in the area of alcohol breath testing and alcohol toxicology." See RFE Response, Exh. N.

Mr. s Former employers also explain that Mr. gained significant experience while conducting this work, and frequently reference Mr. expertise in the field of Forensic Alcohol Criminology. For instance, DUI defense attorney noted:

"I know of no other breath testing expert in the county that has his depth of knowledge. This combination of education and experience makes him an effective witness for citizens charged with drinking and driving offenses. See RFE Response, Exh. O.1.

Criminal Defense attorney Mr. emphasized that Mr. is known for training DUI defense attorneys who have argued cases in front of the Supreme Court of . He confirmed the following:

"I work with and cross-examine many highly competent scientists, both government and private sector. Mr. equals or surpasses their knowledge of evidentiary breath testing science and equipment." See RFE Response, Exh. O.2.

These support letters from industry experts, former employers, and criminal defense attorneys speak for themselves. USCIS abused its discretion in overlooking substantial record evidence and misapplying the regulations. Its previous finding that the beneficiary's education is equivalent to a US bachelor's in criminology should stand.

V. Conclusion

Based on the aforementioned evidence and information, the petitioner clearly established that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training and progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree.

DATED: March 12, 2013

Respectfully submitted,

Camiel Becker
Attorney for Petitioner

U.S. Department of Homeland Security
P.O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

TO:

DATE: JAN 14 2013

Petition: Form I-129

File: WAC

DECISION

Your Form I-129, Petition for a Nonimmigrant Worker, filed in behalf of has been denied for the following reason(s):

See Attachment

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed with this office within 30 days of the date of this notice. Your appeal must be filed on Form I-290B. A fee of $630.00 is required, payable to U. S. Citizenship and Immigration Services with a check or money order from a bank or other institution located in the United States. If no appeal is filed within the time allowed, this decision will be the final decision in this matter.

In support of your appeal, you may submit a brief or other written statement for consideration by the reviewing authority. You may, if necessary, request additional time to submit a brief. Any brief, written statement, or other evidence not filed with Form I-290B, or any request for additional time for the submission of a brief or other material must be sent directly to:

DHS/USCIS
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

Any request for additional time for the submission of a brief or other statement must be made directly to the Administrative Appeals Office (AAO), and must be accompanied by a written explanation for the need for additional time. An extension of time to file the appeal may not be granted. **The appeal may not be filed directly with the AAO.**

The Small Business Regulatory Enforcement and Fairness Act established the Office of the National Ombudsman (ONO) at the Small Business Administration. The ONO assists small businesses with issues related to federal regulations. If you are a small business with a comment or complaint about regulatory enforcement, you may contact the ONO at www.sba.gov/ombudsman or phone 202-205-2417 or fax 202-481-5719.

Sincerely,

Daniel M. Renaud
Acting Director, California Service Center

Enclosure: Form I-290B
cc: Camiel Becker, Esq.

Form I-292

www.dhs.gov

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The record indicates that the beneficiary studied for approximately three years in a post-secondary setting, but does not establish that the beneficiary holds a foreign degree equivalent to a United States baccalaureate or higher degree in the field of Criminology as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).

In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following: (Emphasis added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as follows:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Further, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Also, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Although the petitioner submitted an evaluation from a foreign educational credentials evaluator by the name of Professor on behalf of University , to show that degree equivalency was being sought for the beneficiary based on the beneficiary's foreign education, training, and/or experience, foreign educational credentials evaluators may only evaluate an individual's foreign educational credentials - not training or work experience. Foreign education credentials evaluators do not have the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to three years from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Since the foreign educational credentials evaluation indicated that the beneficiary had less than a baccalaureate level of education in a field of study required by the proffered position, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), and (4) above.

Furthermore, the petitioner submitted an evaluation of training and/or experience from a private educational evaluation service that was completed by a consultant who asserts to having the authority to grant college level credit at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience to show degree equivalency for the beneficiary.

Although the petitioner has submitted a letter from that claims that Ms. , chief evaluator has the authority to grant the college-level credit for various fields offered at the university ( ). A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). As such, the Career Consulting International evaluation carries no weight in these proceedings. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm. 1988).

Furthermore, both evaluator's; Ms. and Professor have not provided sufficient evidence to establish his/her credentials to determine educational equivalency to a bachelor's degree in the particular field of study required for entry into the occupation. Ms. holds a Doctor's degree in Education. Master's degree in Transpersonal Studies, and a bachelor's degree in Sociology. And, Professor holds a Doctor's degree in Education, PhD in Liberal Arts, Master's degree in Business Administration, and a Bachelor's degree in Music. However, the particular field of study required to perform the duties of the proffered position is Criminology, or a related field.

Since the burden of proof to establish eligibility for the benefit sought rests with petitioner who seeks to accord beneficiary's classification, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972)

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him or her to practice a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214(h)(4)(iii)(D)(1), (2), (3), or (4). As such, the only category remaining under which the beneficiary might possibly qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Evaluation of experience by USCIS

When the petitioner fails to establish that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1), the USCIS may make its own independent assessment of the beneficiary's credentials.

In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, the USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) as previously shown above.

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae alone is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and is insufficient to establish equivalency in the claimed specific specialty.

Without supplemental information, it is not possible to determine how the evaluator reached his/her conclusion that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

> **(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;**

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

The petitioner has submitted letters from former colleagues, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

> **(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;**

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;**

The petitioner did not submit sufficient evidence to establish that there has ever been any published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iv) Licensure or registration to practice the specialty occupation in a foreign country; or**

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of the specialty occupation through equivalency to completion of a United States baccalaureate or higher degree in the specialty occupation based on education, training and/or employment experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D). Therefore, the beneficiary is ineligible for classification as an alien employed in a specialty occupation.

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

petitioner's statements about the requirement that the individual will independently review the work product of other professionals. USCIS also ignored evidence that the individual in this position must be qualified as an expert in court to testify about his or her findings.

B. THE BENEFICIARY'S THREE YEAR DEGREE AND MANY YEARS OF EXPERIENCE ARE EQUAL TO THAT OF A FOUR YEAR DEGREE IN CRIMINOLOGY OR A RELATED FIELD.

1. The Regulatory Requirements for Degree Equivalency for Specialty Occupation Workers.

To qualify for an H-1B, a beneficiary must meet one of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(C). Namely, the beneficiary must: (1) Hold a US bachelor's or higher; (2) Hold a foreign degree determined to be equivalent to a US bachelor's degree or higher required by the specialty occupation; (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation; or (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. Here, the petitioner claims only that the beneficiary has satisfied the last requirement, i.e., that the beneficiary's three-year degree and many years of progressive work experience are equivalent to at least a four-year US bachelor's degree in criminology or a related field.

The regulations outline how a beneficiary's work history and educational background can be found equivalent to a US bachelor's degree. 8 C.F.R. § 214.2(h)(4)(iii)(D) states that the equivalence to completion of a United States bachelor's degree or higher degree "shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

Chong, Jenny

From: Baltaretu, Cristina G
Sent: Friday, January 10, 2014 4:17 PM
To: Nicholson, Roya Z; Matthews, Steven D; Murillo, Gustavo; Cartwright, Charity R; Culhane, Dennis J; Luu, Ken W; Vitug, Ella C
Cc: Chong, Jenny
Subject: FW: E-E Relationship and Validity Periods
Attachments: Employer-Employee Memo010810.pdf

Sups,

As we and the seniors have discussed during previous H1B trainings - including the Preponderance Training, Preponderance Practicums, and this month's H1B Roundtables can you kindly remind officers that Bobbie's email guidance was not meant to limit validity periods to less than three years in cases where there is no end/termination date in the contract or end-client letter?

The final adjudicative decision should be based on the totality and evidence provided with each case.

Thanks,
Cristina

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods
Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms

and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

JAN 0 8 2010

HQ 70/6.2.8
AD 10-24

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
(1) Engages a person to work within the United States;
(2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
(3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

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[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

<u>Valid employer-employee relationship would exist in the following scenarios:</u>[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

<u>The following scenarios would not present a valid employer-employee relationship:</u>[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control].

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the

[13] See 8 C.F.R. 214.2(h)(4)(ii).

petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable

at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

***

(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a

[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools

[8] See 8 C.F.R. 214.2(h)(4)(ii).

needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete

itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

Jowett, Haley L

From: Steele, Jenny B
Sent: Wednesday, July 28, 2010 11:10 AM
To: #CSC Division II; Elias, Erik Z; Devera, Jennie F; Harvey, Mark E; Chong, Jenny; Mikhelson, Jack; Ecle, Lynette C; Avetyan, Kurt H; Moran, Karla; Trinh, Nhut
Cc: Gooselaw, Kurt G; Nguyen, Carolyn Q
Subject: E-E Relationship and Validity Periods

Importance: High

This email supersedes any and all previous guidance on H-1B validity periods. As such the instruction below applies to all H-1B petitions including Cognizant.

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS has provided the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

Should you have any further questions or concerns regarding H-1B validity periods, please see your supervisor and/or ACD. Thanks.

Chong, Jenny

From: Tamanaha, Emisa T
Sent: Thursday, November 21, 2013 8:11 PM
To: Chong, Jenny
Subject: FW: E-E Relationship and Validity Periods
Attachments: Employer-Employee Memo010810.pdf

FYI

From: Fierro, Joseph
Sent: Thursday, November 21, 2013 1:34 PM
To: Aucoin, Lauren J
Cc: Tamanaha, Emisa T; Baltaretu, Cristina G; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods

Lauren:

We decided that it is best that we not add to the email guidance from Bobbie Johnson and simply relate to the officers and supervisors that generally the email guidance was not meant to limit validity periods to less than three years in cases where there is no end/termination date in the contract or end-client letter.

We will go forward with this understanding and through our supervisory, team, and section meetings will reinforce the meaning of this guidance. Additionally we will continue to work with the teams through training, mentoring and roundtables to gain full understanding and consistency in the center on this and all issues.

Thanks,

(b)(6)

Joe

[redacted]

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods
Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

Nguyen, Dang H

From: Shuttle, Peter J
Sent: Thursday, September 23, 2010 9:25 AM
To: Janson, Nancy D; Beauregard, Pamela R; Bolog, Marguerite M; Bouchard, Armanda M; Hoffman, Margaret A; Howrigan, Tanya L
Subject: FW: Time limitations for chile/singapore H1b requesting regualr H1B

FYI

Peter Shuttle
USCIS - VSC
Assistant Center Director AG-3
802-527-4786 / cell: 802-734-1229

From: Sweeney, Shelly A
Sent: Thursday, September 23, 2010 12:05 PM
To: Shuttle, Peter J
Cc: Doherty, Shannon P
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Pete,

Per OCC, H-1B1 is a separate classification from H-1B, and 8 CFR 214.2(h)(13)(B) is not applicable to H-1B1s. Therefore, an individual seeking to change status from H-1B1 to H-1B who has been in the US for more than 6 years, would not have to be abroad for one year before applying for an H-1B.

Thanks!

Shelly

From: Sweeney, Shelly A
Sent: Thursday, September 23, 2010 10:49 AM
To: Shuttle, Peter J
Cc: Doherty, Shannon P
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Pete,

I followed up with OCC on this question this morning. They hope to have an answer today. I will forward the answer along as soon as I get it. I will be out of the office tomorrow and Monday. Shannon will keep checking in with OCC if we don't get an answer today since the PP clock expires on Tuesday.

Thanks!

Shelly

From: Sweeney, Shelly A
Sent: Monday, September 20, 2010 11:57 AM
To: Shuttle, Peter J
Subject: RE: Time limitations for chili/singapore H1b requesting regualr H1B

Yes, I'll shoot this to HQ.

Peter Shuttle

USCIS - VSC

Assistant Center Director AG-3

(b)(6)

[redacted]

From: Beauregard, Pamela R [mailto:pamela.beauregard@dhs.gov]
Sent: Thursday, September 16, 2010 11:07 AM
To: Shuttle, Peter J
Cc: Bouchard, Armanda M; Bolog, Marguerite M; Howrigan, Tanya L
Subject: Time limitations for chili/singapore H1b requesting reguair H1B

Pete,

Is it possible to get clarification from SCOPS on the following:

Beneficiary is currently in Chili/Singapore H-1B (HSC) status. The petitioning company is requesting that they now be allowed to change status to regular H-1B. The officer issued an RFE regarding the petitioning company's requested validity dates because the time requested, if granted in full, would be in excess of 6 years, counting the time spent in HSC status. The response back was that the time in HSC status did not count toward the 6 year limit.

214.2(h)(13)(B) does not distinguish between HSC H-1B and regular H-1B status (nor does 214.2(l)(12), both just categorize H and /or L status).

It would seem to be an unfair practice to count the HSC time, as they are renewable in one year increments, indefinitely and I do not interpret the applicable sections of 8 CFR as definitive, I could interpret it either way.

Thanks,

Pam

(b)(6)

Pamela R. Beauregard|Senior Adjudications Officer (ISO 3)| Vermont Service Center |USCIS | ([redacted]) [redacted] pamela.beauregard@dhs.gov

original addressees without prior authorization of the originator.

Nguyen, Dang H

From:	Gooselaw, Kurt G
Sent:	Tuesday, April 27, 2010 8:54 AM
To:	#CSC Division II
Cc:	Nguyen, Carolyn Q; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject:	Meeting 4/22

In response to last Thursday's meeting this is being issued for clarification. This is solely guidance and not a policy memorandum and this is not to be quoted or used in RFEs or distributed to the public. Here are some bullets for your reference to assist with O and H1B adjudication. Should you have questions, please discuss with you supervisors.

Thanks

- O-1 itineraries – As discussed yesterday events and a series of events can be considered one event. There is no day gap threshold in determining whether two or more related events constitute one event for the validity period. You must evaluate, given the facts, whether a gap in time is reasonable and all events or series of events are related in order to be considered one event. This is a case-by-case determination given the totality of the evidence. For example – should a beneficiary be scheduled to perform at more than two venues look to the purpose and scope of the performance and verbiage describing what the beneficiary will be doing between performances in order to evaluate whether the two or more performances can be considered one event. There is no 45 day rule. We will evaluate these in a way that is beneficial to the petitioner and use a reasonable approach. However, should two performances be so far apart that it appears that each performance is one separate event, we will RFE first to allow the petitioner to describe what the beneficiary will be doing between these two or more performances before making a final decision.

- Sustained acclaim – Sustained acclaim is demonstrated by receiving a major internationally recognized award (O-1A). For O-1B arts the beneficiary must have received or been nominated for a significant national or international award or prizes. If not, the beneficiary may qualify by **adequately** meeting 3 of the 8/6 (O1A and O1B arts) regulatory prongs. The prongs are setup to weigh whether or not someone has demonstrated sustained acclaim and meet the O-1 threshold. There was a totality review adjudication discussion, however, we will continue to adjudicate and ensure that the evidence submitted meets that established level for the prongs in order to determine whether the beneficiary qualifies for O-1. Should the petitioner demonstrate the beneficiary **adequately** (more likely than not) meets the 3 of the 8/6 prongs, the case should be approved.

- O-1B Arts – The evidentiary standard is **prominence, well known or leading** in the field of arts. When evaluating evidence that falls within each prong, this standard needs to be applied. O-1B arts has the lowest standard of the three O-1 classification types.

- O-1B Motion Picture/TV – Receipt or nomination of a significant international/national award (including but not limited to Academy Award, an Emmy, a Grammy, or a Director's Guild Award) in this category is sufficient to establish the beneficiary qualifies for this O-1 classification type without additional evidence to show a demonstrated record of achievement. The evidentiary standard is **outstanding, notable or leading in the motion picture or television field**. If an award is not shown when evaluating evidence that falls within each prong this standard needs to be applied. O-1B motion picture/television has the second lowest standard of the three O-1 classification types.

- O-1 comparable evidence – Should evidence be submitted where it cannot be considered a significant award or evidence that does not readily fit into the prongs, such evidence should be considered and analyzed in accordance with the set standards. It should be noted that there is no provision in the regulations for comparable evidence in the motion picture and television category.

- One hit wonders – these are usually few and far between. However, if a beneficiary received a significant award 30 years ago and did not continue in their field of endeavor this may call into question whether the beneficiary actually meets the standard. This would need to be evaluated on a case-by-case basis.

- H-1B offsite employment initial filing (change of employer) – Should the petitioner have a well-established filing practice or track record with USCIS – unlike H-1B dependent employers, 10/25/10 employers, and CFDO returns with Statement of Findings – an employment support letter (written by the petitioner) and itinerary is sufficient as long as it shows the job description, right of control and validity period of the position. With this evidence it is more likely than not the petitioner has met its burden for the employer-employee relationship aspect and you **have the discretion** to accept this evidence as meeting the EE standard. All other issues such as maintenance of status, beneficiary qualifications, specialty occupation must also be evaluated independently on other evidence. Should the case be approvable in all respects and the itinerary states the validity period and matches what is requested on the petition and LCA, we should use that period of time period as the validity period.

- H-1B offsite employment (initial) continued – Should the employment letter fail to include the pertinent information discussed above and/or the petitioner does not have a well-established filing practice or track record, see above for examples, you would need to evaluate the evidence and identify the deficiencies. You should issue an RFE, but you would need to articulate what was received and what the deficiencies are. In this situation the RFE needs to include the evidence as bulleted in the template.

- Contracts – If a contract combined with the statement of work (SOW), addenda, end user client letter, service agreements, etc. is present the validity within those documents controls the end date. If it is shorter than one year, issue an RFE and provide the petitioner with an opportunity to submit evidence for the full period requested. If an RFE has already been issued for these documents, a second RFE is not needed. If less than one year is shown, then provide one year. If more than one year provide that time as long as the beneficiary is eligible. Should there be a range we would give the shorter period. If the shorter period is less than one year we would provide one year.

- EOS with the same employer – As long as the petitioner can establish that it continues to meet all the regulatory H-1B requirements the case should be approved. If the EOS does not indicate regulatory compliance an RFE is warranted and use the RFE template accordingly.

- EOS with a new petitioner – see above on initial filings.

- Self-petitioning H-1Bs and O-1s – Self-petitioning H-1Bs need to be brought to your supervisor with the intended decision – no clerical or C3 updates. O-1self-petitioners can be adjudicated but do not use H-1B language or the EE memo in your adjudication. The regulation for Os is clear that an O-1 beneficiary cannot self-petition and does not qualify as a US employer.

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, November 03, 2009 8:49 AM
To: Zhang, Janet T; Kurniadi, Sanlyati; Hong, Yen; Mendez, Christopher M; Delfosse, Ryan J; Makabali, Michelle L; Reid, Brett M; Chung, Jae M; Nguyen, Dang H
Subject: FW: Advance parolees

FYI

Shawn Adams

From: Gooselaw, Kurt G
Sent: Tuesday, November 03, 2009 8:45 AM
To: Adams, Shawn M; Dyson, Howard E; Nicholson, Roya Z; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Cc: DeJulius, Robert W
Subject: FW: Advance parolees

See below. If there is no time left on the I-797 after the bene has been given advanced parole, then the officer should issue a split decision.

From: Nguyen, Carolyn Q
Sent: Tuesday, November 03, 2009 8:42 AM
To: Gooselaw, Kurt G
Cc: Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
Subject: RE: Advance parolees

I agree that the EOS should be denied if there's no time left on the previous I-797 approval.

From: Gooselaw, Kurt G
Sent: Tuesday, November 03, 2009 8:11 AM
To: Nguyen, Carolyn Q
Subject: FW: Advance parolees
Importance: High

Carolyn,
Please advise if Div I will conform to this adjudication – split decision if there is no time left on the I-797 approval?

From: DeJulius, Robert W
Sent: Tuesday, November 03, 2009 6:13 AM
To: Sweeney, Shelly A; Bouchard, Armanda M
Cc: Young, Claudia F; Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Subject: RE: Advance parolees

Thanks Shelley.

I feel an attorney will eventually challenge us for denying an EOS on an AP admissions request, not requesting an EOS (for those who have EAD authorization) , especially if CBP grants admission to these requests. But I guess we'll see what happens if that occurs. We are really in a catch 22 situation on this.

Robert DeJulius
SrAO

From: Sweeney, Shelly A
Sent: Monday, November 02, 2009 7:03 AM
To: DeJulius, Robert W; Bouchard, Armanda M
Cc: Young, Claudia F; Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Subject: RE: Advance parolees

Bob and Mandy,

As you noted, Bob, the Cronin dual intent memo does state that a final rule will supersede the memo, but I cannot locate where a final rule was ever published. It looks like Cronin is all we have to work with right now.

With regards AOS advanced parole, the Cronin memo specifically states that an EOS request can be made only if there is a "valid and approved petition." As such, I tend to agree with the attached VSC AOS parole guidance. Petitions where the EOS request is filed after the expiration of the H-1B petition could be reviewed under the provisions of 8 CFR 214.1(c)(4).

As for maintenance of status for EOS, the Cronin memo states that until the final rule is published "the Service will not consider a paroled adjustment applicant's failure to obtain a separate employment authorization document to mean that the paroled adjustment applicant engaged in unauthorized employment by working for the H-1 or L-1 employer between the date of his or her parole and the date to be specified in the rule." I interpret this to read that the alien can still work for the H-1B employer after he was admitted as an AOS parolee as long as the original petition is still valid even if he doesn't have a separate EAD. I would still say that 8 CFR 214.2(h)(13) kicks in after the original petition validity expires.

In the situation originally laid out by the CSC where the beneficiary has received a grant of advanced parole not AOS-related and therefore not covered by Cronin (ie. humanitarian) and both the original H-1B petition and the advanced parole I-94 have expired, I again tend to agree with the VSC that any COS/EOS would be denied and the petition would be forwarded for consular processing (unless the petitioner can demonstrate that discretion should be applied under 8 CFR 214.1(c)(4) or 8 CFR 248.1(b)). I don't think we want or even can get into the habit of admitting someone.

If you have any questions/comments/concerns, please email me (and make sure you copy Claudia).

Thanks!

Shelly

From: DeJulius, Robert W
Sent: Thursday, October 29, 2009 12:43 PM
To: Bouchard, Armanda M; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M; Gooselaw, Kurt G; Brolox, John B; Helfer, Wayne D; Onuk, Semra K; Phan, Lethuy; Adams, Shawn M; Dyson, Howard E; Nicholson, Roya Z; Steele, Jenny B; Torres, Lory C; Tran, Helen; Wolcott, Rachel A; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Ellas, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla; Nguyen, Carolyn Q
Subject: RE: Advance parolees

Thanks Armanda,

Again, my worry is the effect of these memos when they say "until a final rule is published". Where is the final rule? And all these memos deal with a denial of the extension, which would be at the post admission stage. If we deny their request for admission. then there would be no need for a denial of an extension. If we admit them, why

then, would we deny their extension? We need to wrap our heads around this and I would like to get a policy established in the SOP before a savvy attorney files against one of these split decisions and we have to defend a denial of an extension when one is not being requested.

Shelley, maybe counsel needs to look at this before we establish a policy so we are on firm ground. Sorry to be such a worry wart, but this stems from my experience with immigration attorneys. And I would not be unhappy if we were advised not to accept these anymore.

Robert DeJulius
SrAO

From: Bouchard, Armanda M
Sent: Thursday, October 29, 2009 3:20 AM
To: DeJulius, Robert W; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Bob,

Given that a parole is not an admission, I understand how CSC looks to adjudicate this scenario as an admission. Also, without an admission there is no nonimmigrant status to extend or change from, so VSC looks at this as a status issue, with the 5/25/00 Cronin memo on AOS parolees being an exception. We look at whether the alien has any status to extend or change, depending what they have requested on the I-129. If the reason for parole is AOS, then we follow the 5/25/00 Cronin memo. If the parole is for some other reason, such as humanitarian parole, then they do not have any status to extend or change, therefore we would not grant any EOS or COS, but could grant an approval for consular notification if they qualified for the classification. I would contact the POE to inquire on what grounds they have admitted an alien if the advanced parole has expired and the reason for parole is not clear.

(b)(6)

Armanda Bouchard| DHS| USCIS | Vermont Service Center | Senior Adjudications Officer [redacted] Armanda.Bouchard@dhs.gov

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From: DeJulius, Robert W
Sent: Wednesday, October 28, 2009 9:17 AM
To: Bouchard, Armanda M; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Armanda,

This is the problem we are seeing. The previous H1B status expired. Now the alien as been admitted as an advance parolee and the petitioner's I-129 is not officially requesting an EOS (even if they mark this on the petition) as they are in a current authorized stay as an advance Parolee and are requesting admission as an H1B. We are now acting as an inspector at admissions would, either granting or denying admission. Because

they are requesting admission as an H1B, there is no EOS to deny. · We'd like more info on how CBP handles these and what they base the decision on (work authorization??). To the best of my knowledge, in a two step process, they admit them, then once admitted as an H1B, they grant them validity.

Robert DeJulius
SrAO

From: Bouchard, Armanda M
Sent: Wednesday, October 28, 2009 5:02 AM
To: DeJulius, Robert W; Sweeney, Shelly A
Cc: Howrigan, Tanya L; Bolog, Marguerite M; Shuttle, Peter J; Perkins, Robert M
Subject: RE: Advance parolees

Bob,

I'm not aware of an increase in the scenario of the AOS applicant whose H-1B has expired. In this scenario if the position and beneficiary qualify for the H-1B, we would grant the classification and deny the EOS. This assumes the alien has H-1B time remaining or has AC21. This is addressed in our local H-1B guide in Chapter 10 attached.

(b)(6)

Armanda Bouchard| DHS| USCIS | Vermont Service Center | Senior Adjudications Officer [redacted] Armanda.Bouchard@dhs.gov

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From: DeJulius, Robert W
Sent: Tuesday, October 27, 2009 3:45 PM
To: Sweeney, Shelly A; Bouchard, Armanda M
Subject: Advance parolees

Shelly and Armanda,

CSC is seeing an increase in I-129 petitions seeking to readmit advance parolees in the U.S. back into H1 or L1 status. Only H and L benes (and I believe V and K) that have a pending adjustment of status can be readmitted on an I-129. They usually are working under an EAD. We are seeing an increase of filings for advance parolees who were former H1B benes. Many of the beneficiaries of these petitions have had their previous I-797 H1B expire and some have also had their advance parole I-94 expire. We know that CBP still admits these aliens back into the U.S., depending on their situation, even if their H1b status has expired and their advance parole stay has expired. We are now starting to see an increase in these. I am aware of no policy for adjudicating these. Because these benes are not currently in non-immigrant status, and as advance parolees, are just seeking admission as an H1B, there are no procedures we have to follow.

Armanda, has VSC seen a rise in these filings and if so how are you handling them? When we get to the appropriate place in the SOP I believe we need to address this. Any advisement would be appreciated. Thanks

Robert W. DeJulius| Senior Immigration Officer | Division 2| USCIS | DHS |

(b)(6)

Laguna Niguel, CA 92677 | ☎ [redacted] 🖷: 949-389-8601 | ✉: robert.deJulius@dhs.gov

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, June 30, 2009 9:32 AM
To: Chung, Jae M; Nguyen, Dang H; Kurniadi, Sanlyati; Hong, Yen; Reid, Brett M; Makabali, Michelle L; Delfosse, Ryan J
Subject: FW: Infosys

Please note...

Shawn Adams

From: Gooselaw, Kurt G
Sent: Tuesday, June 30, 2009 9:31 AM
To: Torres, Lory C; Steele, Jenny B; Adams, Shawn M; Dyson, Howard E; Harton, Frank A; Nicholson, Roya Z; Wolcott, Rachel A
Subject: RE: Infosys

Thanks. SCOPS was advised of this and if they do push back HQ will respond. But for now, we will be giving 1 year. Unless the end client is specific on the time requested or a contract is provided, 1 year will be the default.

From: Torres, Lory C
Sent: Tuesday, June 30, 2009 9:24 AM
To: Steele, Jenny B; Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Wolcott, Rachel A
Subject: RE: Infosys

In a supervisory meeting a couple of weeks back, this issue was brought up and we were advised to go ahead and give a two year period for those that asked for 1-2 years. I had advised my team to do so. Just letting you know we might see some push back from Infosys, who seems to be the biggest culprit, when they begin to receive 1 year instead of 2 or three.

From: Steele, Jenny B
Sent: Tuesday, June 30, 2009 7:17 AM
To: Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Torres, Lory C; Wolcott, Rachel A
Subject: Infosys

Please share the following with your officers.

The recent Infosys H-1B filings include letters from the end-user client. Many of these letters appear to be fine, with the exception of the validity dates given. The validity dates given are so general and are often given in range format, e.g., "We anticipate the need for the services of 15 Infosys personnel for a 2-3 year period commencing from the date they arrive in the US in H-1B status." For cases with such end-user client letters (range given for validity dates), we will be giving 1 year.

Jenny Steele| Supervisory Immigration Service Officer | Division 2| USCIS | DHS |

Laguna Niguel, CA 92677 | [redacted]: 949-389-8601 | ✉: jenny.steele@dhs.gov

relating to Sensitive But Unclassified (SBU) information and is not to be released to the public or other personnel who do not have a valid "need-to-know" without prior approval from the originator.

Nguyen, Dang H

From: Gooselaw, Kurt G
Sent: Thursday, May 28, 2009 9:57 AM
To: #CSC Division II
Subject: H1B

Importance: High

In determining eligibility for the H-1B category, it is necessary, at times, to request for submission of contracts to establish that the services the beneficiary is to perform are in a specialty occupation. Regulations at 8 C.F.R. 214.2(h)(4)(iv)(A)(1) supports such requirement. The request for contracts is essential for cases where the beneficiary will be working off-site for a third party.

Here are the criteria for which to request such documentation:

- Cases where the petitioner falls under the 10/25/10 guidelines (gross annual income of <$10 million; employ 25 employees or less; and business was established within the last 10 years).
- Cases where the petitioner is an H-1B Dependent
- *Cases where the petitioner has an inordinate amount of filings compared to the number of employees listed on the petition*
- *Cases where the petitioner is on the active FID list*

Validity Period – once it has been established that there is a job immediately available for the beneficiary and the proffered position is that of a specialty occupation, the petition should be approved for the period specified on the contract or one year, which ever is longer.

Continuation Without Change cases - please request for W-2s and the beneficiary's income tax documents to establish that the petitioner did indeed pay the wages indicated on the previous H-1B petition.

As a reminder, it is imperative to request only the documents needed to determine eligibility. When requesting additional evidence, the RFE should be tailored to the instant case. The attached RFE includes documentary evidence that normally satisfactorily establishes that a specialty occupation exists for the beneficiary.

If further systems checks or a site check is needed, please refer the case to CFDO.

Please see your/a supervisor if you have questions.

Thanks.

Nguyen, Dang H

From: Adams, Shawn M
Sent: Tuesday, May 19, 2009 4:03 PM
To: Chung, Jae M; Nguyen, Dang H; Kurniadi, Sanlyati; Hong, Yen; Reid, Brett M; Makabali, Michelle L; Steele, Jenny B; Delfosse, Ryan J
Subject: Tuesday Meeting Notes

Reminders and news from the meeting today:

- Limit validity dates to contract dates. This includes medical residents. If for some reason a hospital contracts a medical resident for 18 months, then only approve for the 18 months. If the contract dates are not less than 3 years, then give the full 3 years.
- We will have 20 hours OT for PP 11.
- Post 1/18/09 H2 petitions must have matching dates. The dates on the LCA and petition must be the same.
- Don't forget we have pizza for lunch tomorrow! I ordered two pizzas, a veggie and a pepperoni. I'm looking forward to sharing pizza with you tomorrow! ☺

Thank you Team 3 for being so great!!

~Shawn

Nguyen, Dang H

From: Gooselaw, Kurt G
Sent: Wednesday, April 29, 2009 3:06 PM
To: #CSC Division II
Cc: Nguyen, Carolyn Q
Subject: H-1B Validity Periods
Attachments: Validity Date Cheat Sheet.doc

All,

It has been brought to my attention that we are experiencing a higher than normal error rate on validity periods associated with H-1B filings. Below are some helpful tips in order to facilitate adjudication and to reduce the number of errors. In addition, the validity date chart located in o:common is attached for your reference. I appreciate all the hard work you are doing in the Division, but sometimes we need to step back and ensure that our decisions are correct. So I am asking that you read the information below and in the attachment and become familiar with the requirements on validity periods. The scenarios below are not all the situations that may be encountered but should assist you with a majority of your workload.

Thank you,
Kurt

H-1B Validity Date Tips

As a reminder Validity dates may not be granted for time outside of the period authorized by the Department of Labor on the Labor Condition Application (LCA).

Validity dates may not be given for more than a 3 year period at one time.

A Change of Status, requested for a beneficiary currently on OPT where the petitioner requests a start date that is in the future (ie OPT ends 8/2/09, employment start date is 8/3/09, LCA start date 8/3/09) could be approved today with a validity start date that would not place the beneficiary out of status. In this case the start date is 8/3/09.

All requests for Change of Status, where the start date has past, receive date of adjudication An example would be today is 9/1/09, petitioner and LCA have a start date of 8/10/09 you would approve with a start date of 9/1/09.

An Extension of Stay, filed by a new employer, receives date of adjudication. The portability provision in AC21 allows for the beneficiary to work for the new employer while the I-129 is pending.

An Extension of Stay, filed by the same employer, receives the date following their current expiration date as long as it was timely filed. If untimely filed and claiming circumstances beyond their control discretion may be applied, however, you should consult with your supervisor.

Nunc pro tunc (approve now for then) is prohibited. Petitioners and/or attorneys will request nunc pro tunc, however, this is not done.

Cap Gap only applies to Change of Status petitions filed for a beneficiary currently in F-1 status.

When considering validity dates first you must determine whether the case is cap exempt or subject to the cap.

Jowett, Haley L

From: Fierro, Joseph
Sent: Monday, February 14, 2011 12:59 PM
To: Ecle, Lynette C; Devera, Jennie F; Chong, Jenny; Elias, Erik Z; Avetyan, Kurt H; Brokx, John B; DeJulius, Robert W; Helfer, Wayne D; Phan, Lethuy; Mikhelson, Jack; Cameron, Felicia M
Cc: Arganoza-Franciliso, Carmen U
Subject: FW: AILA Questions

FYI only.

From: Fierro, Joseph
Sent: Monday, February 14, 2011 10:52 AM
To: Sweeney, Shelly A
Cc: Harton, Frank A; Harvey, Mark E; VSC, Division 4 Senior; Chadwick, Donna; Janson, Nancy D; Lockerby, Beth A; Montgomery, Laura; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M; Canney, Keith J
Subject: AILA Questions

Shelly:

CSC also interprets the term "working off site" to mean that the beneficiary will be working at a location other than the petitioner's.

CSC also applies the referenced regulations and memos that VSC refers to.

In addition, CSC also refers to the January 08, 2010 Neufeld memo, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements,* page 10 which states:

> D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)
>
> Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2 (h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being benched without pay between assignments.

Also, CSC refers to page 8 of the January 08, 2010 Neufeld memo which includes "a complete itinerary" as one of the types of evidence a petitioner can submit to demonstrate an employer-employee relationship.

Thanks,

Joe

From: Canney, Keith J
Sent: Friday, February 11, 2011 11:26 AM
To: Fierro, Joseph; Sweeney, Shelly A

Cc: Harton, Frank A; Harvey, Mark E; VSC, Division 4 Senior; Chadwick, Donna; Janson, Nancy D; Lockerby, Beth A; Montgomery, Laura; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M
Subject: FW: AILA Questions

Shelley –

Tanya has summarized VSC's approach to the issues you have raised.

Keith

From: Howrigan, Tanya L **On Behalf Of** VSC, Division 4 Senior
Sent: Friday, February 11, 2011 2:18 PM
To: Canney, Keith J; VSC, Division 4 Senior
Subject: RE: AILA Questions

Keith –

VSC interprets the term "working off-site" to mean the beneficiary will be working at a location other than the petitioner's. Officers refer to the following in determining if the beneficiary will work off-site:

- I129 Form, Part 5, Question 3 – this section has a place to indicate the address where the beneficiary will work if other than the petitioner's location;
- I129 Form, Part 5, Question 5 – this section asks the petitioner to answer yes or no to the question "Will the beneficiary work off-site?"
- The LCA – Page 3, Part G.a – Place of Employment;
- The LCA – Page 6 (if submitted) – the addendum for listing additional work locations;
- The petitioner's cover letter; and
- Any additional supporting documents, such as contracts or a formal itinerary, which suggests the beneficiary will be employed off-site.

In regards to the itinerary, officers refer to the regulations at 8 CFR 214.2(h)(2)(i)(B) which states:

> (B) Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

Officers also refer to the Michael Aytes Memo dated December 29, 1995 *Interpretation of the Terms "Itinerary" found in 8 CFR 214.2(h)(2)(i)(B) as it relates to the H-1B Nonimmigrant Classification.* If it appears the beneficiary will be working off-site, officers will look at the areas listed above to determine the itinerary of services or engagements. (b)(6)

Tanya L. Howrigan|Senior Adjudications Officer (ISO 3)| Vermont Service Center |USCIS | ☎: [redacted] |🖷 **802.527.4843|✉: tanya.howrigan@dhs.gov**

From: Sweeney, Shelly A
Sent: Friday, February 11, 2011 9:32 AM
To: Canney, Keith J; Fierro, Joseph
Cc: Harton, Frank A; Harvey, Mark E
Subject: AILA Questions

Keith and Joe,

AILA has asked how the centers are interpreting the term "working off-site" on the Form I-129 (Question 5, Part 5 on Page 4). Are the centers interpreting an affirmative response to this question to mean that the beneficiary will be working at an end-client location if there is no additional explanation in the file regarding the affirmative response? I believe so, but wanted to check with each of you. They also wanted to know what policy guidance memos each center is following regarding itinerary requirements when the petition indicates that the beneficiary will be performing work in more than one location. Specifically, which memos does each center follow as guidance when determining whether the petition has met the itinerary requirements?

We'd like to get responses by noon EST on Tuesday. I will be on travel to TSC next week, so could you copy Frank and Mark when you respond?

Thanks!

Shelly

Shelly Sweeney
Adjudications Officer
Business Employment Services Team
Service Center Operations
20 Massachusetts Ave N.W., Ste 2000
Washington D.C. 20529-2060

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Friday, March 05, 2010 3:25 PM
To: Steele, Jenny B
Subject: FW: AILA H-1B Questions
Attachments: 031710 QA.doc

For review and comment back to Shelly.

From: Sweeney, Shelly A
Sent: Friday, March 05, 2010 11:26 AM
To: Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Cc: Johnson, Bobbie L; Young, Claudia F
Subject: AILA H-1B Questions

Kurt, Carolyn and Rob,

SCOPS has a meeting with AILA scheduled for the 17th. AILA has submitted a few questions/issues on H-1Bs. I have drafted responses to two and had a question for you all on the third. Can you let me know if you have any issues with the two draft responses and let me know what you think on the third by COB on Tuesday, March 9?

Thanks!

Shelly

Shelly Sweeney
Adjudications Officer
Business Employment Services Team
Service Center Operations
20 Massachusetts Ave N.W., Ste 2000
Washington D.C. 20529-2060

1. **New period of H-1B stay after residing outside of the US for 1 year [8 CFR §214.2(h)(13)(i)(B)]**

AILA respectfully requests that SCOPS confirm that per 8 CFR §214.2(h)(13)(i)(B), brief trips to the United States for business or pleasure during the required time abroad are not interruptive although they do not count towards the fulfillment of the required time abroad to refresh a new period of H-1B status after reaching the maximum limit. Please also confirm that the clock is not reset in counting the one year abroad from the time of the last brief trip to the United States but instead it is the aggregate amount of time spent outside of the United States prior to reapplying for a new full period of H-1B stay.

Response: 8 CFR §214.2(h)(13)(i)(B) does state that brief trips to the United States for business or pleasure are not interruptive, but do not count towards fulfillment of the required time abroad. The clock does not "reset" in those cases. That being said, please note that stays in the United States that are not brief trips for business or pleasure can interrupt the fulfillment of the required time abroad. The clock may "reset" in these cases.

2. **Credentials Evaluation for Education and Work Experience Combined**

A. AILA requests clarification of what the Service requires for credential evaluations that combine education and work experience. The regulations at 8 CFR § 214.2(h)(4)(iii)(D) describe what evidence may be submitted to demonstrate equivalence. The regulation at 8 CFR § 214.2(h)(4)(iii)(D)(1) states that combined education/experience evaluations must come from "an official who has authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training or work experience." Members report denials where the evaluation in support of an 8 CFR § 214.2(h)(4)(iii)(D)(1) determination is presented on the university's letterhead, but, the evaluations do not state that they were "done on behalf" of the university. Please remind adjudicators that there is no requirement that the evaluation have been "done on behalf of the university."

Response: While the determination on an evaluation does not necessarily need to be on behalf of a university, the record must establish that the individual providing the evaluation qualifies and has the authority "to grant college level credit." A letter an individual on university letterhead may not be sufficient to establish that the individual has the appropriate authority to issue the evaluation.

Comment [sas1]: Without seeing the full context of what AILA is claiming, this is as detailed as I can get. VSC and CSC, do you have any additional information or changes that need to be made to this response?

B. Under 8 CFR § 214.2(h)(4)(iii)(D)(5), education and experience can be considered the equivalent of a corresponding degree, *inter alia*, if the alien's expertise in the specialty occupation has been recognized by "at least two recognized authorities in the specialty occupation." A "recognized authority" is

defined in 8 CFR § 214.2(h)(4)(ii) as someone with expertise, special skills or knowledge in a particular field qualifying the person to render the opinion, and the opinion itself must be supported by the writer's qualifications, the writer's experience in giving opinions supported by specific examples, and the methodology and basis for reaching the conclusion. In relation to the proof required under 8 CFR § 214.2(h)(4)(iii)(D)(5), examiners appear to be rejecting "recognized authority" letters written by academics under 8 CFR § 214.2(h)(4)(iii)(D)(5) if these "authorities" are writing the letters at the request and pursuant to payment from credentials evaluation services, as opposed to on behalf of their educational institutions. Again – it does not appear that 8 CFR § 214.2(h)(4)(iii)(D)(5) prohibits anyone seeking to qualify as a "recognized authority" from providing the opinion letter via an evaluation service or other third party, so long as it is clear that it is the opinion of the authority and not the opinion of the third party, and so long as the opinion and its writer meet the other requirements of 8 CFR § 214.2(h)(4)(iii)(D)(5). Please remind examiners that evidence from a "recognized authority" may include opinion evidence found contained in reports from credentials evaluation services.

Comment [sas2]: VSC and CSC, quick question to make sure I understand the situation... is the issue that the authorities in question are not in the same specialty occupation (ie. they are performing services as credential evaluators rather than in the same specialty occupation as the beneficiary)? Or am I missing the nuance? I just want to reach out to you before SCOPS responds.

Jowett, Haley L

From: Perkins, Robert M
Sent: Tuesday, March 24, 2009 3:15 PM
To: Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Boudreau, Lynn A
Subject: FW: Educational Evaluations
Attachments: RFE 2145 & 2146.doc

Kurt and Carolyn,

See Mack's response below regarding educational evaluations....

Rob

From: Bolog, Marguerite M
Sent: Tuesday, March 24, 2009 4:00 PM
To: Perkins, Robert M
Cc:
Subject: Educational Evaluations

Rob—

We are on the same page with CSC in that educational evaluations are acceptable only when considering foreign education equivalencies pursuant to 8 CFR § 214.2(h)(4)(iii)(D). When considering both work experience and foreign education, we request an evaluation from someone who has the authority to grant college level credit at a U.S. college that has a degree program for granting such credit. See autotext 2145 and 2146.

Also, below is an AAO decision posted on VSC's Intranet that is shared in the H1B Denial training, which dismisses an appeal and states that the evaluator has not submitted sufficient evidence to demonstrate he has the authority to grant college-level credit at a U.S. college with a degree program:

http://vsc.uscis.dhs.gov/Adjudications/Allied%203/H1B_AAO_Decisions/Systems%20Analyst%20No%20Eval%20from%20College%20Official.pdf

(b)(6)

--Mack

Marguerite (Mack) Bolog| DHS| USCIS| VSC | Immigration Services Officer 3| [redacted] **802.527.4843 |** marguerite.bolog@dhs.gov

RFE 2145

It appears that the beneficiary may be qualified to perform services in a specialty occupation through a combination of education, specialized training, and/or work experience in areas related to the specialty. Please submit an evaluation from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

RFE 2146

United States Citizenship and Immigration Services (USCIS) may determine that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The following must be clearly demonstrated:

1) The beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty;

2) The claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty; and

3) The beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

A) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

B) Membership in a recognized foreign or United States association or society in the specialty occupation;

C)Published material by or about the alien in professional publications, trade journals, or major newspapers;

D) Licensure or registration to practice the specialty occupation in a foreign country; or Achievements that a recognized authority has determined to be significant contributions to the field of the specialty occupation.

E) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Jowett, Haley L

From: Trinh, Nhut M
Sent: Thursday, March 05, 2015 4:18 PM
To: Chong, Jenny
Subject: FW: Foreign evaluation and duplicate evidence
Attachments: 1993-05-19, HQMemo, Miller--H, L, R Foreign Academic Equivalents.dot

Hi Jenny,
I can only find one e-mail regarding the foreign evaluation. Nothing about specialty occupation.
Thanks,
Nhut

From: Ecle, Lynette C
Sent: Tuesday, November 02, 2010 9:37 AM
To: Brandino, Keith M; Dao, John V; Farrell, Fernanda; Francis, Mariebelle G; Knapp, Julia A; Trinh, Nhut; Verma, Monica K; Westra, Michelle M
Subject: Foreign evaluation and duplicate evidence

Hi,

Please use good judgment when you are requesting more evidence. We're getting inquiries as to why we are requesting foreign evaluations. The issue of whether a foreign evaluation is required to be submitted with the filing of the I-129 is being verified with HQ. However, in the meantime, I'm attaching an older memo from 1993 which I ask that you read. If you have a case where the only issue being raised is the need for a foreign evaluation for a foreign Master's/Doctorate degree, prior to the RFE please send those cases to me so I can review it.

Also, if there is a duplicate copy of the I-129 in your filing (regardless of whether they are asking for consular processing), please make sure that you remove the duplicate copy of the I-129 and the accompanying duplicate evidence so that it can be sent to KCC. This holds true with duplicate evidence that is submitted in response to our RFE. As an example, we received an AmCon return where the Consulate indicated there was no evidence of contracts, etc. If the duplicate evidence that was provided by the petitioner was forwarded to the KCC, it's likely we would not have gotten the case returned to us. Basically, if the petitioner requests that the duplicate is forwarded to KCC/PIMS and provides the duplicate documents, then let's forward it.

Stop by if you would like to discuss this further. Thanks.

U.S. Department of Justice
Immigration and Naturalization Service

CO 214h-C, CO 214L-C
CO 214R-C, CO 1803-C

425 I Street NW
Washington, DC 20536

May 19, 1993

MEMORANDUM FOR All District Directors
All Service Center Directors
Director, Services Center Operations

THROUGH: James A. Puleo
Acting Executive Associate Commissioner for Operations

FROM: Office of Adjudications

SUBJECT: Determining Educational Equivalencies in Petitions Involving Specialty Occupations

Section 214(i)(1)(B) of the INA states, among other things, that a specialty occupation requires the attainment of a bachelor's degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Service officers involved in the adjudication of H-1B petitions for aliens employed in specialty occupations are reminded that all petitions involving an alien who holds a foreign degree need not be accompanied by an evaluation performed by a credentials evaluation service. The regulation at 8 CFR 214.2(h)(4)(iii)(C)(2) merely requires that the beneficiary hold a foreign degree determined to be equivalent to a United States baccalaureate degree.

The determination that a foreign degree is equivalent to a United States degree can be made by a Service officer at the time the petition is adjudicated utilizing a number of factors other than an evaluation performed by a credentials evaluation service. For example, such factors as the alien's prior work experience, the past hiring practices of the petitioning entity, the reputation of the petitioning entity, and an examination of the official transcript of the alien's academic courses should be taken into consideration by the officer in determining whether the alien's foreign degree is equivalent to a United States degree. Obviously, in those situations

where the adjudicator is unable to render a decision in this area, an evaluation from a credentials evaluation service should be requested.

Once a determination has been made that a specific foreign degree is equivalent to a United States degree, that determination may be utilized in the adjudication of future petitions, provided of course, the factors in both petitions are substantially the same.

The instructions in this memorandum may also be utilized in the adjudication of employment-based petitions; L-1 specialized knowledge professional cases, and R-1 religious workers.

R Michael Miller
Acting Assistant Commissioner

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, July 22, 2009 11:20 AM
To: Nguyen, Carolyn Q
Cc: Gregg, Bret S
Subject: FW: H-1B Consultants and Staffing

Carolyn,
Given the confusion surrounding the contract issues and the email from SCOPS, we are currently adjudicating H1Bs in the following manner. Please let me know if you have any issues with this so we can be consistent.

From: Steele, Jenny B
Sent: Wednesday, July 22, 2009 8:34 AM
To: Adams, Shawn M; Dyson, Howard E; Gooselaw, Kurt G; Harton, Frank A; Nicholson, Roya Z; Torres, Lory C; Wolcott, Rachel A
Subject: H-1B Consultants and Staffing

Per our discussion yesterday regarding H-1B consultants and staffing companies, we will accept an employer support letter in lieu of a contract, SOW, or letter from the end-user client, as long as the employer support letter states the dates of employment, contains a detailed job description, and lists the job location. Please note that this email does not apply to the following petitioners: 10-15-10, FID, those with an inordinate number of filings, or H-1B dependent. Any petitioners on the FID, 10-25-10, having an inordinate amount of filings or H-1B dependent needs to provide a contract SOW, or letter from the end-user client. Any evidence provided by such petitioners will receive one year or the validity that is listed on the evidence, whichever is longer. Any evidence giving a range for the validity, i.e., 2-3 years, will receive one year.

(b)(6)

Jenny Steele| Supervisory Immigration Service Officer | Division 2| USCIS | DHS |

Laguna Niguel, CA 92677 | ☎: [redacted] 🖷: 949-389-8601 | ✉: jenny.steele@dhs.gov

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Thursday, April 30, 2009 2:30 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: H-1B Validity Periods
Attachments: Validity Date Cheat Sheet.doc

Follow Up Flag: Follow up
Flag Status: Flagged

FYI –

The 8 CFR also addresses validity of petitions under each specific classifications that I find are useful.

From: Gooselaw, Kurt G
Sent: Wednesday, April 29, 2009 3:06 PM
To: #CSC Division II
Cc: Nguyen, Carolyn Q
Subject: H-1B Validity Periods

All,

It has been brought to my attention that we are experiencing a higher than normal error rate on validity periods associated with H-1B filings. Below are some helpful tips in order to facilitate adjudication and to reduce the number of errors. In addition, the validity date chart located in o:common is attached for your reference. I appreciate all the hard work you are doing in the Division, but sometimes we need to step back and ensure that our decisions are correct. So I am asking that you read the information below and in the attachment and become familiar with the requirements on validity periods. The scenarios below are not all the situations that may be encountered but should assist you with a majority of your workload.

Thank you,
Kurt

H-1B Validity Date Tips

As a reminder Validity dates may not be granted for time outside of the period authorized by the Department of Labor on the Labor Condition Application (LCA).

Validity dates may not be given for more than a 3 year period at one time.

A Change of Status, requested for a beneficiary currently on OPT where the petitioner requests a start date that is in the future (ie OPT ends 8/2/09, employment start date is 8/3/09, LCA start date 8/3/09) could be approved today with a validity start date that would not place the beneficiary out of status. In this case the start date is 8/3/09.

All requests for Change of Status, where the start date has past, receive date of adjudication An example would be today is 9/1/09, petitioner and LCA have a start date of 8/10/09 you would approve with a start date of 9/1/09.

An Extension of Stay, filed by a new employer, receives date of adjudication. The portability provision in AC21 allows for the beneficiary to work for the new employer while the I-129 is pending.

An Extension of Stay, filed by the same employer, receives the date following their current expiration date as long as it was timely filed. If untimely filed and claiming circumstances beyond their control discretion may be applied, however, you should consult with your supervisor.

Nunc pro tunc (approve now for then) is prohibited. Petitioners and/or attorneys will request nunc pro tunc, however, this is not done.

Cap Gap only applies to Change of Status petitions filed for a beneficiary currently in F-1 status.

When considering validity dates first you must determine whether the case is cap exempt or subject to the cap.

EOS – SAME EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will **begin** one day after the current H-1B status expires and will be valid for at most three years or until the beneficiary has reached the six year limit; unless, the petitioner requests less time and/or the LCA's validity dates restrain the adjudicator from granting three years or up to the six year limit.

EOS – DIFFERENT EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

CHANGE OF STATUS

Make note of:
- Beneficiary's current status
- Date current status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary currently in valid status and/or will the beneficiary be in valid status when the COS is to begin? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity dates will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

Note 1: Beneficiary out of Status
If otherwise approvable, but the beneficiary's status expires before the extension or change of status is requested to or legally can begin (e.g. due to H-1B cap), the officer must issue a split decision, denying the extension or change of status while approving the nonimmigrant classification.

Note 2:Extension Beyond 6-Year Limit
Four circumstances exist which enable validity dates to range beyond the six year H-1B limit:
1) AC-21 issues (see below)
2) Itinerant/seasonal work*
3) Border crossers/border commuters*
4) Reclaiming time (see note 3)

* itinerant/seasonal work and border crossers/commuters are relatively rare and will not be discussed here. See your supervisor and/or coach for more information.

AC-21 questions:
- *Is there evidence of a labor certification or immigrant petition that has been pending over 365 days?* If so, the adjudication can extend beyond the sixth year in one year increments.
- *Is there evidence of an approved I-140, but the visa is not available?* If so, the adjudicator can approve beyond the 6th year for up to three years.

Note 3: Reclaimed time
Days spent outside the United States during the validity period will not be counted toward the maximum period of stay; the petitioner must submit independent evidence documenting any and all periods of time spent outside the United States. *See Matter of IT Ascent and Aytes memo dated 10/21/2005.*

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Friday, April 24, 2009 12:50 PM
To: Gooselaw, Kurt G
Subject: FW: Licensure

We are giving the full period.

From: Faulkner, Elliott C
Sent: Friday, April 24, 2009 10:39 AM
To: Nguyen, Carolyn Q; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Henson, John C
Subject: RE: Licensure

yes

From: Nguyen, Carolyn Q
Sent: Friday, April 24, 2009 10:38 AM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: Licensure
Importance: High

I think for positions where they can work under a supervisor's license, we are giving a full 3 years, right? Too lazy to look through my archives. ☺

From: Gooselaw, Kurt G
Sent: Friday, April 24, 2009 9:42 AM
To: Nguyen, Carolyn Q
Subject: Licensure
Importance: High

Carolyn,
Where a bene does need a license such as some resident physicians, what is the current practice in Div I regarding validity periods? I have received some inquires that indicate we are giving only 1 year where someone is authorized to work under a superior's license. I re-read the regs on this and it appears we should be giving the full period as long as they are qualified. Please let me know as I would like to send a message out to my Division to clarify this.

Thanks

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Thursday, May 13, 2010 3:29 PM
To: Trinh, Nhut; Phan, Lethuy; Helfer, Wayne D; Brokx, John B; Avetyan, Kurt H; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Mikhelson, Jack; Moran, Karla
Subject: FW: Meeting 4/22

Hi,

The below was issued by Kurt subsequent to our meetings with Counsel. Please note that we will be working with SCOPS on bullet 2 on adopting the Kazarian decision for our O decisions.

Please let me know if you have questions. Thanks.

From: Gooselaw, Kurt G
Sent: Tuesday, April 27, 2010 8:54 AM
To: #CSC Division II
Cc: Nguyen, Carolyn Q; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject: Meeting 4/22

In response to last Thursday's meeting this is being issued for clarification. This is solely guidance and not a policy memorandum and this is not to be quoted or used in RFEs or distributed to the public. Here are some bullets for your reference to assist with O and H1B adjudication. Should you have questions, please discuss with you supervisors.

Thanks

- O-1 Itineraries – As discussed yesterday events and a series of events can be considered one event. There is no day gap threshold in determining whether two or more related events constitute one event for the validity period. You must evaluate, given the facts, whether a gap in time is reasonable and all events or series of events are related in order to be considered one event. This is a case-by-case determination given the totality of the evidence. For example – should a beneficiary be scheduled to perform at more than two venues look to the purpose and scope of the performance and verbiage describing what the beneficiary will be doing between performances in order to evaluate whether the two or more performances can be considered one event. There is no 45 day rule. We will evaluate these in a way that is beneficial to the petitioner and use a reasonable approach. However, should two performances be so far apart that it appears that each performance is one separate event, we will RFE first to allow the petitioner to describe what the beneficiary will be doing between these two or more performances before making a final decision.

- Sustained acclaim – Sustained acclaim is demonstrated by receiving a major internationally recognized award (O-1A). For O-1B arts the beneficiary must have received or been nominated for a significant national or international award or prizes. If not, the beneficiary may qualify by **adequately** meeting 3 of the 8/6 (O1A and O1B arts) regulatory prongs. The prongs are setup to weigh whether or not someone has demonstrated sustained acclaim and meet the O-1 threshold. There was a totality review adjudication discussion, however, we will continue to adjudicate and ensure that the evidence submitted meets that established level for the prongs in order to determine whether the beneficiary qualifies for O-1. Should the petitioner demonstrate the beneficiary **adequately** (more likely than not) meets the 3 of the 8/6 prongs, the case should be approved.

- O-1B Arts – The evidentiary standard is **prominence, well known or leading** in the field of arts. When evaluating evidence that falls within each prong, this standard needs to be applied. O-1B arts has the lowest standard of the three O-1 classification types.

- O-1B Motion Picture/TV – Receipt or nomination of a significant international/national award (including but not limited to Academy Award, an Emmy, a Grammy, or a Director's Guild Award) in this category is sufficient to establish the beneficiary qualifies for this O-1 classification type without additional evidence to show a demonstrated record of achievement. The evidentiary standard is **outstanding, notable or leading in the motion picture or television field**. If an award is not shown when evaluating evidence that falls within each prong this standard needs to be applied. O-1B motion picture/television has the second lowest standard of the three O-1 classification types.

- O-1 comparable evidence – Should evidence be submitted where it cannot be considered a significant award or evidence that does not readily fit into the prongs, such evidence should be considered and analyzed in accordance with the set standards. It should be noted that there is no provision in the regulations for comparable evidence in the motion picture and television category.

- One hit wonders – these are usually few and far between. However, if a beneficiary received a significant award 30 years ago and did not continue in their field of endeavor this may call into question whether the beneficiary actually meets the standard. This would need to be evaluated on a case-by-case basis.

- H-1B offsite employment initial filing (change of employer) – Should the petitioner have a well-established filing practice or track record with USCIS – unlike H-1B dependent employers, 10/25/10 employers, and CFDO returns with Statement of Findings – an employment support letter (written by the petitioner) and itinerary is sufficient as long as it shows the job description, right of control and validity period of the position. With this evidence it is more likely than not the petitioner has met its burden for the employer-employee relationship aspect and you **have the discretion** to accept this evidence as meeting the EE standard. All other issues such as maintenance of status, beneficiary qualifications, specialty occupation must also be evaluated independently on other evidence. Should the case be approvable in all respects and the itinerary states the validity period and matches what is requested on the petition and LCA, we should use that period of time period as the validity period.

- H-1B offsite employment (initial) continued – Should the employment letter fail to include the pertinent information discussed above and/or the petitioner does not have a well-established filing practice or track record, see above for examples, you would need to evaluate the evidence and identify the deficiencies. You should issue an RFE, but you would need to articulate what was received and what the deficiencies are. In this situation the RFE needs to include the evidence as bulleted in the template.

- Contracts – If a contract combined with the statement of work (SOW), addenda, end user client letter, service agreements, etc. is present the validity within those documents controls the end date. If it is shorter than one year, issue an RFE and provide the petitioner with an opportunity to submit evidence for the full period requested. If an RFE has already been issued for these documents, a second RFE is not needed. If less than one year is shown, then provide one year. If more than one year provide that time as long as the beneficiary is eligible. Should there be a range we would give the shorter period. If the shorter period is less than one year we would provide one year.

- EOS with the same employer – As long as the petitioner can establish that it continues to meet all the regulatory H-1B requirements the case should be approved. If the EOS does not indicate regulatory compliance an RFE is warranted and use the RFE template accordingly.

- EOS with a new petitioner – see above on initial filings.

- Self-petitioning H-1Bs and O-1s – Self-petitioning H-1Bs need to be brought to your supervisor with the intended decision – no clerical or C3 updates. O-1self-petitioners can be adjudicated but do not use H-1B language or the EE memo in your adjudication. The regulation for Os is clear that an O-1 beneficiary cannot self-petition and does not qualify as a US employer.

Jowett, Haley L

From: Faulkner, Elliott C
Sent: Thursday, January 08, 2009 9:07 AM
To: Chong, Jenny ; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E; Nguyen, Carolyn Q; Stock, Chrysta D; Torres, Ricardo (CSC)
Cc: Nguyen, Carolyn Q
Subject: FW: PT's and the OOH

FYI on the Physical Therapists. It makes sense to me. Let me know if you have any comments.

From: Gooselaw, Kurt G
Sent: Monday, December 22, 2008 8:14 AM
To: Faulkner, Elliott C
Subject: RE: PT's and the OOH

Elliott,
I understand the issue and I will be sending this up to HQ for a policy decision on new employment and change of status. However, my argument on this is that the requirements for a specialty occupation is that a baccalaureate degree or higher is required. In this case for PT and OT a masters degree is required in order to be deemed a specialty. Even though the beneficiary may have a license in PT, the position itself cannot be a specialty occupation if the petitioner requires less than a masters degree and in this case the normal minimum entry requirement is a masters. The citations below in your email indicate bene qualifications, not specialty requirements. For example, if the bene has a license in hazardous material trucking and a BS degree in chemical engineering, this would not qualify for a specialty occupation even though the bene has a license and a degree. The position does not qualify as specialty because a BS degree is not the minimum requirement therefore having a license is moot. However, if a dentist presented his full and unrestricted license, he would then qualify under the beneficiary requirements as it is accepted that the position of dentist is a specialty occupation because a degree in DDS or DMD is required, therefore he would not have to present the degrees in order to show qualification, just the license.

I hope this makes sense. Let me know if you have any further questions.

214.2(h)(4)(iii)
(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

214.2(h)(iii)(C) Bene Qualifications –

Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

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From: Faulkner, Elliott C
Sent: Saturday, December 20, 2008 3:13 PM
To: Gooselaw, Kurt G
Subject: PT's and the OOH

Kurt-

Since we are holding the COS/new employment H-1B Physical Therapists to the OOH's new standard of a Master's degree, how are we going to deny these cases? I assume we would deny them because the beneficiary is not qualified, but this is counter to what the regs say. Won't they will just turn around and say that they have a state license and thereby satisfy #3? Let me know what you think.

8 C.F.R. 214.2(h)(4) (iii)(C) further lists four criteria, one of which must be met, for a beneficiary to qualify to perform services in a specialty occupation. Essentially, the beneficiary must:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Jowett, Haley L

From: Agnelly, Mary C
Sent: Thursday, May 22, 2008 2:13 PM
To: Brickett Sr, Stephen M; Fierro, Joseph ; Goodman, Lubirda L; Gooselaw, Kurt G; Johnson, Ron E; Prince, Rose M
Subject: FW: Re: 16 Edition!!
Attachments: ROLLING FAQs 16th ed 052208.doc

Attached is the consolidated 16th Edition of the Rolling FAQ's. It will be updated to o:common at close of business today. Any changes or corrections please advise.

This is the last scheduled edition of the Rolling FAQ's.

From: Wang, Yamei
Sent: Thursday, May 22, 2008 10:40 AM
To: Agnelly, Mary C
Subject: Re: 16 Edition!!

Yamei Wang| Adjudication Officer | Division 3| USCIS | DHS |

Laguna Niguel, CA 92677 | ☎ [redacted] 🖷: 949-389-3490 | ✉: yamei.wang@dhs.gov

(b)(6)

ROLLING FAQ's.....Edition #15

Questions answered on H1B issues

EOS Questions

Grace Period

Q: Is there a grace period for filing after the authorized period of stay expires (as shown on the I-94)? (6th Ed. 4/19/2007) (9th Ed. 4/25/2007) *****Corrected*****

A: There is a 10-day period after the authorized stay expires on H1B nonimmigrants for the purpose of allowing the alien to depart – an extension can be filed during the 10-day grace period, but it is still considered an untimely filing. An untimely filing is one filed after the previous status has expired. The 10-day grace period does not change this. Also, remember that a petition filed the day after status expires is a timely filing: For example, if status expires on 4/24/07 and the extension is received on 4/25/07, this is considered a timely filing. If the extension is received on 4/26/07 or thereafter, it would be considered untimely.

Finally, a late filing can be excused at the discretion of the adjudicator if the late filing was beyond the control of the petitioner or beneficiary. Beyond the control does not mean that the petitioner or the representing attorney forgot to file timely. That is within the petitioner's control. Examples of beyond the petitioner/beneficiary control would be if a petitioner was in an accident while attempting to deliver the petition to the post office and was hospitalized for a period of time and then mailed the file when he was able and it was received late. Another may be an attorney assured the petitioner that the file would be filed timely, but the attorney filed it late and did not inform the petitioner, but attempted to deceive the petitioner that the file was timely. Normally, documented evidence needs to be presented by the petitioner to show the late filing was beyond the petitioner's control. Evidence could be medical reports or evidence that the petitioner has filed a complaint/law suit against the attorney who deceived the petitioner.

H time

Q: Does H1B1 (Singapore or Chile) time count toward the H1B time?

A: Yes, but the reverse is not true. Time as H1B does not count toward the 5-year extension limit on H1B1. See INA 214(g)(8)(D).

Filed during 10 days post expiration

Q: What should I do when the petition is filed during the 10 days after the current H1B expires? What is the start date going to be? (6th Ed. 4/19/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The petitioner can file during the 10 day period after the expiration of the current H1B status granted to the alien to depart the U.S. The H1B is not authorized to work during this period. The officer will need to look at the LCA to determine the start date – grant the start date the LCA does. If the LCA indicates a start date immediately following the end date of the current status, then that start date can be granted; if it gives a start date, for example for the 10th day after the current status expires, then that is the date they will be given. If a split decision, the start date will be the date of adjudication or a future date.

Recaptured Time

Q: Can a petitioner request recaptured time for an AC21 year? Scenario: A petitioner was requesting recaptured time for year 8 when the beneficiary was in their 9th year. (1st ed. 4/12/2007)

A: No. Recaptured time is limited to the initial years. See *Matter of IT Ascent (AAO 2006, 06-001)* AC21 time cannot be adjusted or recaptured. A request for recaptured time is a request to adjust the 6 year period, taking into account time not spent in H1B status, so that is not a request for time beyond the 6 years, but a request to complete the entire 6 years, even if it appears to go into the 7th year.(2nd ed. 4/13/2007)

Q: When can an alien recapture time?

A: Recaptured time may be requested and granted at any stage, before or after AC 21 time, but time under AC 21 can **not** be recaptured. (14th ed.)

Q: Is a new LCA required for recaptured time?
A: The Labor Condition Application must cover the entire time period requested including any recapture time. (14th ed.)

Seasonal/intermittent employment/Commuters
Q: What action do I take? The beneficiary has held previous status as an H1B over the past 5 years. A review of SQ94 shows that the beneficiary was in the U.S. only for a few months at a time for the first three years of the five – in the last two years the beneficiary was in the U.S. in H1B status for most of each year. The petitioner is now asking for another three years. Do I look at recaptured time? How much time are they eligible for? (8nd ed. 4/23/2007)
A: Seasonal/Intermittent employment (less than 6 months out of the year) and commuters are not subject to the 6 year limit. Do not start counting the 6 years until/unless the beneficiary is here for more than 6 months out of the year. In the instant case, we would not count the first three years towards the 6 year limit, as that time is not subject. We would consider the two most recent years as subject to the 6 year limit, and would be able to grant, if otherwise approvable, three years.

AC21 eligibility –

Q: A petitioner filed I-129 seeking extension beyond 6 years limitation. For AC21 104(a), do they have to qualify as of date of filing or date of adjudication?
A: As of date of filing, the alien must have an approved I-140 and visa number not available.

Q: A I-129 petition was filed for a Chinese citizen seeking 104(a) extension for 3 years. The relating I-140 was approved for Employment 2nd Preference with a priority date March 11, 2006. Upon review the attached I-539, the officer found that the alien's spouse was born in Canada and their child is a Japanese citizen. Does it affect the request of extension for 3 years?
A: Yes, under alternate chargeability rules, the visa number may be charged to country of birth of the spouse. Even though a visa number may not available for China, it is available for Canada or Japan. Therefore, the EOS would be granted only for 1 year. See INA 202(b)(2).

Q: The labor certification application was approved on Jan 26, 2007 with no I-140 filing so far. What should I do with the extension?
A: Deny it under AC21 106(a) unless the I-129 was filed before Jan 12, 2008. See o:common for denial. All labor certifications approved before July 16, 2007 must now have an I-140 filed. The 180 day clock for these older approved labor certifications started on July 16, 2007 and the clock expired on January 12, 2008. Therefore, no extension will be granted without the filing of I-140 for these old labor certifications.

Q: If the I-140 used as the basis for eligibility under AC21 was denied and the petitioner filed an appeal with the AAO, can the petitioner use the I-140 to qualify for AC21? (2nd ed. 4/13/2007)
A: Yes - as long as the appeal is still pending, the I-40 is considered pending. If in checking the status of a Backlog Reduction Labor cert the officer finds that the certification has been denied, the officer must either RFE or ITD for verification of whether an appeal has been filed.

NOTE: Because of the 12/05 Aytes memo stating that an alien does not have to be in the U.S. or be in H1B status to file for AC21 benefits, an L beneficiary can get AC21 benefits when a petitioner files a COS to H1B for him. This is true even if the alien has had a mixture of H1B and L status OR if the alien has had all L status.

Examples:

1. An alien with first 3 years of H and then 3 years of L status can COS to H1B under AC21
2. An L1B alien who has used up all 5 years of L1B status can COS to H1B and get the 6th year of H1B and 2 years under AC21 if qualified to do so.
3. An L1A who has used up all 7 years of L1A status can COS to H1B under AC21.

Remember, the alien does not have to be currently in H1B status to get AC21 benefits, but must be in non-immigrants status. He cannot be out of status. An alien outside of the US who has prior H1b status is also eligible for extension under the 6 year rule (11th Ed. 5/18/2007)

Q: What if a second I-140 or I-485 has been filed? (11th Ed. 5/18/2007)
A: With rare exception, once and I-140/485 originally filed under the original labor cert. is denied, the labor cert. is dead in the water. AC21 makes it clear that GENERALLY, the labor cert can be used for AC21 benefits until a FINAL DECISION was made on the related petition/application. Once a decision is made on the I-140/485, the labor cert. is no longer valid for AC21. But please be mindful of appeals of denials that have been filed and are still pending. Also, keep in mind, if a second I-140 has been filed and is now pending for more than 365 days, it does qualify for AC21 benefits. This information will need to be verified.

Q: For FY 2009 cases, are DOL backlog reductions or local filing letters still valid?
A: Letters from local, state DOL offices or the Backlog Reduction Centers are no longer sufficient by themselves to establish that eligibility under AC 21 Section 106. DOL has announced on its website that the backlog reduction centers are closed and that all cases are completed as of Oct 1, 2007. Subsequently, DOL has admitted that there is handful of cases not completed but the number is less than 10. Thus, action on the labor certification request should have been completed. The officer now needs evidence of the most recent action by DOL. If the labor certification is not current and no appeal was filed, the alien is no longer eligible for AC 21 106 benefits. If the labor certificate was granted, then the petitioner has 180 days after approval or Jan 12, 2008, whichever is later, to file an I-140. Failure to file the I-140 timely automatically invalidates the labor certification and thus the alien is not longer eligible for benefits under AC 21 Section 106. (14th ed.)

Q: A letter from DOL indicated the ETA was closed due to late filing or incomplete. In response to my RFE, the petitioner submitted a Backlog printout of the ETA which has a TR in the processing Type. What does TR stand for? (11th ed. 5/18/2007)
A: TR identifies the case as a Traditional Recruitment case for the backlog reduction group at the Department of Labor.

Q: The beneficiary has a pending I-485 as a derivative. The beneficiary wants to remain in H-1B status and request a 3-year extension. Do I need to find out what category the beneficiary has filed for on the I-485 before granting one year or three years? (11th Ed. 5/18/2007)

A: Since the I-485 is based upon the alien's derivative status, not as the "beneficiary of a petition filed under 204(a)", the alien is not eligible in his or her own right for an H1B extension on the basis of SEC 104 of AC 21. To be eligible for 106, the beneficiary needs to have a labor certification and/or I-140 filed in his or her behalf. See the Dec 2005 memo. Thus, being a derivative does not establish eligibility under AC 21 as an H1b.

Q: The status on the Labor Cert shows Denial of RIR (Reduction in Recruitment)...does that mean the Labor Certification has been denied? (2nd ed. 4/13/2007)
A: No, this is not a final decision on the Labor Certification.

Q: When should the officer request an update on the pendancy on the Labor Certification? How old is too old? (2nd ed. 4/13/2007) ***amended*** (12th ed. 3/31/2008)
A: The Department of Labor has indicated that all Backlog Reduction cases have been completes, although they acknowledge that some may have fallen through the cracks. In all Backlog cases, if the DOL letter is more than 90 days old, we will require an updated letter from DOL.

Q: Is there another way I can check on the status of a labor cert (ETA-750/9089)? (5th ed. 4/18/2007)
A: The officer can by emailing H1B7YR@PHI.DFLC.US and giving the alien's name, DOB, name of entity that filed the petition and the approximate date of filing. They can reply to the officer just as they reply to the petitioner, with the Case #< employer name, received date, priority date, and whether the case is pending.

Ongoing employment –
Q: Is the beneficiary maintaining status? (2nd ed. 4/13/2007) Scenario: On a change of employer, the petitioner was requested to submit a copy of the beneficiary's last pay check with the prior employer... The petitioner responded by stating that the while the beneficiary worked for the previous employer, the previous employer had refused to pay the beneficiary, and so a last pay stub was not available. The current petitioner submitted evidence that the beneficiary had filed a complaint against the previous employer with the state's DOL (or equivalent).
A: In this case, it appears that there was an ongoing employee-employer relationship between the beneficiary and the prior employer, thus the alien was maintaining status.

Amended petition
Q: Can I back date to the date requested for amended petition where the date is the same as original petition but the new start date is now past?
A: It depends on the situation. Yes, you can back date it if the amended action is not material to the petition such as name changes, merger or acquisition of the petitioner. If the amended action is material to the decision such as job duties changes, then the earliest date you may give is the adjudication date. Amended petition can only be filed for the petition issues, not status issues. Any change related to I-94 should not be handled by amended petition but I-102. Problems related to split decisions may be resolved through a new petition, not amended petition. 8 CFR 214.2(h)(2)(i)(E).

Portability-Bridging
Q: The petition A was expired in Feb 2008. The petition B, the first extension was filed in Feb 2008. C company, a new employer, also filed the extension for the alien in March 2008. Which petitions should I adjudicate first?
A: Adjudicate petition B before C.

Q: The beneficiary was initially granted H1B status for Company A. He then changed employers to Company B, then to Company C. When I looked in CLAIMS, the I-129 for Company B was denied…What do I do? (2nd ed. 4/13/2007)
A: The officer needs to look further into the case to see whether the beneficiary can bridge under Section 105. See Archives section (d) below for an example and diagram that demonstrates how bridging works…

Concurrent Employment/Part Time Employment
Q: Does the petitioner need to list the hours that the beneficiary is going to work on part-time employment? The fact that they are part time is listed on the I-129 and on the LCA. (5th ed. 4/18/2007) ***Expanded*** (12th ed. 3/31/2008)
A: The LCA specifies that the range of hours for the beneficiary will be listed in detail on the I-129. If the petitioner does not indicate the range of hours on the I-129, then an RFE will need to be issued. Without the range of hours, the LCA is not valid. To adjudicate an EOS/COS, the number of hours is also needed to determine whether or not the alien will have sufficient resources not to become a public charge.

Q: For concurrent employment where there is both non-exempt and exempt employment (meaning exempt or non-exempt from the cap count), how is the cap counted? (13th ed. 4/17/2008)

A: As long as the alien continues to work for the exempt employer and the non-exempt employer continues to file as a concurrent employer, the alien is not required to be counted.

Q: Where the concurrent employment is both non-exempt from the cap and exempt from the cap do we limit the exempt employment to the period of the non-exempt employment? (13th ed. 4/17/2008)

A: No, per Headquarter (April 2008) we will no longer limit the employment period to match the exempt employment period.

Advanced Parolee
Q: When the beneficiary/applicant has been admitted last as an Advanced Parolee, what status does the advanced parole give the beneficiary? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: Aliens applying for status as H-1B / L-1 and their dependents who have been paroled into the U.S. (not as a humanitarian parole) and were prior H-1B or L-1 aliens may be admitted by the adjudicator (through granting the class) and their stay extended without requiring the alien to return to CBP to complete their inspection.

Q: In the split decision we prepare on the H-4 dependents that have been given advance parole, what denial template should I use? (8nd ed. 4/23/2007) ***amended*** (12th ed. 3/31/2008)
A: This is no longer a basis for denial – see prior question

I-94s
NOTE: The most recently issued I-94 is the controlling document. It indicates the dates in which the beneficiary is authorized to work for the petitioner. The I-797 is authorization for the petitioner to employ the beneficiary for the dates listed - for I-9 purposes. (5th ed. 4/18/2007)

Q: What action should I take? The petitioner has submitted an amended petition, indicating that the inspector made an error and granted the beneficiary less time then what was granted on the I-129 approval notice…They want an I-94 with the correct dates. (5th ed. 4/18/2007)
A: The inspector has the authority to and very well may grant less time than the I-797. This is not an error on the inspector's part. There was a reason, known not necessarily to us, why the inspector gave the beneficiary less that the time granted on the I-129 - whether it has to do with the passport of the beneficiary, certain agreements/limits put on certain countries, etc. As stated above, the most recently issued I-94 is the controlling document. There is no error to correct, either by the inspector or in CLAIMS. The I-129 needs to be filed for an extension of stay, not an amended petition.

I-485 Approved
Q: If the alien has an approved I-485 and adjusted status to an LPR…what do I do with the I-129? (7th Ed. 4/20/2007)
A: It depends on the circumstances. If the date of adjustment is prior to the authorized stay expiring, then deny the petition as the alien is no longer a nonimmigrant. If the date of adjustment is after the date of authorized stay expired, approve the petition to cover the gap between the expiration of stay and the date of adjustment. The employer needs this for I-9 purposes.

STATUS Questions

COS/EOS Requirements – H1B and other classifications
Q: What are the requirements regarding being in the U.S.? What about other classifications other that F1's? (e.g. L's etc.) What is KCC? What is the difference with KCC and sending it to the consulate of the beneficiary's country? (6th Ed. 4/19/2007)
A: The same principles apply for EOS as H-1B or COS to H-1B for all other classifications. The beneficiary must be here at the time of filing and, for COS, must remain here. For EOS, it depends if the beneficiary has time remaining on their previously approved validity period. If the beneficiary leaves the country, and assuming the job requires an employee with a degree and the beneficiary has that degree, a split decision would be done. These principles do not necessarily apply to other classifications (e.g., Es and Rs have different requirements). For H-1Bs, the issues are pretty constant and straightforward.
KCC is the Kentucky Consular Center. KCC will send the duplicate petition to the embassy or consulate of the beneficiary's choice; the service center does not send the petition directly (like we used to many years ago). Clerical will route the duplicate set of petition and documents as well as CLAIMS updates. All you have to do is annotations, approval stamp with signature (on both sets of petitions), and at least two copies of the I-541 denial notice; staple a Processing Worksheet on the front of the file(s) labeling it as a split decision, and route to Clerical. This is the process unless the beneficiary is a Canadian citizen (by birth or by conversion, as evidenced usually by their passport), in which case we would send the duplicate petition to either pre-flight inspection or the nearest port-of-entry.

Alien Departed prior to filing COS

Q: Alien was not in the US at the time of filing EOS?
A: Split decision if otherwise approvable. See 8 CFR 214.2(h)(15)(i). However, if alien has returned as H1B at the time of adjudication, the officer is not precluded from granting the extension by using the new I-94 number from the last admission.

Q: The alien departed prior to the petition being filed, and returned after the petition was filed – do we deny the case for abandonment? (2nd ed. 4/13/2007)

A: If the alien departed prior to the filing of the COS I-129 petition, the alien is not eligible for a COS because at the time of filing they were not in NI status, even if they return during the pendency of the case. If the petition is approved, a split decision needs to be prepared using the abandonment denial with an alteration to the facts and discussion section to fit the circumstances, as this is not an abandonment denial – they had no status at the time of filing to abandon. (5th ed. 4/18/2007) The alien would not be precluded from filing a new I-129 petition for COS at a later date, as they have already established a cap number with the first petition. NOTE: The alien in this scenario was an F-1 student in OPT… had the alien been a B-2, there would be a question of their intent upon re-entry into the United States, and the second petition might not be approved for COS. Take the current NI classification into account when this situation arises.

NOTE: Aliens who are not in the United States at the time of filing OR have departed since the time of filing are not eligible for COS. If otherwise approvable, a split decision needs to be prepared, and the second copy of the petition will need to be sent to KCC or to the POE/PFI. (5th ed. 4/18/2007)

Alien Departed after COS is filed

Q: Why do we need to deny for abandonment COS's in which the beneficiary is seeking COS from F-1 (OPT) to H-1B (CAP cases), wherein the beneficiary departed the U.S. after filing? The beneficiary has not abandoned their current status, as they are permitted to travel on their F-1 visa…Aren't they maintaining their status? What is the regulatory/legal cite for these denials? (6th Ed. 4/19/2007)

A: 8 CFR 248.1(a) states: Except for those classes enumerated in § 248.2, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status pursuant to section 247 of the Act, who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification …

When a nonimmigrant is not in the U.S., technically they are not in status – which is the whole basis for recaptured time in Matter of IT Ascent – The F-1 Visa allows them to depart and return, but for the duration of time that they are gone, they are not an F-1. They reapply for admission as an F-1 upon re-entry. This is a split decision. If the alien returns to the US at a later date, to resume his F-1 OPT, he is not precluded from filing a new I-129 to change status to H1B – with the initial approved H1B (split decision) he would have been counted.

Inadmissibility – Possible Public Charge- Part-Time Position

Q: What concerns should the officer address when the position is Part-Time? (4th ed. 4/17/2007) *amended* (11th Ed. 5/18/2007)

A: The officer will need to take several factors into consideration when the beneficiary is going to be paid part-time in order to determine whether the beneficiary may be found inadmissible as a possible public charge. These factors include: The location of the position (and cost of living in that area), the amount of part- time pay to be received, and the size of the family that the beneficiary is supporting, keeping in mind that any H4 dependents cannot work (a spouse that is also an F-1 or other NI Classification may be able to work). If there is no I-539 attached, the officer can look at SEVIS to see if there are any dependents listed if the beneficiary is currently an F, M, or J. The officer should also keep in mind that there may be income coming in from other sources – properties owned abroad, parents, etc. – the beneficiary could also be working part-time as an H1B while continuing to attend graduate school. There is an RFE that will be added to O:Common in the next few days to address this issue.

Establishing Maintenance of Status

Q: The alien left the US one day after the filing of EOS change of employer but returned as B2 since his H1B status expired. How do I handle this case?
A: If otherwise approvable, a split decision should be issued to deny his EOS because the alien was not in the H1B status any more.

Q: Petition A was revoked on 12/1/07, petition B was filed on 10/1/07 but was denied on 05/02/08. What do I do with petition C filed on 04/30/08?
A: There is no bridge. The alien was out of status as of the date the petition A was revoked since the petition B was denied. Therefore, deny EOS request for petition C, if otherwise approvable.

Q: What is considered sufficient proof that the alien is and will continue to maintain status until 10/1/2007? The beneficiary has completed his F Program. He has submitted a letter from a test preparation school indicating that he has been accepted, and indicates in a statement that he will be attending the test prep school up through the requested start date on the I-129. There is no I-20 for the test prep school in the file. (4th ed. 4/17/2007)
A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: If the alien is currently an F-1 student that is otherwise qualified, and is due to have his program end with the conference of his degree on June 30, 2007, and there is no evidence in the file or in CLAIMS that shows that an I-539 or I-765 is pending, will I need to do a split decision?

A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: Is the 60 days departure rule firmly applied? This beneficiary status expires on 7/30/2006 and they ask start date 10/01/2007. Is this is a split decision? (6th Ed. 4/19/2007)
A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: SEVIS indicates the OPT that the student is currently on expires in June, but indicates as well that the student "plans to continue classes in July". The program dates indicate that the next session begins in July and continues through to 2008. Is this beneficiary going to maintain his status until 10/1/2007? (6th Ed. 4/19/2007)
A: Yes – they may be switching from one education level to another, or getting a 2nd degree. If his next session is listed in SEVIS, then he is still in D/S as an F-1, and can be considered as maintaining that status until 2008.

I-20 ID –
Q: What if the only evidence submitted of an alien's admission is an I-20 ID and there is no evidence in NIIS? (1st ed. 4/12/2007) ***Expanded*** (12th Ed. 3/31/2008)
A: Starting in the early 1980's, school information was entered into ST/SC (Student/School) database from the I-20AB. Alien entered as an F-1 student (they could go to elementary school at that time) and was issued a basic I-20 ID as well as an I-94. Entries from that time are not in NIIS or the archives, and if the student came in as an elementary student and stayed a student since, they may not have any other evidence of admission. So, an I-20 ID is acceptable in lieu of an I-94 to establish admission. However, by August 2003, schools were required to enter into SEVIS all current students and assign an "N" number to the student.

J-1 –
Q: J1 COS to H1B, do I need waiver before filing?
A: If subject to 212(e), yes. Check Mainframe CLAIMS to see whether a waiver was filed or adjudicated. If not, issue a RFE.

Q: The petitioner submitted as evidence of the J-1 waiver the application to the Waiver Review Board without the recommendation from the Board. Is this acceptable? (4th ed. 4/17/2007)
A: No – If the application was approved before October 10, 2006, the recommendation would need to be submitted by mail to the CIS servicing office. If on or after October 10, 2006 the recommendation would be submitted to the VSC. See instructions in Archives, section (c) below...

Q: If an alien was a J-1, filed an I-539 in the past and was approved and changed status to another NI classification, do we need to check if the alien was subject to 212(e)? (2nd ed. 4/13/2007)
A: Presume the officer properly adjudicated the case; if the beneficiary is a physician, however, he/she may have a 214(l) waiver which requires other on-going considerations.

REMINDER: Adjudicators need to verify whether all J-1 exchange visitors (and the J-2 dependents) are subject to 212(e). The three ways in which they can be subject (and all three ways need to be checked) are:
1 – If the program is funded all or in any part by either the U.S. or a Foreign Government directly or indirectly;
2 – If the program is listed on Exchange Visitor's Skills list for the beneficiary's country; and
3 – If the J-1 is a Graduate Medical Student. (1st ed. 4/12/2007) *expanded* (6th Ed. 4/19/2007)

Q: What do I need to look at if the beneficiary is subject to 212(e)? (1st ed. 4/12/2007) ***expanded*** (11th Ed. 5/18/2007), (12th ed. 3/31/2008)
A: If the beneficiary has a No Objection (NOL)/Government Interest Letter dated on or after October 10, 2006 they must have the I-612 waiver approved prior to the filing of the Change of Status Request. Verification can be made, if they do not offer the waiver approval – follow the instructions listed in the Archives section (c) at the end of this document...**NOTE:** Physicians need to have a Conrad 20/30 waiver and can only work at the facility listed on the waiver, as that is the facility that they have been granted to work at, and which meets the requirements for the Conrad 20/30 waiver (being in an underserved area). If the alien is requesting permission to change facilities, see 8 CFR 212.7(c)(9)(iv). Question relating to this issue should be directed to a supervisor or a coach.

Airline Stewardesses
Q: The beneficiary was admitted as an airline stewardess...can they change status? (1st ed. 4/12/2007)
A: Airline stewardesses are admitted as D-1 or D-2's. INA 248 indicates that any nonimmigrant admitted as a D cannot change status.

No Status indicated –
Q: The beneficiary's status is not indicated on the I-129...what action should I take? (6th Ed. 4/19/2007) ***Expanded*** (12th ed. 3/31/2008)
A: If, even in CLAIMS or NIIS, you cannot determine the beneficiary's current status, RFE. Remember to verify that the petitioner has requested an EOS or COS. If requesting consular processing, no verification is necessary.

Different NI classifications changing status to H1B
Q: Can the following NI classification change status to H1B? (2nd ed. 4/13/2007)
A: See each classification below:
S8 – stands for H1A registered nurse/spouse/child. Time as the H1A principal counts towards the six year limit. Due to the recent memo issued, time as a dependent does not.

Check to see if the beneficiary was the principal, and if so, check to see if they left the U.S. for one continuous year. If they were outside the U.S. for one year, they can be recounted and the six years start over. If they have not been out for one continuous year, then the H1A time needs to be counted, and they would be considered an EOS case, as opposed to a cap case.
TN – TN's can change status to H1B's
E3 – Australian Specialty Workers – can change status to H1B's
H1B1 Singapore/Chile nonimmigrants are not precluded from changing status to H1B.
NOTE – Any case fee receipted after 4/15/2007 must be relocated to Vermont, except for E-Filed cases. ***Added*** (11th ed. 5/18/2007), ***Amended*** (12th ed. 3/31/2008)
H3 – Trainees – if less than 18 months, then can change status to H1B – H3 time is counted towards 6 year limit. More than 18 months, they may not be able to COS without specific amount of time outside the U.S....Policy decision will be forthcoming. (8nd ed. 4/23/2007)
WT – Visa Waiver Program Visitors – Any alien admitted as a visitor under visa waiver program or visa pilot program is not eligible to change his/her nonimmigrant status under section 248 of the Act. See 8 CFR 248.2(e). (14th Ed.)

Q: An alien last admitted as WT and had prior F1 status, is he eligible for COS?
A: No, status is determined by last admission. (14th Ed.)

Q: The petition was filed for the beneficiary to COS from A1 to H1B without I-566. What do I do if the petitioner provided no I-566 but excuses for the RFE?
A: COS from A1 must have I-566s. If I-566 was not submitted after RFE, the petition must be denied. The I 566 is mandatory, No matter what the reason, failure to provide said document is grounds for denials. See 8 CFR 248.3(c).

R1
Q: A religious related petitioner filed the petition for an alien to COS from R1 to H1B. The alien has a pending R1 EOS. What is the current policy on the case?
A: Consider the following factors before making the decision—is the petitioner also the R1 employer for the pending case? Is the position a religious occupation? Has the site check been completed for the pending R1 petition yet? If possible, check site reports for both religious organizations if not the same. Is the alien maintaining R status? Has the alien reached 5 years limitation of R status? Is this an attempt to circumvent site check? Please see supervisors if you have any question.

H3 To H1B
Q: I have a case that the beneficiary is going from H3 to H1B. Are there restrictions on a trainee H3 changing to an H1B? (11th Ed. 5/18/2007)
A: There is not a statutory or regulatory prohibition against an H-3 changing to H-1B (or H-1B changing to H-3). There are issues to consider, however, with the COS request:
1. Is the beneficiary maintaining status as an H-3 prior to the filing of the I-129? The intent behind the H-3 classification is, once the training is completed, the beneficiary will return to his or her home country. I would pay particular interest to this explanation from the H-1B petitioner, and if not sufficient, RFE.
2. The time already spent as an H-3 will count toward the 6-year limit for an H-1B. This does not usually cause a problem unless the beneficiary, for example, was an H-1B, changed to H-3, and is now changing back to H-1B.
3. A reason for changing to H-1B may be the filing of a permanent labor certification by the H-1B petitioner. If the labor certification was filed with the DOL prior to the filing of the I-129,

the beneficiary is ineligible to change to H-1B because there is not a dual intent provision for H-3s.

Otherwise, handle this COS just like any other.

Reminder: *Per INA 248, **all** NI classifications **except** C, D, K, WT, WB and some S and V, can change to another NI classification.*

B Nonimmigrants

Q: How do I know that a B non-immigrant is maintaining status? What can B Nonimmigrants do? (10th Ed. 5/1/2007)

A: B-1 visas are for business, including such things as a need to consult with business associates, negotiate a contract, buy goods or materials, settle an estate, appear in a court trial, and participate in business or professional conventions or conferences; or, where an applicant will be traveling to the United States on behalf of a foreign employer for training or meetings. The individual may not receive payment (except for incidental expenses) from a United States source while on a B-1 visa.

B-2 visas are issued for general pleasure/tourist travel, such as touring, visits to friends and relatives, visits for rest or medical treatment, social or fraternal conventions and conferences, and amateur/unpaid participants in cultural or sports events.

In most instances, consuls will issue a combined B-1/B-2 visa, recognizing that most business travel will also include tourist activities. The B1 or B2 may come in as a missionary or religious worker, however he/she can only receive honorary payments.

EAD Card/Parolee

Q: The applicant's previous H1B status expired on 8/22/2006 which at first glance would make him out of status when he filed the I-129. However, he has an EAD that doesn't expire until 2/1/07 and he has an I-94 that shows he was paroled in until 4/21/2007 because he has a I-485 pending. For EOS purposes, is the applicant in status or would this be a split decision? (9th Ed. 4/25/2007)

A: Normally an EAD card by itself does not grant nonimmigrant status and the decision would be a split decision. As this is a case where they are requesting an EOS and were paroled, in approving the petition we are, in effect, admitting the alien as an H1B, which would then grant the alien an extension of stay.

Previous I-129 pending/not approved

Q: The I-129 petition was filed to argue the split decision made on its prior petition. What should I do about it?

A: If otherwise approvable, the officer should do a split decision again since the beneficiary is not maintaining status. Do not discuss the basis for that prior decision just note that the prior COS/EOS was denied and any concerns relating to that denial should have been addressed by filing a timely motion to reopen/reconsider the earlier decision. The officer may want to consider sending the 2nd petition to the NTA unit after issuance of the split decision.

Q: The bene's previous I-129 was denied on 06/23/05 and appeal was transferred to AAO on Sept 05. However, AAO returned the petition to Vermont on March 1, 06. No decision has been made yet. A new petition filed by new employer on Jan 07. What should I do? (9th Ed. 4/25/2007) ***Amended and expanded*** (12th ed. 3/31/2008)

A: If otherwise approvable, this decision will be a split decision, as having a motion pending does not grant the beneficiary status… You may also have an issue with unauthorized employment if the beneficiary has worked more than 240 days (8 months) past the expiration of his/her previously approved petition, if the beneficiary continued to work for the same employer

(see 8 CFR 274a.12(b)(20)). If the alien is changing employers, INA 214(n) <AC 21 sec. 205> is controlling.

Revocation

Q: If the beneficiary's previous I-129 was found to be an auto revocation, is he maintaining his/her status?

A: At least, as of the date of revocation, the beneficiary was considered not in status. However, a new petition could be filed before revocation to cover the gap. The officer must check the system to determine the existence of gap before the current filing of EOS or COS to make sure the beneficiary has been maintaining the nonimmigrant status. (14th ED.)

Pending Legalization –

Q: Is an alien with pending legalization with an approved I-765 eligible to change status? (2nd ed. 4/13/2007)

A: Legalization by itself does not extend an alien's nonimmigrant status or grant eligibility for change of status.

TPS

Q: The beneficiary is currently in TPS status. Can they request a change of status? (9th Ed. 4/25/2007)

A: Aliens under TPS can change status, as long as they are maintaining the TPS status. If the TPS status expires, then the alien reverts back to the status held prior to the TPS being granted and would most likely not be eligible for COS. According to statute and regs: INA 244(a)(5) - The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this Act. 8 CFR 244.10(f)(2)(iv) For the purposes of adjustment of status under section 245 of the Act and change of status under section 248 of the Act, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant while the alien maintains Temporary Protected Status.

In status on 10/1/07?

Q: Is the beneficiary maintaining status if they indicate that they will file for an extension of stay in their current classification until the 10/1/07 start date for the H1B COS? (2nd ed. 4/13/2007)

A: If the beneficiary states that they intend to file an extension, check CLAIMS to verify whether anything is pending – if they have not filed anything yet, then they have not established that they will be in status on the 10/1/07 start date. If the pending I-539 and/or I-765 is here in the CSC, then email CSC PPhelp to get those files pulled and adjudicated. If they have filed with VSC, TSC or NSC, the SC that is in possession of the file(s) can be contacted to adjudicate the I-539 and/or I-765 prior to adjudication of the I-129. (5th ed. 4/18/2007) The beneficiary/applicant must establish that they will be in status, not just propose that they will be in status.

Q: What if the I-539/I-765 that was filed to extend their stay has to be RFE'ed? What does that do to my I-129? (5th ed. 4/18/2007)

A: If the I-539/I-765 has to be RFE'ed due to lack of evidence, then the beneficiary has not established that they will be in status and a split decision will need to be prepared. When writing the denial, when addressing the extension/work authorization, indicate that the I-539 or the I-765 has not been approved.

Q: The I-539 that the beneficiary filed for an extension indicates that they wish to change to or extend their stay as a B – can they? (5th ed. 4/18/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The alien can, so long as he is otherwise maintaining his/her current nonimmigrant status, apply to change to another nonimmigrant status. When adjudicating a COS or EOS to a B, keep

in mind that the alien has to establish that their stay is temporary and that they have a foreign residence that they have no intent to abandoning. If there is an I-129 filed on their behalf, the officer will have to determine whether this is truly a temporary visit with an intent to depart the U.S. Generally, the fact that there is an I-129 filed on their behalf may lead an officer to believe otherwise, and deny the I-539, setting up the groundwork for an I-129 split decision as the alien will not be in status at the future start date.

Prior Time Spent out of Status –
Q: Do we take any action if, prior to their current status, the alien overstayed or was out of status and departed the U.S.? (1st ed. 4/12/2007)
A: We will not consider the prior out of status time EXCEPT for calculation of possible Unlawful Presence.

Unlawful Presence –
Q: When do we start counting unlawful presence? Does it affect the beneficiary's ability to change status? (5th ed. 4/18/2007)
A: No unlawful presence will be gathered while a petition or application is pending; however, having a petition or application pending does not establish status.

CPT and OPT
Q: What is CPT? What is OPT? (1st ed. 4/12/2007)
A: Curricular Practical Training – Work that is required in order to get the degree… for instance, part of the requirement for a Bachelor's in Architecture is that you serve as an intern in an Architectural firm for a certain # of weeks/months…If the beneficiary is currently participating in CPT, they have not completed all requirements for the degree. CPT completion is a requirement to obtain the degree, not an option. (5th ed. 4/18/2007)

Optional Practical Training is granted during they school year or after the degree has been conferred or after they have met all the course requirements– the student is eligible for up to one year of OPT. Evidence? An EAD card or check the SEVIS record. See 8 CFR 214.2(f)(9).

F-1 Students graduating after the filing date/OPT availability
Q: What happens when the start date requested is 10/01/07 and there is a letter in the file that says the beneficiary will be given a master's degree in June? All requirements have been completed. Do they have to have the degree certificate or diploma in hand or just have completed the requirements? Do the requirements have to be completed before filing the petition, before adjudication, or before the employment start date of October 1? (1st ed. 4/12/2007)
A: If they do not have a degree they are required to have either a transcript showing that they have completed all of the requirements. If the transcript does not show that they have completed all the requirements, then a letter from a college official in addition to the transcript would be acceptable… see Archives section (a) below for further details… **NOTE:** A letter from the school without the transcripts is not acceptable. RFE for the transcripts. (5th ed. 4/18/2007)

Q: If the alien does not have the degree certificate or diploma in hand but has completed all requirements for the Master's degree, can the alien get Optional Practical Training? (1st ed. 4/12/2007)
A: Yes, they can get OPT during the school year, and prior to their degree being conferred…see Archives section (b) below for further details…

Q: If the person has not finished their course of study for the master's degree, we deny them. Is it the same concept for a bachelor's degree? I have a current student who has a letter from the school stating he has to complete 4 more classes in order to graduate and that he is on the list to

graduate this spring. I would think we would have to deny him also…what happens if he does not pass? (6th Ed. 4/19/2007)
A: Yes – the only reason why we would approve those without the diploma is that all the course and other requirements have been met – if push came to shove at the school they have already passed all requirements they could get the diploma tomorrow – they are just waiting until the graduation ceremony so that the diploma can be issued. The beneficiary in this instance has NOT met all his course requirements and therefore is not qualified at the time of filing…

Passport
Q: What if the beneficiary, who is in valid Nonimmigrant Status until 2008, has an expired passport? What action should we take? (5th ed. 4/18/2007) ***amended*** (12th Ed. 3/31/2008)
A: The officer needs to RFE for a valid passport – a valid passport at the time of filing is required, except for Canadian citizens.

FRAUD Questions

5:1 Ratio Profile
Q: What is the 5:1 Ratio? (2nd ed. 4/13/2007)
A: The 5:1 project was a 30 day sweep to find H1B petitioners that fit into a certain profile that tended towards fraud and/or abuse. While the project and sweep are no longer in effect, if an officer finds that an I-129 fits this profile and/or otherwise warrants attention, they can RFE for contracts and/or send a Request for Assistance to CFU. The indicators include businesses with a low annual income (generally less than $5 million, low number of employees, with an abnormally high rate of filings in a very short time (e.g., $1 million gross annual income with 10 employees that has 100 or more filings in the past year). The ratio that was used as a suggested threshold, though not a firm guideline, for the project as far as filings was 5:1 - if the company files 5 times the number of petitions and applications than the number of employees.

Q: Are we still checking the petitioner for 5:1 ratio?
A: No. Five to one ratio will be one of reasons the petition being forwarded to CFDO (Center Fraud Detection Operation) but not the sole reason. We would still check the petitioner with multiple filing for the same beneficiary.

OSCAR List – Fraud Digest
Q: The petitioner is on the Fraud Digest List – what do I do with it? (5th ed. 4/18/2007) ***revised*** (12th ed. 3/31/2008)
A: The Fraud Digest is in 2 parts – the Index and the Digest, itself. The Index simply gives a list of the companies, attorneys, schools, etc. of interest. If the officer finds that a party of their case is listed on the Index, the officer needs to look at the actual Digest to determine why the company is on the list and what actions, if any, the officer needs to take. The Fraud Digest is located in the CFU folder in O:Common. The Fraud Digest has web links from the Index to the Digest. The adjudicator will need to read the Digest information carefully. It may indicate that the company is no longer a specific adjudication concern, This is shown by "OK" at the beginning of the entry.

PROCESS Questions

NOTE: The following is a list of the most common errors found by AST – these items should be carefully scrutinized to verify that the information is complete and correct…remember that these

issues may affect the approval notice print process, and can generate inquiries/requests for correction. (9th Ed. 4/25/2007) ***Revised and expanded*** (12th Ed. 3/31/2008)

- ✓ Validity date incorrect or missing
- ✓ Classification missing; incorrect status or classification
- ✓ Officers did not pull second copy of I-129 petition to send to KCC – This includes EOS & COS.
- ✓ Missing I-94 for EOS or COS or I-94 included but annotated the wrong/incomplete I-94 number
- ✓ Bene birthday not included (or incorrect)
- ✓ Bene citizenship incorrect
- ✓ Officer did not stamp deny/approved or is missing signature
- ✓ Decision on I-129 but nothing on I-539 (I-129 approved but nothing on I-539)
- ✓ I-824 is approved for notify to consulate, but officer did not make I-129 petition copy for clerk to send to KCC.
- ✓ Officers forgot to order RFE, ITD, ITR, deny and withdrawal.
- ✓ WAC # doesn't match file on RFE notice, etc.
- ✓ Address is incorrect from CLAIM3 and petition/application – make sure CLAIMS and the petition both have the correct address.

The following is a list of common errors seen by Division 12.

- ✓ Country of Citizenship is different from Country of Birth. Change CLAIMS to COC in the COB Field. If the case is a COS case, the COC should show the COB. If requesting consular processing, COC should be the country of citizenship.
- ✓ Ensure that CLAIMS information is complete (Name, DOB, COB, etc.)
- ✓ Australia is coded "RALIA" in CLAIMS, not AUSTR, which is French Polynesia. Austria is STRIA.
- ✓ Tasmania is TASMA in CLAIMS. People from Tasmania may also be Australian Citizens.
- ✓ Niger vs. Nigeria – in CLAIMS, Niger is NIGER; Nigeria is NIGIA
- ✓ TAIWAN = AIT, not CHINA. China = People's Republic of China = Mainland China.
- ✓ Split Decisions without I-541.
- ✓ Name corrections require new IBIS Checks. If the name is spelled incorrectly or the date of birth is incorrect on the notices, this will result in an IBIS error.
- ✓ Remember to mark the petition if the dates granted do not match the requested dates.
- ✓ Ensure that any annotations – ESPECIALLY DATES – are in legible handwriting – Clerks are making errors as they cannot decipher the writing of the adjudicator.
- ✓ Make sure that any attached applications (I-539's, etc.) are complete
- ✓ Incorrect Classification given
- ✓ No I-94 number in CLAIMS
- ✓ New Attorney (with G-28) is not updated in CLAIMS

Motions

Q: <u>What do we do when an untimely filed motion for a denial due to no ACWIA fee, and the ACWIA fee is sent with the motion?</u> (11th ed. 5/18/2007)

A: Per HQ, dismiss the untimely motion and refund the ACWIA fee.

Q: <u>The I-129 petition was denied and a motion was filed. The case was opened with ITD. Then the petitioner withdrew the case. How does the officer update in CLAIMS?</u>

A: As standard, the I-129 case would be updated as withdrawal since it is treated as a new or pending case once it was reopened due to the motion. On the notice of withdrawal, be sure to

give history as it relates to the dates of the denial and filing of motion, and add "MTR" to the receipt number. See 8 CFR 103.2(b)(6) . (15th Ed.)

Revocation

Q: Do I need to pull the prior petition which is a revocation in order to proceed with the current petition I have now?

A: Check case history in CLAIMS for the revocation first. If the revocation was issued without action of Intent to Revoke, it often was an "auto revocation" due to withdrawal by the petitioner. Then the current petition may be adjudicated without review of the prior petition—revocation. However, if the revocation was issued after the action of Intent to Revoke, it may involve fraud or other adjudicative issue returned by the consular offices. In this scenario, it is better to review the revocation case before processing the current petition to make sure that the beneficiary has been maintaining the H1B status. Note: the beneficiary was out of the status as of the date the petition was revoked.

SQ94 -

Q: Since there is already a SQ94 print-out in file by the contractor, do I have to place another SQ94 print-out in file? (7th Ed. 4/20/2007)

A: Yes, if the SQ94 print-out in the file is not within 15 days of adjudication for either an EOS/COS approval or denial, then a current SQ94 print-out should be placed in the file. Refer to the following HQ memos:
3/18/2002: Enhanced Processing Instructions
4/05/2005: Revised Enhanced Processing Instructions

Q: What is considered evidence of a SQ94 search if *No Arrival or Departure Record* is found? (7th Ed. 4/20/2007)

A: If the search results in a *No Arrival or Departure Record* using the I-94 number, the following three print-outs must be in the file as proof of a SQ94 check using the following searches:

- I-94 number
- Name and date of birth
- Passport number

I-94s

Q: The beneficiary provided a copy of I-539 reinstatement without I-94 number as evidence of maintaining his/her current F1 status. Can the beneficiary change his/her status to H1B without I-94 information?

A: Neither the approval notice of I-539 reinstatement or that of I-824 show validity dates or I-94 numbers. Therefore, it is all right to adjudicate the COS petition by checking out the latest I-94 number in SQ94/NIIS.

Q: Under what circumstances do we issue a new I-94 to a Canadian? What are the proper procedures? (7th Ed. 4/20/2007) ***amended*** (12th ed. 3/31/2008)

A: If the Canadian citizen did not have an I-94 previously issued to them when they entered (came in as a B NIV for example), then we need to issue them an I-94 # or their approval notice will not print. To do this, first the officer should see Anisa Tailor in AST. She will give the officer a blank I-94. Write the I-94 # on the I-129, and update CLAIMS with the I-94 #. Staple the blank I-94 in the file on the non-record side so that it cannot be used again. From then, the officer can continue adjudication.

Q: The beneficiary claimed he/she lost the last I-94 and asked for replacement with I-102. However, the I-94 number provided by the beneficiary is used by another in SQ94/NIIS. What do we do to resolve it?
A: RFE to obtain the original passport containing the admission stamp showing her/his claimed entry or if CLAIMS shows a prior petition with a different I-94 number that is not in SQ94/NIIS then use the new I-94 number as the basis of action.. (14th ED.)

Number of Employees
Q: A check of CLAIMS Mainframe found out the petitioner has a total of 124 cases - On #12 of the petition the current number of employees is 63. Where are the other 61 beneficiaries? The company was established in 2003. Should we worry about the rest of the petitions? (7th Ed. 4/20/2007)
A: The number of petitions, which can be an indicator, does not necessarily signify that there is a concern on the number of employees. You need to keep in mind a few factors: Some of the beneficiaries filed for could count for more than one petition, attrition, and that some of the beneficiaries of the petitions you see may never even have started work for the employer... A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee... This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less... See section (f) of Archives for full text of answer...

Split Decisions
Q: What denial forms do we use for split decisions? (6th Ed. 4/19/2007)
A: EOS – All cases need an I-541 denial.
COS – Not timely filed (only issue) – use the notice in CLAIMS
- All other scenarios – use the I-541 Denial.

Q: What start date do I give on a split decision? (6th Ed. 4/19/2007)
A: Approval is from the date of adjudication or a future date – they do not go back in time.

Q: Under what circumstances can I use the denial letter automatically generated by CLAIMS? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: The CLAIMS automatically generated denial notice, in which no separate I-541 denial would need to be prepared, is only used when the petition is UNTIMELY FILED and no reason given for the untimely filing. Non-maintenance of status prior to the start date would need an I-541 written by the officer.

Appeal before AAO
Q: What action do I take if the H1B in front of me looks approvable but a check of CLAIMS finds that the previous petition filed by the petitioner for the same beneficiary was denied and is on appeal with the AAO? Would this be a cap case or have they already been counted? (6th Ed. 4/19/2007)
A: Per HQ guidance in the form of a memo, this case, and any others in which a previous petition is before the AAO must be held until the AAO makes a decision on the prior case. Regarding the cap, cases aren't counted and visas aren't issued until the case is approved, so – no, the case was not previously counted.

Interfiled petitions/applications
Q: I have found, in reviewing the I-129, that the I-539 and evidence for it is interfiled with the I-129...What action should I take? (5th ed. 4/18/2007)
A: Officers are finding I-539s along with evidence in between the I-129 Evidence. Some of the officers have also found some I-824's. The officer needs to pull these I-539s and documents and

get them to SCOT. We either need to place them in a new file jacket if they were fee'd in or send them back to the petitioner/beneficiary for the correct fee.

Consular Processing/POE's/PFI's

Q: The petitioner has marked PFI on Part 4 of the petition, but has not listed the PFI or given the alien's Canadian Address. How can I determine where to send the petition? (9th Ed. 4/25/2007)
A: Look in SQ94 to see if the alien made any prior entries, and if so, what was the POE listed on the SQ94 screen? That may give you the answer you need. Otherwise, look through the file to see if there is an address anywhere for the beneficiary - a resume, perhaps?

Q: What do we do when the petitioner has submitted only one copy of the petition and it needs to go for consular processing?
A: For the petitioner to have AMCON notification on either EOS or COS, the petitioner must request the notification and submit a complete duplicate set upon filing. If there is no duplicate set or incomplete duplicate, and the petitioner requested AMCON notification, the officer will adjudicate the case and place 2 copies of the memo--824letter.doc in o:\common in the file for clerical to mail out to the petitioner. Clerical will also affix the labels. If there is a split decision but no duplicate was provided, the officer can approve the case and place 2 copies of the memo-824letter.doc in file for clerical to process also. If it is determined by the officer that the petitioner is requesting AMCON notification and a RFE is required for some other issues, the officer can request the petitioner to submit a complete duplicate for AMCON notification. However, the officer should not issue an RFE for the sole purpose of obtaining a duplicate set of documentation. (14th Ed.)

Q: When the beneficiary is in/from Canada, who gets consular processing and who gets processed at the POE or PFI? (5th ed. 4/18/2007)
A: Canadian citizens will get processed at the port-of-entry (POE) or the pre-flight-inspection (PFI). Landed immigrants or other non-citizens of Canada get processed at the consulate.

Q: What about if the beneficiary is a naturized citizen of Canada and asks for Consular processing? Do we grant their request and send it to a consulate, or do we change the consular notification to POE/PFI? (8th ed. 4/23/2007)
A: It depends on the circumstances. Sometimes, if the alien is overseas (not coming from Canada) and will be boarding a plane in Paris, for instance, we may send it to KCC for a "courtesy" notice. The alien may want to apply for visa, even though it is not needed, to avoid problems boarding a plane from Paris to the US. However, if the petition shows Canadian address, send it to a POE or PFI.

Q: Is there a more up-to-date list of the visa issuing posts? (5th ed. 4/18/2007)
A: The Visa Issuing Posts list that is in O:Common and was a part of the training materials given in the last few H1B training sessions is not the most up-to-date...because the list is not constant – it changes on a regular basis. If the petitioner requests consular processing at a post not listed, go to the State Department's Reciprocity List & Country Documents Finder (a.k.a. the FAM) and see what posts are listed for the country that the petitioner is requesting. If it is not in the FAM, then there is not a visa issuing post in that area and a nearby post will need to be selected.

IBIS

Q: Do I have to run an IBIS query on employment-based petitioners? (11th Ed. 5/18/2007)
A: No. Employment-based petitioners that are business entities do not need to be queried. Sole proprietorships are considered business entities so they do not need to be queried. Exception:

Individual persons that are not considered business entities must be queried. See pg. 12 of the IBIS SOP.

Q: Do I have to place an IBIS stamp on the petition for a business petitioner? (11th ed. 5/18/2007)
A: Yes. Per IBIS SOP, p. 40, "...IBIS queries are not required for business petitioners on employment-based petitions. The adjudicator must apply the IBIS stamp near the subject's information on the application/petition, circle "NR" for "Not Required", and annotate inside the stamp the date it was determined that IBIS was not required. If more than one beneficiary on a multi-beneficiary I-129 petition does not require an IBIS query, USCIS personnel are only required to apply the IBIS stamp once and annotate inside the stamp the number of beneficiaries not requiring a query."

NSEERS
Q: When do we check NSEERS?
A: See NSEERS I-129 Processing Instruction—When to RFE in o:common\adj\NSEERS\SOP for details.

Fees
Q: Does the petitioner, UCLA, need to submit Fraud fee if the alien's prior employer is UC, Merced?
A: No, all10 campuses of University of California are governed by the Regents. Therefore, UCLA is exempt from Fraud fee.

Q: Is there a lesser fee on H1B renewal cases? (4th ed. 4/17/2007)
A: Maybe – if same employer, yes. If new employer, then no.

Q: Can we RFE for higher ACWIA fees when it appears by the # of petitions filed that the petitioner has 25 or more FTE employees? (6th Ed. 4/19/2007)
A: No – per HQ guidance, do not RFE for the difference in the ACWIA fee. If, however, you receive evidence of the # of employees and you find that the petitioner does in fact have 25 or more FTE employees, then you can RFE for the difference in the fee.

Q: How do we calculate the ACWIA fee when the petitioner has part-time employees? Scenario: The petitioner paid an ACWIA fee of $750, while indicating that he had 35 employees. In response to the RFE, the petitioner indicated they have 24 F/T employees and 11 P/T employees, and therefore does not have to pay the full $1500. Is there a ratio of # of P/T employees equals 1 F/T employee? What is the regulatory cite for a denial? (11th Ed. 5/18/2007)
A: INA 214(c)(9)(B) requires the lesser fee for those with not more than 25 full time equivalent employees. The statute presumes that the ACWIA fee will be $1500 unless the petitioner shows otherwise. In this case 24 F/T and 11 P/T add up to at least 25 F/T equivalent positions. Adjudicators do not routinely challenge the number of employees, but if inconsistencies are found, the adjudicator should look more closely at the case.

Q: The alien has been the beneficiary of multiple I-129 petitions; the current petition appears to be the 1st extension filed by this petitioner for this alien. Does the petitioner qualify for ACWIA fee exemption?
A: Check the petition to make sure that there are no employer name changes, merger, or acquisition changes which may qualify the petitioner for fee exemption before the issuance of RFE for ACWIA fee.

SEVIS Printout –
Reminder: ALL F, M, and J Nonimmigrants must have a SEVIS printout in the file (1st ed. 4/12/2007), **unless** the petitioner is requesting consular/POE/PFI notification. (2nd ed. 4/13/2007) ***Expanded*** (12th Ed. 3/31/2008) The purpose of the SEVIS printout is to verify the status of the alien. SEVIS is updated with an F, J, or M alien registers under NSEERS. In lieu of the NSEERS printout, you may print out the NSEERS screen in SEVIS to verify registration.

SEVIS Status –
Q: What is the meaning of Deactivated in the SEVIS record status field? (2nd ed. 4/13/2007)
A: Typically, the student will retain the same N# for the entirety of their student status, and the officer, when doing a search using the N# will see multiple records for a student if these transfers/changes have occurred. The current record will show Active, and the previous records will show Deactivated. If the SEVIS record indicates Deactivated, look to see if the student transferred to another school or educational level. There may be circumstances in which the student is issued a new N#, so if the officer finds only a deactivated record in SEVIS, it is recommended that the officer run a name/dob search in SEVIS to see if another N# was issued.

(b)(7)(e)

I-765's –
Q: What eligibility code do I give the dependent spouse of an L or E on the I-765? (2nd ed. 4/13/2007)
A: The most up-to-date information on the eligibility codes for E and L dependent spouses is listed on the Instructions to the I-765.

I-824's
Q: What do I do with the I-824 that is attached to the I-129? (1st ed. 4/12/2007)
A: Any I-824 attached to the I-129 needs to be adjudicated by the officer – the clerical staff or the officer will update when the I-129 is updated.

CLAIMS Updating –
Q: Does the SEVIS N# needs to be entered into CLAIMS? (2nd ed. 4/13/2007)

A: IF you have an F, M, or J requesting a change of status to an H (or any other classification), verification needs to be made in CLAIMS that the SEVIS N# is correctly listed on the beneficiary screen. If it is not, the officer **MUST** correct it and save the changes. If this is not done, SEVIS will not be updated when the decision on the COS is made.

RFE

Q: If the officer chooses to make a telephone request for evidence, what must the officer document to establish the RFE?

A: The notes must be legible by the writer (the officer) including the date/time of phone call, the name of the person whom you called or spoke with, the discussed issues, and the requested documents.

Previous Filings

Q: How do I determine when the beneficiary first entered as an H1B? (6th Ed. 4/19/2007)

A: You will need to backtrack through the previous petitions in CLAIMS and you may need to check SQ94 afterwards. For instructions on backtracking through CLAIMS, see Archives (f) below…

REMINDER: When adjudicating an amended petition asking for corrected validity dates, be aware of both the to and from dates to ensure they follow the LCA, dates requested AND any licensing issues. (7th Ed. 4/20/2007)

H4 Dependents

Q: The dependent H4 was not in US at time of filing EOS. Deny him/her?

A: If the H4 visa expired at the time of adjudication, deny EOS. If visa is valid, it is all right to proceed with adjudication if the alien returned US.

Q: How do I process the H4 Dependents when there are multiple applicants on the I-539 and one of the children is about to reach, or has reached the age of 21? (6th Ed. 4/19/2007)

A: If the child has turned 21 prior to the date of adjudication, then a split decision will be done in CLAIMS, and the remaining applicants can be approved, if otherwise eligible, for the time requested. A denial letter will need to be prepared for the 21 year old applicant.

If the child is turning 21 after adjudication and during the time requested, the officer should, if otherwise approvable, approve the decision but limit the "to" date to the day before the child's 21st birthday.

QUOTA Issues

REMINDER: Quota-exempt cases can **IMMEDIATELY** start employment upon approval. These include Universities, Non-profit research institutions, etc. Be sure to look at the petitioner and at the date of requested employment to determine visa availability. (8th ed. 4/23/2007)

Cap exemption

Q: Does employment by US Government such as Dept. of Defense as a research contractor qualify for cap exemption as employment of government research organization?

A: No. The contract needs to be with the specific research group within Dept. of Defense. That is, the employment must be with research command at a command site.

Error in Cap Eligibility

Q: What do I do if we receipted a case and found that the petitioner made an error indicating eligibility for the Cap on the petition? (11th Ed. 5/18/2007)
A: We deny the petition. For example, if the petitioner marked on the petition that the beneficiary was the holder of a U.S. Master's degree and we accepted it under the Master's Cap and the adjudicator determined that the degree is actually a foreign degree, then a denial would be issued. There are no fee refunds, because it was a petitioner error. If, however, the petitioner was not aware the master's degree had to be a U.S. school and marked the petition properly as, "no the school was not a U.S. school", and we accepted it under the Master's Cap then it would be our error. It would have to go back to the contractor for a rejection and fee refund because it was a service error.

Already Counted?
Q: What action should I take? A beneficiary is approved from F-1 to H-1B for a well-known university (cap-exempt) for three years. During this three year period, a computer consulting company (which is not cap-exempt) files a petition in behalf of the same beneficiary. This petition is approved and the beneficiary is extended and counted against the H-1B cap. A third company has now filed a petition in behalf of the same beneficiary; evidence submitted with this petition shows that the beneficiary has never worked for the computer consulting company, but rather has continuously worked for the university. Does this beneficiary need to be counted, as they did not actually work for the cap company? (8th ed. 4/23/2007)
A: The beneficiary does not need to be counted against the cap again.

Not Eligible for Recount?
Q: When is an H1B eligible to be recounted? (1st ed. 4/12/2007)
A: If the alien is requesting that the 6 year clock be reset, but you find that they have not spent a continuous year outside the U.S., they are not eligible for recounting. They should, however, be considered as an EOS case.

Q: What if the alien changed to a different nonimmigrant classification for more that one year…Is that considered sufficient for resetting the clock? (3rd Ed. 4/16/2007)
A: The alien must be OUTSIDE the U.S. for one continuous year. The only NI classification that the alien can be admitted as that will not 'break' that continuity is time in B status, however, time in B NI status does not count towards the one year timeframe, either. E.g. – H1B leaves the U.S. and re-enters 9 months later as a B for three months. The alien has not met the 12 month requirement. Even though the B time did not make a break in the 12 months, the 3 months in B status will not count towards the 12 month requirement. The alien will need to stay outside the U.S. another 3 months to have his 6 years reset.

Q: Can the beneficiary's time be reset? The beneficiary was classified as an H for six years, and then changed status in the US to an O-1 which she has been on for the last couple of years. Is the beneficiary now entitled to another six years of H time since it's been at least one year since she's been in H status? The beneficiary does not qualify for any exceptions to the 6 year rule… (11th Ed. 5/18/2007 ***Amended*** (12th Ed. 3/31/2008)
A: The regulations (8 CFR 214.2(h)(13)(iii)(A)) state that a beneficiary once classified as an H-1B may not change back to H-1B unless he or she has been physically outside the U.S. for the immediate prior year. In other words, it's permissible to change from H-1B to another classification such as O-1, but the beneficiary can't change back to H-1B unless they reside out of the U.S. for one year. Be mindful that an alien eligible for AC21 Section 104 or 106 status may change back to H-1B from another non-immigrant status as long as the alien is otherwise maintaining their status (i.e. H-1B to O-1 to H1-B).

Eligibility for Advanced Degree Cap

Q: Can the beneficiary use a U.S. Bachelor's degree and experience to qualify for the Advanced degree cap? (1st ed. 4/12/2007)

A: The Master's degree must be 'earned' from a U.S. institution; the Bachelor's + 5 years of experience do not qualify for this Congressional exception to the overall H-1B cap. Deny.

Q: The H1B Data Collection Form indicates that the alien is in a U.S. doctorate program, but it does not show that a degree was conferred or that the alien has a U.S. Master's degree…Are they qualified for an Advanced Degree cap H1B? (3rd Ed. 4/16/2007)

A: The adjudicator will need to look at a couple items on the alien's transcript and determine how he alien entered the program and with what degree, as well as where they are in the doctorate program. See Archives, section (e) for further instructions…

Q: Is American University in Beirut a US based University for Advanced Degree Cap case purposes?

A: There are lots of American Universities all over the world. Not every American University is qualified for Advanced Degree Cap. For example, the American University of Beirut was founded under a charter from the State of New York. The University is registered with and recognized by the Department of Education of New York State since 1863. In the US, the American University in Cairo is licensed to grant degrees and is incorporated by the State of Delaware. On the other hand, the American University in Dubai only holds an agent's license issued by the District of Columbia Education Licensure Commission. Here is some information about other American Universities—

American University of Kuwait
Contract with Dartmouth to develop curriculum
US accreditation not shown

American University of the Caribbean
Accredited only
Affiliated with US Hospitals for Clinical Elective Rotations

American University of Afghanistan
Contract with Dartmouth to develop curriculum
US accreditation not shown

American University of London
Distance Learning Program
US accreditation not shown

American University of Paris
Accredited
Incorporated in Delaware
Registered in the US as a 501(c)(3) non-profit

American University of Kosovo
Primarily a Jr. College
Student Exchange agreement with Rochester Institute of Technology
US accreditation not shown

Requests for Starts earlier than 10/1/2007 –

Q: What do we do if the petitioner is asking for a start date prior to 10/1/2007? (2nd ed. 4/13/2007)

A: There are three options depending upon the facts of the case –

1. Quota exempt cases can start at any time.
2. For those individuals from Chile/Singapore the FY 2007 quota has not yet been met and so would be eligible to have an earlier start date.
3. For all others: on advanced degree cases we will deny because a visa number is not available for FY 2007. If they don't qualify for a 2008 cap number we should deny without refund. They filed and it made it to the floor for adjudication – thus we will make a decision.. (9th Ed. 4/25/2007) ***Amendment***

Advanced Degree vs. regular quota

Q: Why is there an advanced degree quota in addition to the regular quota? (4th ed. 4/17/2007)

A: After WWII, the country needed many individuals with college degrees in order to expand the economy and create jobs. In response, Congress created the H1 program. At that time there were no limitations on the number of aliens who could enter under this program. In 1990, Congress determined that the future numbers should not exceed 65,000. In the late 1990's, Congress raised the quota in response to Y2K concerns and the booming economy. Since then, the basic quota has returned to the congressionally-mandated 65,000. Congress then realized that the quota was limiting the admission of aliens who were job-creators and economy expanders, especially those holding an advanced degree. Further, as a result of 9/11, U.S. colleges and universities were no longer obtaining the diversity of students from abroad as before that contributed to a well-rounded education. To encourage foreign students to study at the graduate level in the U.S. as well as create jobs and improve the economy, congress created the 20,000 per year advanced degree cap.

ELIGIBILITY Issues

Specialty Occupation

Q: How can I tell whether the position is a specialty occupation when the duties listed are so technical that I cannot determine what the beneficiary will be doing? (6th Ed. 4/19/2007)

A: RFE the case, requesting that the petitioner submit a job description, including all duties, in non-technical terms. If the petitioner cannot explain what the beneficiary is doing, then we can deny, as they have not established that the position is a specialty occupation.

Wage

Q: Do poverty guidelines apply to non-immigrants?

A: No, poverty guidelines may apply to immigrants but do not apply to non-immigrants including H1B, B, or even F. For students, they must demonstrate with documents that they are able to pay for their study and any expense while they remain in US. Poverty guidelines do not apply to the sponsors whom are listed on I-134s. Remember all non-immigrant aliens must otherwise establish that they will not become a public charge.

Q: An IT company filed the petition with LCA showing the prevailing wage about $72,000 for the offsite position in San Jose area. However, the wage indicated on the petition was $53,000. Should the officer address the discrepancy?

A: Generally, the enforcement activities relating to prevailing wage is the responsibility of DOL. Under DOL rules, no action can be taken until the employer has not paid the appropriate wage. There is no statutory or regulatory provision for prospective enforcement of this issue. Thus, it is not issue on AMCON notification, Change of Status or Change of Employer cases. If an

employer did not pay an alien in the past the appropriate wage, we can consider action under the revocation provisions. See 8 CFR 214.2(h)(11)(B)(iii)(A). (15th Ed.)

Models – H1B3's

Q: What criteria do I look at when I am adjudicating a model? (10th Ed. 5/1/2007)

A: Regarding H1B3 models (in Claims they are just H1Bs): These are so rare, most officers probably won't see any. H1B models obviously do not require a degree. They were included in H1B way back when because HQ didn't know where to put them. When AAO ruled that models with high salaries ($250 per hour and more) could qualify as O1's in the business category, most high profile models use that road. But once in a while we get an H1B.

Look for:

1. The high salary
2. An established agent or agency (like the Ford Model Agency in NY) that represents them. A good way to verify a top agent/agency is to RFE for names of other high profile models they represent. The top agencies listed below in this e-mail is a good reference.
3. A contract with the work itinerary, salary, clients, etc.
4. Past history of work and representation
5. Magazine covers, ads, articles from major model/glamour magazines (always ask for circulation numbers)
6. Awards, recognition, etc.

Internet checks of the model, agency, etc.

Usually H1B3 models command $250 per hour and this would meet one of the H1B3 criterion in establishing distinguished merit and ability. High remuneration is also a criterion for the O classification, as well. $25 an hour would not meet such criteria. Since most of the petitioners are agents please make sure that there is a contract that spells out the terms of the contractual relationship. Also, these aliens need an itinerary of events. Please review your law books for the types of evidence required to establish eligibility for the H1B3 or O classification. Remember, many high profile models are not as well known as Elle MacPherson and Tyra Banks. So use the whole range of considerations listed above when adjudicating H1B models.

Strike/Lockout

Q: I have a petition here from a non-profit organization. Enclosed with the petition is a Collective Bargaining Agreement between the petitioner and UAW. I seem to recall that H-1B1 has a no-strike clause, or can not go on picket/strike. If this is true, how shall I ensure, thru RFE, the petitioner is made aware of this restriction? (10th Ed. 5/1/2007)

A: H1b are not prohibited from striking. They are prohibited from crossing the picket line and the employment of the alien would adversely affect the wages and working conditions of US employees, as certified by DOL. Since this office has not received such a certification, it is not an issue.

Previous Work Authorizations

Q: If the beneficiary is currently working while in L2 status, do we have to count that time? So are they still considered to be under the L2 which is not countable towards the six year maximum time limit? (7th Ed. 4/20/2007)

A: Per the December memo, dependent time – including time in which employment is authorized – is not counted towards the 6 year limit.

Contracts –

Q: What should I be looking at when examining a contract? (6th Ed. 4/19/2007)

A: As a general guideline ONLY – look to see who the parties of the contract are, what the duties or the job being contracted actually is, how long is the contract for, who has control of the persons that are doing the contract work – look at all related supplements – there may be a Purchase Agreement or a Work Order. It is a bonus if the beneficiary's name is listed in the contract, but by no means required. The contract should ideally be good for at least a year.

NOTE: See O:\ADJ_div\ I-129_H1b1\Computer Consultants.doc for guidance on jobs in the computer industry. Note that this is local internal guidance only and not for public dissemination. (11th Ed. 5/18/2007)

Q: A staffing firm, new business, has income less than 5 million in 2006. It seems to have legitimate work with actual duties for the position. What do I ask for RFE?
A: Contracts showing the described duties & the respective work location and covering the requested employment period or one year whatever is less.

Optometrists –
Q: The petitioner has submitted exam results from the National Board of Examiners…Does this suffice, or do they need a license? (2nd ed. 4/13/2007)
A: Each state requires a license to practice Optometry. Each state decides which methods it will use to issue licenses. The National Board of Examiners gives an examination that is wholly, or in part, incorporated into the licensing process. Some states just go by the exam results, some take part or all of the exam results and combine them with other additional oral, written, or practical exams, or exams in specific topics, such as law or pharmacology. Even though the alien passed the exam, that test is just one step in the whole state licensing process, so exam results alone are not sufficient evidence of licensure.

Architects –
Q: Do architects need licenses? (3rd Ed. 4/16/2007)
A: As with engineers, it depends on the duties of the architect and who they will be working for/under. If the architect is working directly for the public, they either need a license, or depending on the circumstances/state they are working in, need to be working under a licensed architect that can sign off on their work. Look at the individual state requirements. As a rule, however, licenses for architects are not required when the duties do not include design work but do require knowledge of architecture, urban planning or geography.

Acupuncturists –
Q: Do licensed acupuncturists typically qualify as a specialty occupation? (4th ed. 4/17/2007)
A: As with certain other occupations, the officer will need to see what the licensing requirements are for each state, to determine whether the position qualifies as a specialty occupation. In California, for example, in order to obtain a license to practice acupuncture, the state requires a Master's Degree, making it a specialty occupation. Most states require at least a two year program at a school that teaches Traditional Chinese Medicine, and many of these require a bachelor's degree (in any subject) to qualify for the program.

Private school teacher –
Q: Do private school teachers require licenses? (10th Ed. 5/1/2007)
A: Private schools do not require licensing through the state/area. They do, however, need to demonstrate that the position is a specialty occupation – Private schools are not comparable to public schools, as far as specialty occupation qualifications go. The licensing requirement covers the industry standards prong as far as public schools go, but does not cover private school teachers as they are not required to obtain a license. Without the licensing requirement, they can

and often do have difficulty in proving that the position is, indeed, a specialty occupation. The OOH covers public school teachers only. It does mention private school teachers, but only to say that there are vast variations as to the requirements that each individual private school has for their teaching staff. They will have to go through prongs 3 or 4…

Q: Are Montessori Teachers a specialty occupation? Do they require a license? (5th ed. 4/18/2007)
A: The officer will need to make the determination on whether the position is actually that of a teacher, whether the school requires all teachers to have a bachelor's as a requirement, etc. Is this a school that is providing an educational curriculum with lesson plans, etc. or is this a day care provider. A good way to check on some or all of this information, besides the case itself, is to do a search on the Internet. As far as licensing is concerned, generally Montessori teachers do not require state-issued licenses or credentials to teach, because Montessori's are private schools and therefore not subject to the licensing/credentialing requirements.

Medical Workers
Q: Do psychiatric residents require a license? (6th Ed. 4/19/2007)
A: Psychiatry is a field of medicine and psychiatrists are medical doctors. Like any other resident doctor profession, the beneficiary has to be licensed, or if allowed in the state of intended employment, has to be working in a licensed facility/hospital and/or under a licensed physician's supervision. In New York State, for example, residents are not required to have a license, as long as they are working for a licensed facility.

Licensing vs. Certification (Visa Screen)
Q: What is the difference between licensure and certification? (2nd ed. 4/13/2007)
A: Licensing is a requirement for the approval of the petition. It is a classification issue. Essentially, there are three scenarios that the officer may encounter…
1 - Initially the alien may have a temporary or permanent license from the state of intended employment; or
2 - The state may allow the alien to work under the supervision of a licensed professional; or
3 – The alien will submit a letter from the state indicating that a permanent or temporary license will be issued once the alien enters the U.S. or after approval by USCIS.

Certification is an admissibility issue. Therefore, this is only an issue on COS or EOS cases. AmCon cases and POE/PFI cases are resolved at the visa issuance and/or admission to the U.S.

Resources for Licensure Requirements
Q: The petitioner claims the beneficiary does not have to meet any exam or license requirements since the proffered position "physician" would be working on internet site. Is this correct?
A: As a physician, the beneficiary must comply with licensing and examination requirements of INA 212(j)(2)(A). The petitioner is not a research or nonprofit organization eligible to exempt a physician from the 212(j) rules.

Q: Where do I find out whether occupations require licensing? (2nd ed. 4/13/2007) ***revised*** (12th Ed. 3/31/2008)
A: The Occupational Outlook Handbook (OOH) gives general guidance in this area. A search of the internet utilizing a search engine such as Google or Yahoo using "License requirements for (occupation)" as the search parameters will generally give you several sites that will either give you general information for all states or state-specific information.

Q: At the time of adjudication, alien's permanent license was expired for a year. If otherwise approvable, should we grant the extension for 3 years as requested or 1 year?
A: Since the license is a permanent one, the fact that it is expired is not relevant to the decision. However, the officer may want to check online sources to make sure the respective permanent license was not revoked before the requested 3 years extension is granted. (15th Ed.)

Q: The petition was filed for the beneficiary with 1 year training level medical license to work for the internal medical residency program in PA area. How many years do I grant the beneficiary for extension?
A: One year due to his/her training license because the beneficiary does not hold a permanent license.

Q: The petition was filed for the position as a resident physician in California. The attorney argued that the beneficiary with a Texas medical license should be granted for 3-year extension since it is just a matter of time for the beneficiary to get his/her CA license with the license & experience he/she has now. Is it true?
A: No. Unless the petitioner provides a copy of the beneficiary's CA medical license, the beneficiary is not qualified to practice medicine in California and cannot immediately engage in his profession.

Q: The petition was filed for the position as a physician resident in pathology in NY area. The beneficiary has not completed #3 exam of USMLE. The attorney argued that the beneficiary does not need a state medical license since he/she won't have direct contact with patients. Is he right?
A: No. As foreign medical graduates, they must complete all exams of USMLE in order to receive graduate medical education or training in the United States. See INA 212(j)(1)(B). Since the beneficiary is not coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in US to teach or conduct research, or both, he/she is not exempt from all the required Federation licensing examination even he/she won't perform direct patient care, to qualify as a H1B. See INA 212(j)(2)(A). The beneficiary apparently is not an international renown physician to be qualified under 8 CFR 214.2(h)(4)(viii), either.

Q: When do we need the license for the position as a civil engineer?
A: If the petitioner is a civil engineering firm specializing in civil engineering project development or research, it must submit evidence showing that the beneficiary has required state civil engineer license to practice the profession or he/she would be supervised by a licensed civil engineer within the company. If the petitioner is a construction company assuming the duties require a civil engineer to perform, he/she must possess state civil engineer license or be supervised by an engineer with such license with-in the company. If the duties described by the construction company are unrelated to those duties of a civil engineer, then the license is not required. However, then examine the duties carefully to make sure them qualified the position (not the job title) as a specialty occupation.

Q: Do law clerks require license?
A: It depends on the claimed duties provided by the petitioner. If a law clerk performs the duties similar to those of a lawyer, he/she must be licensed to fully perform the occupation. Limiting the duties of the position will not exempt the alien from a license. At issue is the occupation not the duties. If the position requires a law degree to perform, then the occupation is law and the alien is required to be licensed. However, if the occupation is that of a law clerk, then whether the position is qualified as a specialty occupation may be in question. See 8 CFR 214.2(h)(4)(v). (14th Ed.)

Import/Export Companies & Iran Sanctions

Q: How do I handle petitions that that are Import/Export companies involving Iranians or sensitive technology and/or services? (6th Ed. 4/19/2007)

A: If you have a case in which a petitioner's business is or relates to the import/export industry, in which the petitioner is linked in any way to Iran OR whose business relates to Sensitive Technology goods or services, the Importer/Exporter and possibly the beneficiary, depending on the position they are petitioning for, is required to be licensed by the Department of Treasury's Export Control Agency. If there is no evidence of this in the file, RFE for the license or proof that they do not need a license.

For more information, take a look at the information in the Iran folder – the link is: O:\ADJ_div\ I-129\Reference Material\Iran

LCA

Q: The submitted LCA was issued in error by DOL during the petitioner's disbarment period due to violations. What should the officer do about it?

A: Deny it because of the invalid LCA. The said LCA was issued during the period when the petitioner was barred for DOL violations. Therefore, the LCA is invalid even if the petitioner was subsequently became active at the time of filing the petition.

Q: The job title "business development specialist" is listed on the petition but the industrial code on the submitted LCA is "030", computer industry with the same job code. Do they have to be consistent?

A: If job code is consistent with the duties, it is OK. DOL adjudicates on job code, not title just as CIS adjudicates on duties, not title.

Q: Does the LCA need to be certified prior to filing? (2nd ed. 4/13/2007)

A: The ETA-9035 (LCA) must be approved prior to filing, however, for some cases approved in March the DOL website was not allowing the petitioner to print the certification. There is an RFE for this issue in O:Common.

Q: A petition was filed for EOS by the same employer with no change. The submitted LCA indicates the work locations are at Greensboro, NC and Chicago, IL. However, the alien's address is located in Seattle, WA. Should a RFE be sent for this issue?

A: It depends on the alien's status. If at the time of adjudication, the alien's current H1B status is still valid, then RFE for explanation of discrepancy and a new LCA, which may resolve the issue. However, if the alien's H1B status has expired or will expire shortly; the petition should be denied since the LCA does not cover all work locations. Unlike the first scenario, the petitioner would not be able to secure a new LCA since DOL does not issue backdated LCAs. (15th Ed.)

Q: The job title listed on the petition is development analyst and duties described on the petition are marketing duties but the occupation code shown on the LCA is for system analyst. What should do I do?

A: If the start date listed on the petition has passed, deny the petition because the submitted LCA is not for the position shown on that document. If it is a future start date, RFE may be issued for explanation of discrepancy and a new LCA.

H3

Q: Continued from the above question, if the beneficiary has an IBIS hit due to the intention of abandoning his/her foreign residency, what should I do?
A: The intention of abandoning foreign residency is an issue for H3 petition, but not for H1B petition. Therefore, issue a decision for the H3 first.

Q: The alien, as an F-1 Student, was recently approved for H3 Status, and is now being petitioned for as an H1B…what should I do with the H1B? (3rd Ed. 4/16/2007)
A: Pull the H3 approval case and take a look at it. If the petitioning company indicates that the alien is required to have the H3 training to do the duties of the petition, then the applicant does not qualify for the H1B at the time of filing because they did not have this training. If, however, the H3 training is valid training but is not requisite for the position applied for on the H1B petition, then the adjudicator can continue adjudicating the petition.

OTHER NONIMMIGRANT CLASSIFICATIONS

L1B

Q: Can a computer consulting company qualify as an L1B petitioner? (11th Ed. 5/18/2007)
A: An L1B cannot work for or at a client as a "an arrangement to provide labor for hire" like an H1B. However, an L1B can work for a client company ONLY if the work involves bona fide L1B specialized knowledge and is in connection with a product or service of specialized knowledge that is offered by the L petitioner.
Additionally, the supervision and control must lie with the L petitioner throughout the time the L1B works at the client company. The client company supervision can provide input, guidance and feedback as it relates to the benefit of the client company, but cannot control of the work in regards to directed tasks and activities. This control must remain with the L petitioner. The contract(s) must show this control and work being PRINCIPALLY related to the specialized knowledge or service provided by the petitioner. If it tangentially (just touches on or is remotely related) to the petitioner's specialized knowledge, this is not enough.

Multiple Beneficiaries

Q: I have a I-129 petition with multiple beneficiaries – but the petitioner did not submit "attachment 1" (page 17 of the I-129). Instead the petitioner included a typed written list of the additional beneficiaries to be included on the petition. Is this acceptable? The petition is otherwise approvable. (10th Ed. 5/1/2007)
A: As long as we have all the required information, you can accept it.

H2B Returning Workers

Q: What is the process followed on returning workers? Do I need to check SQ94 on each beneficiary?- (9th Ed. 4/25/2007) ***Revised*** (12th Ed. 3/31/2008)
A: The returning worker provisions have now sunsetted.

Q: I am working on an H2b petition where the dates being requested exceed the three year limit for one beneficiary. The remaining beneficiaries qualify for the entire period of intended employment. Do we assign a shorter validity period to one beneficiary (up to the 3 year limit)? Also, can you tell me what the proper annotation is for returning workers? (10th Ed. 5/1/2007)
A: R is the correct annotation. Also mark the top middle of the petition with "R", even if there is only one returning worker out of xxxx number. 8CFR 214.2(h)(2)(ii) on multiple H2b petitions, the beneficiaries must be eligible "for the same period of time." Therefore, the officer can either deny one or grant all for the same period of time.

H3

Q: The petitioner filed I-129 H3 petition and I-129 H1B Cap for the same beneficiary. What do I do?
A: To qualify as an H-3 the employer must establish that the training program is not for the purposes of staffing the US operation. The subsequent actions of this employer in this case show to the contrary. Based upon these actions an ITD on the H-3 would be appropriate. See 8 CFR 214.2(h)(7)(iii)(E) & (F). However, if there is a bridge issue for H1B petition, proceed with the H3 adjudication, first.

Q NonImmigrants–
Q: How do we process the following scenario? On a multiple beneficiary application, Alien A is approved and listed on the approval notice. At the consulate, Alien B is substituted for Alien A. After Alien B's admission to the U.S. as a Q-1, a request is submitted to withdraw Alien B and substitute him with Alien C…How do we process this in CLAIMS? (4th ed. 4/17/2007)
A: Add Alien B and C to CLAIMS. In the split decision screen, update Alien A and B as denial, then approve Alien C in the split decision screen.

Q: The Petitioner submitted a letter to withdraw a beneficiary of a Q-1 petition. The regulations do not address this particular issue. The beneficiary they are withdrawing was substituted at the consulate, therefore, this name is not on the approval notice. (11th ed. 3/31/2008) ***Revised*** (12th Ed. 3/31/2008)
A: According to the regulation an automatic revocation does not require Service action if the qualifying business goes out of business, files a written withdrawal of the petition or terminates the approved international cultural exchange program prior to its expiration date. **None of these apply in this case.** A revocation on notice requires an ITR when the international visitor is no longer employed by the petitioner (there are other reasons). If the alien is outside of the US, the regulations require notification of the AMCON or POE **not** CIS. See 8 CFR 214.2(Q)(6). Thus, no action is required.

CAP-GAP Relief Information (F-1 to H-1B) (The interim final rule effective April 8, 2008 expands cap-gap relief for ALL F-1 students with pending H-1B petitions.) (13th ed. 4/16/2008)

Q: What does this mean to officers adjudicating H-1B cap cases?

A: Prior to this interim rule, F-1 students who are beneficiaries of approved H-1B petitions but whose period of authorized stay (including authorized period of OPT + 60-day departure preparation period) expires before October 1st would have a gap in authorized stay and employment. Therefore, the Service would issue a split decision and order the beneficiary to leave the US, obtain the H1B visa abroad and return at the time the H1B status becomes effective. With the interim rule, the authorized period of stay is extended for ALL F-1 students* who have a properly filed H-1B petition and change of status request filed under the cap pending with USCIS. If the petition is approved, the F-1 student will have an extension that will allow them to remain in the U.S. until the requested start date indicated on the H-1B petition takes effect. *The student beneficiary must be in a valid F-1 status at the time of filing the H-1B petition.

Q: What if the petitioner requested consular notification even if the evidence demonstrates that the F-1 student is eligible to change status in the U.S.?

A: If the petitioner requested consular notification as indicated on Page 1 Part 2 #5a of Form I-129, the adjudicating officer will assess the beneficiary's eligibility for a change of status. If the beneficiary is eligible to continue in F-1 status until October 1, 2008 and no request has been received from the petitioner, annotate on the side of the petition (in red) "COS eligible". However, adjudication must be made as "consulate notification" unless otherwise requested by the petitioner.

Q: What if there is an I-539 COS filed for the same H1B beneficiary?

A: In anticipation to close the "gap", some applicants file an I-539 COS from F-1 to B-2. Adjudicating officers are responsible to check the system for any pending cap-related cases. It has been CSC's standard to deny any COS from an F-1 to B-2 because the applicant's ultimate intention is to remain in the U.S. as a nonimmigrant worker.

Q: Is USCIS giving the petitioners opportunity to change their original request for consular notification to a change of status without filing an amended petition?

A: Yes, Service Centers are currently in the process of setting up email addresses so that the petitioners can notify us that they want a change of status rather than consular notification. A USCIS Update will also be posted once the email addresses for both CSC and VSC are set up.

- Premium cases: The USCIS Update will instruct PP petitioners to communicate to us via a designated PP e-mail address once they get the e-mail receipt from us with the receipt number. The file will be flagged to indicate that change of status eligibility has been assessed.
    - If we have not yet adjudicated the case, and the beneficiary is eligible for change of status, the approval notice will indicate H-1B and change of status approval.
    - If we have already adjudicated the case, it will be pulled and an approval notice indicating change of status will be issued. This will be greatly facilitated by the fact that we will have already looked at change of status eligibility while reviewing the I-129 (so we don't have to go back and adjudicate just the change of status portion as it will have been "pre-adjudicated".)
- Non Premium cases: The USCIS Update will instruct non PP petitioners to communicate via designated e-mail address once they get their receipt notice in the mail. We will urge them to do this within 30 days of receiving the receipt notice. Since we have until 10/1 and these cases will be processed after we have worked the PP cases, the likelihood of having made an adjudication before we get the c/s request from the petitioner is lessened. At any rate, if we have already adjudicated the case, the change of status eligibility will already have been noted in the file.

What is new for F-1 students? (13th ed. 4/17/2008)

Effective April 8, 2008, Interim Regulations involving student were published. These regulations both change and add provisions to provide relief for graduating and former students in the areas of maintaining status and OPT.

Changes to Current Regulations:

- F-1 students (and their F-2 dependents) status is automatically extended to 10-01-08, if the F-1 is the beneficiary of a timely filed pending or approved H-1b petition with request for a change of status.

- OPT can now be filed 90 days before or 60 days after the completion of studies but within the 30 days of the DSO's recommendation.

- During the initial 12- months of OPT, the F-1 can have up to 90 days of unemployment; Otherwise the F-1 is not maintaining status.

New Provisions:

- Provides for an extension of 17 months OPT for STEMS students, Science, Technology, Engineering & Math, for a maximum total time of 29 months.

- STEMS students are entitled to max of 120 days total of unemployment.

- Extensions must be filed with CIS prior to the expiration of the initial grant of OPT, that is while the F-1 is in valid status and with 30 days of the DSO recommendation.

- The alien may receive only one 17-month extension.

- The alien must provide the school with updated information and comply with a 6 months reporting requirement.

What is a STEM degree?

To be eligible for the 17-month OPT extension, a student must have received a degree included in the STEM Designated Degree Program List. This list sets forth eligible courses of study according to Classification of Instructional Programs (CIP) codes developed by the U.S. Department of Education's National Center for Education Statistics (NCES). The STEM Designated Degree Program List includes the following courses of study:

- o Computer Science
- o Actuarial Science
- o Engineering
- o Engineering Technologies
- o Science Technologies
- o Biological and Biomedical Sciences
- o Mathematics and Statistics
- o Military Technologies
- o Physical Sciences
- o Medical Scientist

The STEM degree list is included in the preamble to the interim final rule and will be posted on the ICE website.

Note that to be eligible for an OPT extension the student must currently be in an approved post-completion OPT period based on a designated STEM degree. Thus, for example, a student with an undergraduate degree in a designated STEM field, but currently in OPT based on a subsequent MBA degree, would not be eligible for an OPT extension.

What are the eligibility requirements for the 17-month extension of post-completion OPT?

- The student must have a bachelor's, master's, or doctorate degree included in the STEM Designated Degree Program List.

- The student must currently be in an approved post-completion OPT period based on a designated STEM degree.

- The student's employer must be enrolled in E-Verify.

- The student must apply on time (i.e., before the current post-completion OPT expires).

ARCHIVES

(a) Answer: In 2004, Congress established an exception to the H-1B cap for aliens who 'earned' a Master's degree or higher degree from a United States academic institution. Consequently, the regulation cite that provides for a bachelor's degree plus at least five years of progressively responsible experience does not apply for this exception. In addition, all requirements for the U.S. Master's degree must be completed at the time of filing of the petition and not a date in the future. Transcripts of study evidencing completion of the requirements for the Master's degree are acceptable in lieu of the degree certificate or diploma; a letter from the dean of the alien's college without the transcript of study will not suffice.

If all requirements for the Master's degree have not been met, the alien would not be eligible for this exception. The denial shell can be located at O:/Common/ADJ_div/I-129/_H1b1/I-292 Denials/Petitioner Issues/Cap Issue/H-1B Cap FY-2008, No Adv Degree Exemption-Not US Degree.doc.

Section 248 of the INA and parts 214 and 248 of 8 CFR allow for the change of an alien's nonimmigrant classification to another nonimmigrant classification provided the alien is not within one of the classifications precluded from changing status. The alien must continue to maintain their current classification to the date of intended employment. If the alien is not maintaining their current classification to the date of intended employment, the petition may be approved while the change of status request must be denied (split decision).

(b) Answer: An F-1 academic student is admitted or changed to F-1 while in the U.S. for duration of status (D/S). Duration of status is defined as the time during which the student is pursuing a full course of study or engaged in authorized optional practical training following the completion of studies. The student is considered to be maintaining status if he or she is making normal progress toward completing their course of study. An F-1 student who has completed a course of study and any authorized practical training following completion of studies will be allowed an additional 60-day period to prepare for departure from the U.S. or file a petition for a change of status to another nonimmigrant classification.

Not all F-1 students are permitted the 60-day departure period. A student authorized by the Designated School Official (DSO) to withdraw from classes will be allowed a 15-day departure period (SEVIS indicates this status as 'Withdraw'). A student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for

any additional departure period (SEVIS indicates this status as 'Failure to Appear' or 'No Show' for example).

A student may be authorized a maximum of 12 months of optional practical training directly related to the student's major area of study. A student must apply for OPT on Form I-765 and may not begin employment until the date indicated on the EAD card. The student may be granted authorization for employment after completion of all course requirements for the Master's degree (excluding the thesis or thesis equivalent). OPT must be requested through the DSO and the filing of an I-765 prior to the completion of all course requirements for the degree or prior to the completion of the course of study. A student must complete all practical training within a 14-month period following the completion of all course requirements or the completion of study. After completion of OPT, the student is permitted 60 days to depart or file a petition for a change of status.

If the F-1 student's authorized employment and 60-day departure period do not extend to the intended start date of employment (October 1, 2007), the petition may be approved but the change of status request must be denied (split decision).

Please note that the paragraphs above pertain only to F-1 students; issues and time periods for M-1 and J-1 students are not the same.

(c)

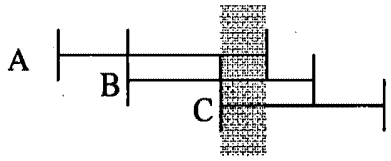
If the copy of the NOL is submitted with the I-129 and it is dated on or after October 10, 2006, an officer can check the lists found at http://vsc.cis.dhs.gov/VSC_DOS_612.htm and click on Vermont Service Center "DOS Approvals" or "DOS Denials" to locate the EAC receipt number. Once the officer has the receipt number, he/she can check CLAIMS (National) for the decision. If the case is not worked yet and it needs to be adjudicated, an appointed POC can email Michael J. Paul, Supervisory Adjudications Officer, at the VSC with the information (Name as it appears on the letter, DOB, and COB). Michael can also be contacted at phone number 802-527-4776.

The officer should also do a name, DOB and COB search in CLAIMS LAN and CLAIMS Mainframe first to verify if case was possibly adjudicated here at the CSC or at another service. Even though, the I-612 went electronic and paperless on October 10, there are still a few that were in the pipeline and came in through regular mail.

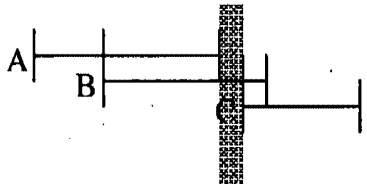
If the NOL letter is dated prior to 10/10/2006, then we should send out an RFE asking that the case be reconstructed. The applicant would need to submit the NOL letter and biographic data sheet (DS-3035) along with all supporting documentation. These requests can be sent to Marisol De Los Santos, so that someone on her team can adjudicate it for the officer needing the waiver.

(d)

Example: Employer A files a petition for a beneficiary for 3 years as H1B and is approved. Then the beneficiary finds a job with Employer B. Employer B files a petition for the beneficiary – the beneficiary can go to work for company B as soon as the petition has been filed. While the petition for Company B is pending, the beneficiary finds a job with Company C. The beneficiary can go work for Company C as soon as C has filed the petition. Do not let Premium processing Company C cases precede Company B case decision. The diagram below shows how the overlap or non-overlap of dates determines whether the beneficiary has maintained status. The lines of A, B, and C represent the span of time granted/requested on the H1B petitions for each company.



In this case, because approval of Company A overlapped Company C, beneficiary has maintained status if/when petition for Company B is denied or revoked.



In this case, because approval of Company A did not overlap Company C, beneficiary has not maintained status if/when petition for Company B is denied or revoked. Split decision.

(e)

The adjudicator will need to look at a couple items on the alien's transcript and determine how the alien entered the program and with what degree, as well as where he or she is in the doctoral program. The first page should indicate the requirements to enter the doctoral program. Some programs require a Master's Degree and some require only a Bachelor's Degree. The transcript should show what the alien used to enter the program (type of degree and place of issuance). If the basis for entry into the doctoral program is a U.S. based Master's Degree, then the alien has the requisite degree needed for the Advanced degree cap. If not, then further review of the transcript is required. If the alien entered using the program using a foreign master's degree, then in order to qualify for the advanced degree cap they must have completed ALL requirements for conference of the degree (coursework, thesis/dissertation, and orals). If he or she has not completed this, then he or she is not eligible. If however the alien entered the program with a bachelor's degree (foreign or U.S.), and the coursework is completed, then we can, for immigration quota purposes ONLY, consider him or her as having received a U.S. Master's Degree. To determine whether the coursework is complete, review the classes listed in the transcript. If the latest classes are all listed as "thesis research" or "dissertation research," and there are no coursework or instructor-led classes, then the alien has completed the required coursework. The reason for this is that for those entering doctoral programs with a Bachelor's degree who finish all coursework, but fail at the thesis/dissertation and/or the orals, he or she will be given, by default, a Master's degree. NOTE, however, that if the position that the alien is being hired for requires a master's degree or higher to perform the duties, the alien must have all requirements for the requisite degree met OR, if a master's degree is required then look at equivalency.

(f)

First, look at the petition – on the first page, the petitioner should list the prior petition in Section 2, question 3 & 4. Type the previous petition # into CLAIMS MF.

When you look at the previous case in CLAIMS MF, you need to look at three things –

```
FSXMIPT1                  CLAIMS MAINFRAME SYSTEM                  04/19/2007
                        PETITION UPDATE PROCESSING                 16:48
    MODE: L                                                        WACSIP02
    FORM: I129      RECEIPT NBR [redacted]                  OWNED BY:  SRC
  PART 2: B   PART 3: C   RECEIVED DATE: 09/15/2005
 REF NBR:                 APPEALED FORM: 334200   ASSOC RCPT NBR: [redacted]
```

(b)(6)

Under the form type and Number, you will see Part 2, Part 3, and to the right, the Assoc Rcpt Nbr.

"Part 2" corresponds to the Part 2, question 2 of the I-129.

A – New employment

B – Continuation of same employment

C – Change in previously approved employment
D – Concurrent employment.
E – Change of employment.
F – Amended petition.

"Part 3" corresponds to Part 2, question 5 of the I-129.
A – Consular Notification
B – Change of Status Requested
C – Extend the stay of person who holds the status
D – Amend the stay of person who holds the status

Assoc Rcpt Nbr – is the petition filed previous to the petition on the screen.

Looking at the above example, the beneficiary has a petition prior to this one - - keep following the associated receipt numbers back until you see A in the Part 2 field, and A or B in Part 3 field. If Part 3 is an A, you will then need to go to SQ94 and run a Name/DOB search to see when the beneficiary's 1st entry as an H1B occurred – it should be, but not always is, a date within a couple months of the approval of the I-129. If Part 3 is a B, then look at the validity dates of the petition – the start date is the beneficiary's first day in H1B status.

(g)
The number of petitions, which can be an indicator, does not necessarily indicate that there is a concern on the number of employees.
You need to keep in mind a few factors –
1 – Some of the beneficiaries filed for could count for more than one petition – If the company originally filed for them in 2003 and later filed an extension, then the beneficiary would account for 2 of the files…if they have an I-140 pending, that would be a 3rd. Also, as this is 2007, you will only look at those petitions filed in 2004 or later – anyone earlier than that either was extended on a later petition OR is no longer at the company…
2 – Attrition – especially in the IT industry, employees move around quite a bit – some of the beneficiaries may no longer be at the company…
3 – I-129 approval is sometimes a lure to get someone to come work for a company…When a person is looking for a job, they generally send their resume to several companies – those companies compete, in part, for that person by filing an I-129. The approval of the I-129 can be an incentive for the person to choose that particular company…If there are 5 companies competing for the person, 4 companies may have approved petitions for employees who never entered on duty. So, some of the beneficiaries of the petitions you see may never even have started work for the employer…
A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee…
This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less…
So if you had a company of 61 employees and you saw that they had 305 petitions, this would be more of an indicator of fraud…

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Tuesday, May 13, 2008 5:20 PM
To: Dyson, Howard E; Goto, Blake K; Nicholson, Roya Z; Rangaswamy, Jay ; Taylor, Shawn M; Torres, Lory C; Wolcott, Rachel A; DeJulius, Robert W (rwdejuli@fins3.dhs.gov); Eberling, George (ggeberli@fins3.dhs.gov)
Subject: FW: ROLLING FAQs 15th ed 051308

FYI

From: Agnelly, Mary C
Sent: Tuesday, May 13, 2008 10:57 AM
To: Brickett Sr, Stephen M; Fierro, Joseph ; Goodman, Lubirda L; Gooselaw, Kurt G; Johnson, Ron E; Prince, Rose M
Cc: Wang, Yamei
Subject: ROLLING FAQs 15th ed 051308

Below is the 15th Edition of the Rolling FAQ. Comments and changes need to be made by 4:30 for pulication onWed 8 am.

ROLLING FAQ's.....Edition #15

Questions answered on H1B issues

EOS Questions

Grace Period

Q: Is there a grace period for filing after the authorized period of stay expires (as shown on the I-94)? (6th Ed. 4/19/2007) (9th Ed. 4/25/2007) ***Corrected****

A: There is a 10-day period after the authorized stay expires on H1B nonimmigrants for the purpose of allowing the alien to depart – an extension can be filed during the 10-day grace period, but it is still considered an untimely filing. An untimely filing is one filed after the previous status has expired. The 10-day grace period does not change this. Also, remember that a petition filed the day after status expires is a timely filing: For example, if status expires on 4/24/07 and the extension is received on 4/25/07, this is considered a timely filing. If the extension is received on 4/26/07 or thereafter, it would be considered untimely.

Finally, a late filing can be excused at the discretion of the adjudicator if the late filing was beyond the control of the petitioner or beneficiary. Beyond the control does not mean that the petitioner or the representing attorney forgot to file timely. That is within the petitioner's control. Examples of beyond the petitioner/beneficiary control would be if a petitioner was in an accident while attempting to deliver the petition to the post office and was hospitalized for a period of time and then mailed the file when he was able and it was received late. Another may be an attorney assured the petitioner that the file would be filed timely, but the attorney filed it late and did not inform the petitioner, but attempted to deceive the petitioner that the file was timely. Normally, documented evidence needs to be presented by the petitioner to show the late filing was beyond the petitioner's control. Evidence could be medical reports or evidence that the petitioner has filed a complaint/law suit against the attorney who deceived the petitioner.

Filed during 10 days post expiration

Q: What should I do when the petition is filed during the 10 days after the current H1B expires? What is the start date going to be? (6th Ed. 4/19/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The petitioner can file during the 10 day period after the expiration of the current H1B status granted to the alien to depart the U.S. The H1B is not authorized to work during this period. The officer will need to look at the LCA to

determine the start date – grant the start date the LCA does. If the LCA indicates a start date immediately following the end date of the current status, then that start date can be granted; if it gives a start date, for example for the 10th day after the current status expires, then that is the date they will be given. If a split decision, the start date will be the date of adjudication or a future date.

Recaptured Time

Q: Can a petitioner request recaptured time for an AC21 year? Scenario: A petitioner was requesting recaptured time for year 8 when the beneficiary was in their 9th year. (1st ed. 4/12/2007)

A: No. Recaptured time is limited to the initial years. See *Matter of IT Ascent (AAO 2006, 06-001)* AC21 time cannot be adjusted or recaptured. A request for recaptured time is a request to adjust the 6 year period, taking into account time not spent in H1B status, so that is not a request for time beyond the 6 years, but a request to complete the entire 6 years, even if it appears to go into the 7th year.(2nd ed. 4/13/2007)

Q: When can an alien recapture time?

A: Recaptured time may be requested and granted at any stage, before or after AC 21 time, but time under AC 21 can **not** be recaptured. (14th ed.)

Q: Is a new LCA required for recaptured time?

A: The Labor Condition Application must cover the entire time period requested including any recapture time. (14th ed.)

Seasonal/intermittent employment/Commuters

Q: What action do I take? The beneficiary has held previous status as an H1B over the past 5 years. A review of SQ94 shows that the beneficiary was in the U.S. only for a few months at a time for the first three years of the five – in the last two years the beneficiary was in the U.S. in H1B status for most of each year. The petitioner is now asking for another three years. Do I look at recaptured time? How much time are they eligible for? (8nd ed. 4/23/2007)

A: Seasonal/Intermittent employment (less than 6 months out of the year) and commuters are not subject to the 6 year limit. Do not start counting the 6 years until/unless the beneficiary is here for more than 6 months out of the year. In the instant case, we would not count the first three years towards the 6 year limit, as that time is not subject. We would consider the two most recent years as subject to the 6 year limit, and would be able to grant, if otherwise approvable, three years.

AC21 eligibility –

Q: A petitioner filed I-129 seeking extension beyond 6 years limitation. For AC21 104(a), do they have to qualify as of date of filing or date of adjudication?

A: As of date of filing, the alien must have an approved I-140 and visa number not available. (15th Ed.)

Q: A I-129 petition was filed for a Chinese citizen seeking 104(a) extension for 3 years. The relating I-140 was approved for Employment 2nd Preference with a priority date March 11, 2006. Upon review the attached I-539, the officer found that the alien's spouse was born in Canada and their child is a Japanese citizen. Does it affect the request of extension for 3 years?

A: Yes, under alternate chargeability rules, the visa number may be charged to country of birth of the spouse. Even though a visa number may not available for China, it is available for Canada or Japan. Therefore, the EOS would be granted only for 1 year. See INA 202(b)(2). (5-08-2008 15th Ed.)

Q: The labor certification application was approved on Jan 26, 2007 with no I-140 filing so far. What should I do with the extension?

A: Deny it under AC21 106(a) unless the I-129 was filed before Jan 12, 2008. See o:common for denial. All labor certifications approved before July 16, 2007 must now have an I-140 filed. The 180 day clock for these older approved labor certifications started on July 16, 2007 and the clock expired on January 12, 2008. Therefore, no extension will be granted without the filing of I-140 for these old labor certifications.

Q: If the I-140 used as the basis for eligibility under AC21 was denied and the petitioner filed an appeal with the AAO, can the petitioner use the I-140 to qualify for AC21? (2nd ed. 4/13/2007)

A: Yes - as long as the appeal is still pending, the I-40 is considered pending. If in checking the status of a Backlog Reduction Labor cert the officer finds that the certification has been denied, the officer must either RFE or ITD for verification of whether an appeal has been filed.

NOTE: Because of the 12/05 Aytes memo stating that an alien does not have to be in the U.S. or be in H1B status to file for AC21 benefits, an L beneficiary can get AC21 benefits when a petitioner files a COS to H1B for him. This is true even if the alien has had a mixture of H1B and L status OR if the alien has had all L status.

Examples:

1. An alien with first 3 years of H and then 3 years of L status can COS to H1B under AC21
2. An L1B alien who has used up all 5 years of L1B status can COS to H1B and get the 6th year of H1B and 2 years under AC21 if qualified to do so.
3. An L1A who has used up all 7 years of L1A status can COS to H1B under AC21.

Remember, the alien does not have to be currently in H1B status to get AC21 benefits, but must be in non-immigrants status. He cannot be out of status. An alien outside of the US who has prior H1b status is also eligible for extension under the 6 year rule (11th Ed. 5/18/2007)

Q: What if a second I-140 or I-485 has been filed? (11th Ed. 5/18/2007)
A: With rare exception, once and I-140/485 originally filed under the original labor cert. is denied, the labor cert. is dead in the water. AC21 makes it clear that GENERALLY, the labor cert can be used for AC21 benefits until a FINAL DECISION was made on the related petition/application. Once a decision is made on the I-140/485, the labor cert. is no longer valid for AC21. But please be mindful of appeals of denials that have been filed and are still pending. Also, keep in mind, if a second I-140 has been filed and is now pending for more than 365 days, it does qualify for AC21 benefits. This information will need to be verified.

Q: For FY 2009 cases, are DOL backlog reductions or local filing letters still valid?
A: Letters from local, state DOL offices or the Backlog Reduction Centers are no longer sufficient by themselves to establish that eligibility under AC 21 Section 106. ~~ON~~ DOL has announced on its website that the backlog reduction centers are closed and that all cases are completed as of Oct 1, 2007. Subsequently, DOL has admitted that there is handful of cases not completed but the number is less than 10. Thus, action on the labor certification request should have been completed. The officer now needs evidence of the most recent action by DOL. If the labor certification is not current and no appeal was filed, the alien is no longer eligible for AC 21 106 benefits. If the labor certificate was granted, then the petitioner has 180 days after approval or Jan 12, 2008, whichever is later, to file an I-140. Failure to file the I-140 timely automatically invalidates the labor certification and thus the alien is not longer eligible for benefits under AC 21 Section 106. (14th ed.)

Q: A letter from DOL indicated the ETA was closed due to late filing or incomplete. In response to my RFE, the petitioner submitted a Backlog printout of the ETA which has a TR in the processing Type. What does TR stand for? (11th ed. 5/18/2007)
A: TR identifies the case as a Traditional Recruitment case for the backlog reduction group at the Department of Labor.

Q: The beneficiary has a pending I-485 as a derivative. The beneficiary wants to remain in H-1B status and request a 3-year extension. Do I need to find out what category the beneficiary has filed for on the I-485 before granting one year or three years? (11th Ed. 5/18/2007)
A: Since the I-485 is based upon the alien's derivative status, not as the "beneficiary of a petition filed under 204(a)", the alien is not eligible in his or her own right for an H1B extension on the basis of SEC 104 of AC 21. To be eligible for 106, the beneficiary needs to have a labor certification and/or I-140 filed in his or her behalf. See the Dec 2005 memo. Thus, being a derivative does not establish eligibility under AC 21 as an H1b.

Q: The status on the Labor Cert shows Denial of RIR (Reduction in Recruitment)...does that mean the Labor Certification has been denied? (2nd ed. 4/13/2007)
A: No, this is not a final decision on the Labor Certification.

Q: When should the officer request an update on the pendancy on the Labor Certification? How old is too old? (2nd ed. 4/13/2007) ***amended*** (12th ed. 3/31/2008)

A: The Department of Labor has indicated that all Backlog Reduction cases have been completes, although they acknowledge that some may have fallen through the cracks. In all Backlog cases, if the DOL letter is more than 90 days old, we will require an updated letter from DOL.

Q: Is there another way I can check on the status of a labor cert (ETA-750/9089)? (5th ed. 4/18/2007)
A: The officer can by emailing H1B7YR@PHI.DFLC.US and giving the alien's name, DOB, name of entity that filed the petition and the approximate date of filing. They can reply to the officer just as they reply to the petitioner, with the Case #< employer name, received date, priority date, and whether the case is pending.

Ongoing employment –
Q: Is the beneficiary maintaining status? (2nd ed. 4/13/2007) Scenario: On a change of employer, the petitioner was requested to submit a copy of the beneficiary's last pay check with the prior employer… The petitioner responded by stating that the while the beneficiary worked for the previous employer, the previous employer had refused to pay the beneficiary, and so a last pay stub was not available. The current petitioner submitted evidence that the beneficiary had filed a complaint against the previous employer with the state's DOL (or equivalent).
A: In this case, it appears that there was an ongoing employee-employer relationship between the beneficiary and the prior employer, thus the alien was maintaining status.

Portability-Bridging
Q: The petition A was expired in Feb 2008. The petition B, the first extension was filed in Feb 2008. C company, a new employer, also filed the extension for the alien in March 2008. Which petitions should I adjudicate first?
A: Adjudicate petition B before C. (15th Ed.)

Q: The beneficiary was initially granted H1B status for Company A. He then changed employers to Company B, then to Company C. When I looked in CLAIMS, the I-129 for Company B was denied…What do I do? (2nd ed. 4/13/2007)
A: The officer needs to look further into the case to see whether the beneficiary can bridge under Section 105. See Archives section (d) below for an example and diagram that demonstrates how bridging works…

Concurrent Employment/Part Time Employment
Q: Does the petitioner need to list the hours that the beneficiary is going to work on part-time employment? The fact that they are part time is listed on the I-129 and on the LCA. (5th ed. 4/18/2007) ***Expanded*** (12th ed. 3/31/2008)
A: The LCA specifies that the range of hours for the beneficiary will be listed in detail on the I-129. If the petitioner does not indicate the range of hours on the I-129, then an RFE will need to be issued. Without the range of hours, the LCA is not valid. To adjudicate an EOS/COS, the number of hours is also needed to determine whether or not the alien will have sufficient resources not to become a public charge.

Q: For concurrent employment where there is both non-exempt and exempt employment (meaning exempt or non-exempt from the cap count), how is the cap counted? (13th ed. 4/17/2008)

A: As long as the alien continues to work for the exempt employer and the non-exempt employer continues to file as a concurrent employer, the alien is not required to be counted.

Q: Where the concurrent employment is both non-exempt from the cap and exempt from the cap do we limit the exempt employment to the period of the non-exempt employment? (13th ed. 4/17/2008)

A: No, per Headquarter (April 2008) we will no longer limit the employment period to match the exempt employment period.

Advanced Parolee
Q: When the beneficiary/applicant has been admitted last as an Advanced Parolee, what status does the advanced parole give the beneficiary? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: Aliens applying for status as H-1B / L-1 and their dependents who have been paroled into the U.S. (not as a humanitarian parole) and were prior H-1B or L-1 aliens may be admitted by the adjudicator (through granting the class) and their stay extended without requiring the alien to return to CBP to complete their inspection.

Q: In the split decision we prepare on the H-4 dependents that have been given advance parole, what denial template should I use? (8nd ed. 4/23/2007) ***amended*** (12th ed. 3/31/2008)
A: This is no longer a basis for denial – see prior question

I-94s
NOTE: The most recently issued I-94 is the controlling document. It indicates the dates in which the beneficiary is authorized to work for the petitioner. The I-797 is authorization for the petitioner to employ the beneficiary for the dates listed - for I-9 purposes. (5th ed. 4/18/2007)

Q: What action should I take? The petitioner has submitted an amended petition, indicating that the inspector made an error and granted the beneficiary less time then what was granted on the I-129 approval notice...They want an I-94 with the correct dates. (5th ed. 4/18/2007)
A: The inspector has the authority to and very well may grant less time than the I-797. This is not an error on the inspector's part. There was a reason, known not necessarily to us, why the inspector gave the beneficiary less that the time granted on the I-129 - whether it has to do with the passport of the beneficiary, certain agreements/limits put on certain countries, etc. As stated above, the most recently issued I-94 is the controlling document. There is no error to correct, either by the inspector or in CLAIMS. The I-129 needs to be filed for an extension of stay, not an amended petition.

I-485 Approved
Q: If the alien has an approved I-485 and adjusted status to an LPR...what do I do with the I-129? (7th Ed. 4/20/2007)
A: It depends on the circumstances. If the date of adjustment is prior to the authorized stay expiring, then deny the petition as the alien is no longer a nonimmigrant. If the date of adjustment is after the date of authorized stay expired, approve the petition to cover the gap between the expiration of stay and the date of adjustment. The employer needs this for I-9 purposes.

STATUS Questions

COS/EOS Requirements – H1B and other classifications
Q: What are the requirements regarding being in the U.S.? What about other classifications other that F1's? (e.g. L's etc.) What is KCC? What is the difference with KCC and sending it to the consulate of the beneficiary's country? (6th Ed. 4/19/2007)
A: The same principles apply for EOS as H-1B or COS to H-1B for all other classifications. The beneficiary must be here at the time of filing and, for COS, must remain here. For EOS, it depends if the beneficiary has time remaining on their previously approved validity period. If the beneficiary leaves the country, and assuming the job requires an employee with a degree and the beneficiary has that degree, a split decision would be done. These principles do not necessarily apply to other classifications (e.g., Es and Rs have different requirements). For H-1Bs, the issues are pretty constant and straightforward.
KCC is the Kentucky Consular Center. KCC will send the duplicate petition to the embassy or consulate of the beneficiary's choice; the service center does not send the petition directly (like we used to many years ago). Clerical will route the duplicate set of petition and documents as well as CLAIMS updates. All you have to do is annotations, approval stamp with signature (on both sets of petitions), and at least two copies of the I-541 denial notice; staple a Processing Worksheet on the front of the file(s) labeling it as a split decision, and route to Clerical. This is the process unless the beneficiary is a Canadian citizen (by birth or by conversion, as evidenced usually by their passport), in which case we would send the duplicate petition to either pre-flight inspection or the nearest port-of-entry.

Alien Departed prior to filing COS

Q: Alien was not in the US at the time of filing EOS?
A: Split decision if otherwise approvable. See 8 CFR 214.2(h)(15)(i). However, if alien has returned as H1B at the time of adjudication, the officer is not precluded from granting the extension by using the new I-94 number from the last admission. (15th Ed.)

Q: The alien departed prior to the petition being filed, and returned after the petition was filed – do we deny the case for abandonment? (2nd ed. 4/13/2007)

A: If the alien departed prior to the filing of the COS I-129 petition, the alien is not eligible for a COS because at the time of filing they were not in NI status, even if they return during the pendency of the case. If the petition is approved, a split decision needs to be prepared using the abandonment denial with an alteration to the facts and discussion section to fit the circumstances, as this is not an abandonment denial – they had no status at the time of filing to abandon. (5th ed. 4/18/2007) The alien would not be precluded from filing a new I-129 petition for COS at a later date, as they have already established a cap number with the first petition. NOTE: The alien in this scenario was an F-1 student in OPT… had the alien been a B-2, there would be a question of their intent upon re-entry into the United States, and the second petition might not be approved for COS. Take the current NI classification into account when this situation arises.

NOTE: Aliens who are not in the United States at the time of filing OR have departed since the time of filing are not eligible for COS. If otherwise approvable, a split decision needs to be prepared, and the second copy of the petition will need to be sent to KCC or to the POE/PFI. (5th ed. 4/18/2007)

Alien Departed after COS is filed

Q: Why do we need to deny for abandonment COS's in which the beneficiary is seeking COS from F-1 (OPT) to H-1B (CAP cases), wherein the beneficiary departed the U.S. after filing? The beneficiary has not abandoned their current status, as they are permitted to travel on their F-1 visa…Aren't they maintaining their status? What is the regulatory/legal cite for these denials? (6th Ed. 4/19/2007)

A: 8 CFR 248.1(a) states: Except for those classes enumerated in § 248.2, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status pursuant to section 247 of the Act, who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification …

When a nonimmigrant is not in the U.S., technically they are not in status – which is the whole basis for recaptured time in Matter of IT Ascent – The F-1 Visa allows them to depart and return, but for the duration of time that they are gone, they are not an F-1. They reapply for admission as an F-1 upon re-entry. This is a split decision. If the alien returns to the US at a later date, to resume his F-1 OPT, he is not precluded from filing a new I-129 to change status to H1B – with the initial approved H1B (split decision) he would have been counted.

Inadmissibility – Possible Public Charge- Part-Time Position

Q: What concerns should the officer address when the position is Part-Time? (4th ed. 4/17/2007) *amended* (11th Ed. 5/18/2007)

A: The officer will need to take several factors into consideration when the beneficiary is going to be paid part-time in order to determine whether the beneficiary may be found inadmissible as a possible public charge. These factors include: The location of the position (and cost of living in that area), the amount of part- time pay to be received, and the size of the family that the beneficiary is supporting, keeping in mind that any H4 dependents cannot work (a spouse that is also an F-1 or other NI Classification may be able to work). If there is no I-539 attached, the officer can look at SEVIS to see if there are any dependents listed if the beneficiary is currently an F, M, or J. The officer should also keep in mind that there may be income coming in from other sources – properties owned abroad, parents, etc. – the beneficiary could also be working part-time as an H1B while continuing to attend graduate school. There is an RFE that will be added to O:Common in the next few days to address this issue.

Establishing Maintenance of Status

Q: What is considered sufficient proof that the alien is and will continue to maintain status until 10/1/2007? The beneficiary has completed his F Program. He has submitted a letter from a test preparation school indicating that he has been accepted, and indicates in a statement that he will be attending the test prep school up through the requested start date on the I-129. There is no I-20 for the test prep school in the file. (4th ed. 4/17/2007)

A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: If the alien is currently an F-1 student that is otherwise qualified, and is due to have his program end with the conference of his degree on June 30, 2007, and there is no evidence in the file or in CLAIMS that shows that an I-539 or I-765 is pending, will I need to do a split decision?

A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: Is the 60 days departure rule firmly applied? This beneficiary status expires on 7/30/2006 and they ask start date 10/01/2007. Is this is a split decision? (6th Ed. 4/19/2007)
A: This issue has been superseded by Cap-Gap Relief Regulations dated April 8, 2008. (14th ed.)

Q: SEVIS indicates the OPT that the student is currently on expires in June, but indicates as well that the student "plans to continue classes in July". The program dates indicate that the next session begins in July and continues through to 2008. Is this beneficiary going to maintain his status until 10/1/2007? (6th Ed. 4/19/2007)
A: Yes – they may be switching from one education level to another, or getting a 2nd degree. If his next session is listed in SEVIS, then he is still in D/S as an F-1, and can be considered as maintaining that status until 2008.

I-20 ID –
Q: What if the only evidence submitted of an alien's admission is an I-20 ID and there is no evidence in NIIS? (1st ed. 4/12/2007) ***Expanded*** (12th Ed. 3/31/2008)
A: Starting in the early 1980's, school information was entered into ST/SC (Student/School) database from the I-20AB. Alien entered as an F-1 student (they could go to elementary school at that time) and was issued a basic I-20 ID as well as an I-94. Entries from that time are not in NIIS or the archives, and if the student came in as an elementary student and stayed a student since, they may not have any other evidence of admission. So, an I-20 ID is acceptable in lieu of an I-94 to establish admission. However, by August 2003, schools were required to enter into SEVIS all current students and assign an "N" number to the student.

J-1 –
Q: The petitioner submitted as evidence of the J-1 waiver the application to the Waiver Review Board without the recommendation from the Board. Is this acceptable? (4th ed. 4/17/2007)
A: No – If the application was approved before October 10, 2006, the recommendation would need to be submitted by mail to the CIS servicing office. If on or after October 10, 2006 the recommendation would be submitted to the VSC. See instructions in Archives, section (c) below…

Q: If an alien was a J-1, filed an I-539 in the past and was approved and changed status to another NI classification, do we need to check if the alien was subject to 212(e)? (2nd ed. 4/13/2007)
A: Presume the officer properly adjudicated the case; if the beneficiary is a physician, however, he/she may have a 214(l) waiver which requires other on-going considerations.

REMINDER: Adjudicators need to verify whether all J-1 exchange visitors (and the J-2 dependents) are subject to 212(e). The three ways in which they can be subject (and all three ways need to be checked) are:
1 – If the program is funded all or in any part by either the U.S. or a Foreign Government directly or indirectly;
2 – If the program is listed on Exchange Visitor's Skills list for the beneficiary's country; and
3 – If the J-1 is a Graduate Medical Student. (1st ed. 4/12/2007) *expanded* (6th Ed. 4/19/2007)

Q: What do I need to look at if the beneficiary is subject to 212(e)? (1st ed. 4/12/2007) ***expanded*** (11th Ed. 5/18/2007), (12th ed. 3/31/2008)
A: If the beneficiary has a No Objection (NOL)/Government Interest Letter dated on or after October 10, 2006 they must have the I-612 waiver approved prior to the filing of the Change of Status Request. Verification can be made, if they do not offer the waiver approval – follow the instructions listed in the Archives section (c) at the end of this document…**NOTE:** Physicians need to have a Conrad 20/30 waiver and can only work at the facility listed on the waiver, as that is the facility that they have been granted to work at, and which meets the requirements for the Conrad 20/30 waiver (being in an underserved area). If the alien is requesting permission to change facilities, see 8 CFR 212.7(c)(9)(iv). Question relating to this issue should be directed to a supervisor or a coach.

Airline Stewardesses
Q: The beneficiary was admitted as an airline stewardess…can they change status? (1st ed. 4/12/2007)
A: Airline stewardesses are admitted as D-1 or D-2's. INA 248 indicates that any nonimmigrant admitted as a D cannot change status.

No Status indicated –

Q: The beneficiary's status is not indicated on the I-129…what action should I take? (6th Ed. 4/19/2007) ***Expanded*** (12th ed. 3/31/2008)
A: If, even in CLAIMS or NIIS, you cannot determine the beneficiary's current status, RFE. Remember to verify that the petitioner has requested an EOS or COS. If requesting consular processing, no verification is necessary.

Different NI classifications changing status to H1B
Q: Can the following NI classification change status to H1B? (2nd ed. 4/13/2007)
A: See each classification below:

S8 – stands for H1A registered nurse/spouse/child. Time as the H1A principal counts towards the six year limit. Due to the recent memo issued, time as a dependent does not. Check to see if the beneficiary was the principal, and if so, check to see if they left the U.S. for one continuous year. If they were outside the U.S. for one year, they can be recounted and the six years start over. If they have not been out for one continuous year, then the H1A time needs to be counted, and they would be considered an EOS case, as opposed to a cap case.
TN – TN's can change status to H1B's
E3 – Australian Specialty Workers – can change status to H1B's
H1B1 Singapore/Chile nonimmigrants are not precluded from changing status to H1B. **NOTE** – Any case fee receipted after 4/15/2007 must be relocated to Vermont, except for E-Filed cases. ***Added*** (11th ed. 5/18/2007), ***Amended*** (12th ed. 3/31/2008)
H3 – Trainees – if less than 18 months, then can change status to H1B – H3 time is counted towards 6 year limit. More than 18 months, they may not be able to COS without specific amount of time outside the U.S.…Policy decision will be forthcoming. (8nd ed. 4/23/2007)
WT – Visa Waiver Program Visitors – Any alien admitted as a visitor under visa waiver program or visa pilot program is not eligible to change his/her nonimmigrant status under section 248 of the Act. See 8 CFR 248.2(e). (14th Ed.)

Q: An alien last admitted as WT and had prior F1 status, is he eligible for COS?
A: No, status is determined by last admission. (14th Ed.)

Q: The petition was filed for the beneficiary to COS from A1 to H1B without I-566. What do I do if the petitioner provided no I-566 but excuses for the RFE?
A: COS from A1 must have I-566s. If I-566 was not submitted after RFE, the petition must be denied. The I-566 is mandatory, No matter what the reason, failure to provide said document is grounds for denials. See 8 CFR 248.3(c).

H3 To H1B
Q: I have a case that the beneficiary is going from H3 to H1B. Are there restrictions on a trainee H3 changing to an H1B? (11th Ed. 5/18/2007)
A: There is not a statutory or regulatory prohibition against an H-3 changing to H-1B (or H-1B changing to H-3). There are issues to consider, however, with the COS request:

1. Is the beneficiary maintaining status as an H-3 prior to the filing of the I-129? The intent behind the H-3 classification is, once the training is completed, the beneficiary will return to his or her home country. I would pay particular interest to this explanation from the H-1B petitioner, and if not sufficient, RFE.
2. The time already spent as an H-3 will count toward the 6-year limit for an H-1B. This does not usually cause a problem unless the beneficiary, for example, was an H-1B, changed to H-3, and is now changing back to H-1B.
3. A reason for changing to H-1B may be the filing of a permanent labor certification by the H-1B petitioner. If the labor certification was filed with the DOL prior to the filing of the I-129, the beneficiary is ineligible to change to H-1B because there is not a dual intent provision for H-3s.

Otherwise, handle this COS just like any other.

Reminder: *Per INA 248, **all** NI classifications **except** C, D, K, WT, WB and some S and V, can change to another NI classification.*

B Nonimmigrants
Q: How do I know that a B non-immigrant is maintaining status? What can B Nonimmigrants do? (10th Ed. 5/1/2007)
A: B-1 visas are for business, including such things as a need to consult with business associates, negotiate a contract, buy goods or materials, settle an estate, appear in a court trial, and participate in business or professional conventions or

conferences; or, where an applicant will be traveling to the United States on behalf of a foreign employer for training or meetings. The individual may not receive payment (except for incidental expenses) from a United States source while on a B-1 visa.
B-2 visas are issued for general pleasure/tourist travel, such as touring, visits to friends and relatives, visits for rest or medical treatment, social or fraternal conventions and conferences, and amateur/unpaid participants in cultural or sports events.
In most instances, consuls will issue a combined B-1/B-2 visa, recognizing that most business travel will also include tourist activities. The B1 or B2 may come in as a missionary or religious worker, however he/she can only receive honorary payments.

EAD Card/Parolee
Q: The applicant's previous H1B status expired on 8/22/2006 which at first glance would make him out of status when he filed the I-129. However, he has an EAD that doesn't expire until 2/1/07 and he has an I-94 that shows he was paroled in until 4/21/2007 because he has a I-485 pending. For EOS purposes, is the applicant in status or would this be a split decision? (9th Ed. 4/25/2007)
A: Normally an EAD card by itself does not grant nonimmigrant status and the decision would be a split decision. As this is a case where they are requesting an EOS and were paroled, in approving the petition we are, in effect, admitting the alien as an H1B, which would then grant the alien an extension of stay.

Previous I-129 pending/not approved
Q: The I-129 petition was filed to argue the split decision made on its prior petition. What should I do about it?
A: If otherwise approvable, the officer should do a split decision again since the beneficiary is not maintaining status. Do not discuss the basis for that prior decision just note that the prior COS/EOS was denied and any concerns relating to that denial should have been addressed by filing a timely motion to reopen/reconsider the earlier decision. The officer may want to consider sending the 2nd petition to the NTA unit after issuance of the split decision.

Q: The bene's previous I-129 was denied on 06/23/05 and appeal was transferred to AAO on Sept 05. However, AAO returned the petition to Vermont on March 1, 06. No decision has been made yet. A new petition filed by new employer on Jan 07. What should I do? (9th Ed. 4/25/2007) ***Amended and expanded*** (12th ed. 3/31/2008)
A: If otherwise approvable, this decision will be a split decision, as having a motion pending does not grant the beneficiary status... You may also have an issue with unauthorized employment if the beneficiary has worked more than 240 days (8 months) past the expiration of his/her previously approved petition, if the beneficiary continued to work for the same employer (see 8 CFR 274a.12(b)(20)). If the alien is changing employers, INA 214(n) <AC 21 sec. 205> is controlling. -

Revocation
Q: If the beneficiary's previous I-129 was found to be an auto revocation, is he maintaining his/her status?
A: At least, as of the date of revocation, the beneficiary was considered not in status. However, a new petition could be filed before revocation to cover the gap. The officer must check the system to determine the existence of gap before the current filing of EOS or COS to make sure the beneficiary has been maintaining the nonimmigrant status. (14th ED.)

Pending Legalization –
Q: Is an alien with pending legalization with an approved I-765 eligible to change status? (2nd ed. 4/13/2007)
A: Legalization by itself does not extend an alien's nonimmigrant status or grant eligibility for change of status.

TPS
Q: The beneficiary is currently in TPS status. Can they request a change of status? (9th Ed. 4/25/2007)
A: Aliens under TPS can change status, as long as they are maintaining the TPS status. If the TPS status expires, then the alien reverts back to the status held prior to the TPS being granted and would most likely not be eligible for COS. According to statute and regs: INA 244(a)(5) - The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this Act. 8 CFR 244.10(f)(2)(iv) For the purposes of adjustment of status under section 245 of the Act and change of status under section 248 of the Act, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant while the alien maintains Temporary Protected Status.

In status on 10/1/07?

Q: Is the beneficiary maintaining status if they indicate that they will file for an extension of stay in their current classification until the 10/1/07 start date for the H1B COS? (2nd ed. 4/13/2007)

A: If the beneficiary states that they intend to file an extension, check CLAIMS to verify whether anything is pending – if they have not filed anything yet, then they have not established that they will be in status on the 10/1/07 start date. If the pending I-539 and/or I-765 is here in the CSC, then email CSC PPhelp to get those files pulled and adjudicated. If they have filed with VSC, TSC or NSC, the SC that is in possession of the file(s) can be contacted to adjudicate the I-539 and/or I-765 prior to adjudication of the I-129. (5th ed. 4/18/2007) The beneficiary/applicant must establish that they will be in status, not just propose that they will be in status.

Q: What if the I-539/I-765 that was filed to extend their stay has to be RFE'ed? What does that do to my I-129? (5th ed. 4/18/2007)

A: If the I-539/I-765 has to be RFE'ed due to lack of evidence, then the beneficiary has not established that they will be in status and a split decision will need to be prepared. When writing the denial, when addressing the extension/work authorization, indicate that the I-539 or the I-765 has not been approved.

Q: The I-539 that the beneficiary filed for an extension indicates that they wish to change to or extend their stay as a B – can they? (5th ed. 4/18/2007) ***Amended*** (12th Ed. 3/31/2008)

A: The alien can, so long as he is otherwise maintaining his/her current nonimmigrant status, apply to change to another nonimmigrant status. When adjudicating a COS or EOS to a B, keep in mind that the alien has to establish that their stay is temporary and that they have a foreign residence that they have no intent to abandoning. If there is an I-129 filed on their behalf, the officer will have to determine whether this is truly a temporary visit with an intent to depart the U.S. Generally, the fact that there is an I-129 filed on their behalf may lead an officer to believe otherwise, and deny the I-539, setting up the groundwork for an I-129 split decision as the alien will not be in status at the future start date.

Prior Time Spent out of Status –

Q: Do we take any action if, prior to their current status, the alien overstayed or was out of status and departed the U.S.? (1st ed. 4/12/2007)

A: We will not consider the prior out of status time EXCEPT for calculation of possible Unlawful Presence.

Unlawful Presence –

Q: When do we start counting unlawful presence? Does it affect the beneficiary's ability to change status? (5th ed. 4/18/2007)

A: No unlawful presence will be gathered while a petition or application is pending; however, having a petition or application pending does not establish status.

CPT and OPT

Q: What is CPT? What is OPT? (1st ed. 4/12/2007)

A: Curricular Practical Training – Work that is required in order to get the degree… for instance, part of the requirement for a Bachelor's in Architecture is that you serve as an intern in an Architectural firm for a certain # of weeks/months…If the beneficiary is currently participating in CPT, they have not completed all requirements for the degree. CPT completion is a requirement to obtain the degree, not an option. (5th ed. 4/18/2007)

Optional Practical Training is granted during they school year or after the degree has been conferred or after they have met all the course requirements– the student is eligible for up to one year of OPT. Evidence? An EAD card or check the SEVIS record. See 8 CFR 214.2(f)(9).

F-1 Students graduating after the filing date/OPT availability

Q: What happens when the start date requested is 10/01/07 and there is a letter in the file that says the beneficiary will be given a master's degree in June? All requirements have been completed. Do they have to have the degree certificate or diploma in hand or just have completed the requirements? Do the requirements have to be completed before filing the petition, before adjudication, or before the employment start date of October 1? (1st ed. 4/12/2007)

A: If they do not have a degree they are required to have either a transcript showing that they have completed all of the requirements. If the transcript does not show that they have completed all the requirements, then a letter from a college official in addition to the transcript would be acceptable… see Archives section (a) below for further details… **NOTE:** A letter from the school without the transcripts is not acceptable. RFE for the transcripts. (5th ed. 4/18/2007)

Q: If the alien does not have the degree certificate or diploma in hand but has completed all requirements for the Master's degree, can the alien get Optional Practical Training? (1st ed. 4/12/2007)
A: Yes, they can get OPT during the school year, and prior to their degree being conferred…see Archives section (b) below for further details…

Q: If the person has not finished their course of study for the master's degree, we deny them. Is it the same concept for a bachelor's degree? I have a current student who has a letter from the school stating he has to complete 4 more classes in order to graduate and that he is on the list to graduate this spring. I would think we would have to deny him also…what happens if he does not pass? (6th Ed. 4/19/2007)
A: Yes – the only reason why we would approve those without the diploma is that all the course and other requirements have been met – if push came to shove at the school they have already passed all requirements they could get the diploma tomorrow – they are just waiting until the graduation ceremony so that the diploma can be issued. The beneficiary in this instance has NOT met all his course requirements and therefore is not qualified at the time of filing…

Passport
Q: What if the beneficiary, who is in valid Nonimmigrant Status until 2008, has an expired passport? What action should we take? (5th ed. 4/18/2007) ***amended*** (12th Ed. 3/31/2008)
A: The officer needs to RFE for a valid passport – a valid passport at the time of filing is required, except for Canadian citizens.

FRAUD Questions

5:1 Ratio Profile
Q: What is the 5:1 Ratio? (2nd ed. 4/13/2007)
A: The 5:1 project was a 30 day sweep to find H1B petitioners that fit into a certain profile that tended towards fraud and/or abuse. While the project and sweep are no longer in effect, if an officer finds that an I-129 fits this profile and/or otherwise warrants attention, they can RFE for contracts and/or send a Request for Assistance to CFU. The indicators include businesses with a low annual income (generally less than $5 million, low number of employees, with an abnormally high rate of filings in a very short time (e.g., $1 million gross annual income with 10 employees that has 100 or more filings in the past year). The ratio that was used as a suggested threshold, though not a firm guideline, for the project as far as filings was 5:1 - if the company files 5 times the number of petitions and applications than the number of employees.

Q: Are we still checking the petitioner for 5:1 ratio?
A: No. Five to one ratio will be one of reasons the petition being forwarded to CFDO (Center Fraud Detection Operation) but not the sole reason. We would still check the petitioner with multiple filing for the same beneficiary.

OSCAR List – Fraud Digest
Q: The petitioner is on the Fraud Digest List – what do I do with it? (5th ed. 4/18/2007) ***revised*** (12th ed. 3/31/2008)
A: The Fraud Digest is in 2 parts – the Index and the Digest, itself. The Index simply gives a list of the companies, attorneys, schools, etc. of interest. If the officer finds that a party of their case is listed on the Index, the officer needs to look at the actual Digest to determine why the company is on the list and what actions, if any, the officer needs to take. The Fraud Digest is located in the CFU folder in O:Common. The Fraud Digest has web links from the Index to the Digest. The adjudicator will need to read the Digest information carefully. It may indicate that the company is no longer a specific adjudication concern, This is shown by "OK" at the beginning of the entry.

PROCESS Questions

NOTE: The following is a list of the most common errors found by AST – these items should be carefully scrutinized to verify that the information is complete and correct…remember that these issues may affect the approval notice print process, and can generate inquiries/requests for correction. (9th Ed. 4/25/2007) ***Revised and expanded*** (12th Ed. 3/31/2008)

- ✓ Validity date incorrect or missing

- ✓ Classification missing; incorrect status or classification
- ✓ Officers did not pull second copy of I-129 petition to send to KCC – This includes EOS & COS.
- ✓ Missing I-94 for EOS or COS or I-94 included but annotated the wrong/incomplete I-94 number
- ✓ Bene birthday not included (or incorrect)
- ✓ Bene citizenship incorrect
- ✓ Officer did not stamp deny/approved or is missing signature
- ✓ Decision on I-129 but nothing on I-539 (I-129 approved but nothing on I-539)
- ✓ I-824 is approved for notify to consulate, but officer did not make I-129 petition copy for clerk to send to KCC.
- ✓ Officers forgot to order RFE, ITD, ITR, deny and withdrawal.
- ✓ WAC # doesn't match file on RFE notice, etc.
- ✓ Address is incorrect from CLAIM3 and petition/application – make sure CLAIMS and the petition both have the correct address.

The following is a list of common errors seen by Division 12.

- ✓ Country of Citizenship is different from Country of Birth. Change CLAIMS to COC in the COB Field. If the case is a COS case, the COC should show the COB. If requesting consular processing, COC should be the country of citizenship.
- ✓ Ensure that CLAIMS information is complete (Name, DOB, COB, etc.)
- ✓ Australia is coded "RALIA" in CLAIMS, not AUSTR, which is French Polynesia. Austria is STRIA.
- ✓ Tasmania is TASMA in CLAIMS. People from Tasmania may also be Australian Citizens.
- ✓ Niger vs. Nigeria – in CLAIMS, Niger is NIGER; Nigeria is NIGIA
- ✓ TAIWAN = AIT, not CHINA. China = People's Republic of China = Mainland China.
- ✓ Split Decisions without I-541.
- ✓ Name corrections require new IBIS Checks. If the name is spelled incorrectly or the date of birth is incorrect on the notices, this will result in an IBIS error.
- ✓ Remember to mark the petition if the dates granted do not match the requested dates.
- ✓ Ensure that any annotations – ESPECIALLY DATES – are in legible handwriting – Clerks are making errors as they cannot decipher the writing of the adjudicator.
- ✓ Make sure that any attached applications (I-539's, etc.) are complete
- ✓ Incorrect Classification given
- ✓ No I-94 number in CLAIMS
- ✓ New Attorney (with G-28) is not updated in CLAIMS

Motions

Q: What do we do when an untimely filed motion for a denial due to no ACWIA fee, and the ACWIA fee is sent with the motion? (11th ed. 5/18/2007)

A: Per HQ, dismiss the untimely motion and refund the ACWIA fee.

Q: The I-129 petition was denied and a motion was filed. The case was opened with ITD. Then the petitioner withdrew the case. How does the officer update in CLAIMS?

A: As standard, the I-129 case would be updated as withdrawal since it is treated as a new or pending case once it was reopened due to the motion. On the notice of withdrawal, be sure to give history as it relates to the dates of the denial and filing of motion, and add "MTR" to the receipt number. See 8 CFR 103.2(b)(6). (15th Ed.)

SQ94 -

Q: Since there is already a SQ94 print-out in file by the contractor, do I have to place another SQ94 print-out in file? (7th Ed. 4/20/2007)

A: Yes, if the SQ94 print-out in the file is not within 15 days of adjudication for either an EOS/COS approval or denial, then a current SQ94 print-out should be placed in the file. Refer to the following HQ memos:
3/18/2002: Enhanced Processing Instructions
4/05/2005: Revised Enhanced Processing Instructions

Q: What is considered evidence of a SQ94 search if *No Arrival or Departure Record* is found? (7th Ed. 4/20/2007)

A: If the search results in a *No Arrival or Departure Record* using the I-94 number, the following three print-outs must be in the file as proof of a SQ94 check using the following searches:

- I-94 number
- Name and date of birth
- Passport number

I-94s

Q: The beneficiary provided a copy of I-539 reinstatement without I-94 number as evidence of maintaining his/her current F1 status. Can the beneficiary change his/her status to H1B without I-94 information?
A: Neither the approval notice of I-539 reinstatement or that of I-824 show validity dates or I-94 numbers. Therefore, it is all right to adjudicate the COS petition by checking out the latest I-94 number in SQ94/NIIS.

Q: Under what circumstances do we issue a new I-94 to a Canadian? What are the proper procedures? (7th Ed. 4/20/2007) ***amended*** (12th ed. 3/31/2008)
A: If the Canadian citizen did not have an I-94 previously issued to them when they entered (came in as a B NIV for example), then we need to issue them an I-94 # or their approval notice will not print. To do this, first the officer should see Anisa Tailor in AST. She will give the officer a blank I-94. Write the I-94 # on the I-129, and update CLAIMS with the I-94 #. Staple the blank I-94 in the file on the non-record side so that it cannot be used again. From then, the officer can continue adjudication.

Q: The beneficiary claimed he/she lost the last I-94 and asked for replacement with I-102. However, the I-94 number provided by the beneficiary is used by another in SQ94/NIIS. What do we do to resolve it?
A: RFE to obtain the original passport containing the admission stamp showing her/his claimed entry or if CLAIMS shows a prior petition with a different I-94 number that is not in SQ94/NIIS then use the new I-94 number as the basis of action.. (14th ED.)

Number of Employees

Q: A check of CLAIMS Mainframe found out the petitioner has a total of 124 cases - On #12 of the petition the current number of employees is 63. Where are the other 61 beneficiaries? The company was established in 2003. Should we worry about the rest of the petitions? (7th Ed. 4/20/2007)
A: The number of petitions, which can be an indicator, does not necessarily signify that there is a concern on the number of employees. You need to keep in mind a few factors: Some of the beneficiaries filed for could count for more than one petition, attrition, and that some of the beneficiaries of the petitions you see may never even have started work for the employer…
A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee… This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less… See section (f) of Archives for full text of answer…

Split Decisions

Q: What denial forms do we use for split decisions? (6th Ed. 4/19/2007)
A: EOS – All cases need an I-541 denial.
COS – Not timely filed (only issue) – use the notice in CLAIMS
- All other scenarios – use the I-541 Denial.

Q: What start date do I give on a split decision? (6th Ed. 4/19/2007)
A: Approval is from the date of adjudication or a future date – they do not go back in time.

Q: Under what circumstances can I use the denial letter automatically generated by CLAIMS? (5th ed. 4/18/2007) ***Amended*** (12th ed. 3/31/2008)
A: The CLAIMS automatically generated denial notice, in which no separate I-541 denial would need to be prepared, is only used when the petition is UNTIMELY FILED and no reason given for the untimely filing. Non-maintenance of status prior to the start date would need an I-541 written by the officer.

Appeal before AAO

Q: What action do I take if the H1B in front of me looks approvable but a check of CLAIMS finds that the previous petition filed by the petitioner for the same beneficiary was denied and is on appeal with the AAO? Would this be a cap case or have they already been counted? (6th Ed. 4/19/2007)
A: Per HQ guidance in the form of a memo, this case, and any others in which a previous petition is before the AAO must be held until the AAO makes a decision on the prior case. Regarding the cap, cases aren't counted and visas aren't issued until the case is approved, so – no, the case was not previously counted.

Interfiled petitions/applications
Q: I have found, in reviewing the I-129, that the I-539 and evidence for it is interfiled with the I-129…What action should I take? (5th ed. 4/18/2007)
A: Officers are finding I-539s along with evidence in between the I-129 Evidence. Some of the officers have also found some I-824's. The officer needs to pull these I-539s and documents and get them to SCOT. We either need to place them in a new file jacket if they were fee'd in or send them back to the petitioner/beneficiary for the correct fee.

Consular Processing/POE's/PFI's
Q: The petitioner has marked PFI on Part 4 of the petition, but has not listed the PFI or given the alien's Canadian Address. How can I determine where to send the petition? (9th Ed. 4/25/2007)
A: Look in SQ94 to see if the alien made any prior entries, and if so, what was the POE listed on the SQ94 screen? That may give you the answer you need. Otherwise, look through the file to see if there is an address anywhere for the beneficiary - a resume, perhaps?

Q: What do we do~~send to the Consulate~~ when the petitioner has submitted only one copy of the petition and it needs to go for consular processing? ~~(8nd ed. 4/23/2007)~~
A: For the petitioner to have AMCON notification on either EOS or COS, the petitioner must request the notification and submit a complete duplicate set upon filing. If there is no duplicate set or incomplete duplicate, and the petitioner requested AMCON notification, the officer will adjudicate the case and place 2 copies of the memo--824letter.doc in o:\common in the file for clerical to mail out to the petitioner. Clerical will also affix the labels. If there is a split decision but no duplicate was provided, the officer can approve the case and place 2 copies of the memo-824letter.doc in file for clerical to process also. If it is determined by the officer that the petitioner is requesting AMCON notification and a RFE is required for some other issues, the officer can request the petitioner to submit a complete duplicate for AMCON notification. However, the officer should not issue an RFE for the sole purpose of obtaining a duplicate set of documentation. (14th Ed.)
~~A: A copy of the petition itself, the LCA and all evidence used to make the decision (the employment letter, the transcripts and diploma, etc.) should be sent to the Consulate. Evidence submitted that was not relevant to the decision (e.g. Annual Reports issued to stockholders of major corporations).~~

Q: When the beneficiary is in/from Canada, who gets consular processing and who gets processed at the POE or PFI? (5th ed. 4/18/2007)
A: Canadian citizens will get processed at the port-of-entry (POE) or the pre-flight-inspection (PFI). Landed immigrants or other non-citizens of Canada get processed at the consulate.

Q: What about if the beneficiary is a naturized citizen of Canada and asks for Consular processing? Do we grant their request and send it to a consulate, or do we change the consular notification to POE/PFI? (8th ed. 4/23/2007)
A: It depends on the circumstances. Sometimes, if the alien is overseas (not coming from Canada) and will be boarding a plane in Paris, for instance, we may send it to KCC for a "courtesy" notice. The alien may want to apply for visa, even though it is not needed, to avoid problems boarding a plane from Paris to the US. However, if the petition shows Canadian address, send it to a POE or PFI.

Q: Is there a more up-to-date list of the visa issuing posts? (5th ed. 4/18/2007)
A: The Visa Issuing Posts list that is in O:Common and was a part of the training materials given in the last few H1B training sessions is not the most up-to-date…because the list is not constant – it changes on a regular basis. If the petitioner requests consular processing at a post not listed, go to the State Department's Reciprocity List & Country Documents Finder (a.k.a. the FAM) and see what posts are listed for the country that the petitioner is requesting. If it is not in the FAM, then there is not a visa issuing post in that area and a nearby post will need to be selected.

IBIS

Q: Do I have to run an IBIS query on employment-based petitioners? (11th Ed. 5/18/2007)
A: No. Employment-based petitioners that are business entities do not need to be queried. Sole proprietorships are considered business entities so they do not need to be queried. Exception: Individual persons that are not considered business entities must be queried. See pg. 12 of the IBIS SOP.

Q: Do I have to place an IBIS stamp on the petition for a business petitioner? (11th ed. 5/18/2007)
A: Yes. Per IBIS SOP, p. 40, "...IBIS queries are not required for business petitioners on employment-based petitions. The adjudicator must apply the IBIS stamp near the subject's information on the application/petition, circle "NR" for "Not Required", and annotate inside the stamp the date it was determined that IBIS was not required. If more than one beneficiary on a multi-beneficiary I-129 petition does not require an IBIS query, USCIS personnel are only required to apply the IBIS stamp once and annotate inside the stamp the number of beneficiaries not requiring a query."

NSEERS
Q: When do we check NSEERS?
A: See NSEERS I-129 Processing Instruction—When to RFE in o:common\adj\NSEERS\SOP for details!

Fees
Q: Is there a lesser fee on H1B renewal cases? (4th ed. 4/17/2007)
A: Maybe – if same employer, yes. If new employer, then no.

Q: Can we RFE for higher ACWIA fees when it appears by the # of petitions filed that the petitioner has 25 or more FTE employees? (6th Ed. 4/19/2007)
A: No – per HQ guidance, do not RFE for the difference in the ACWIA fee. If, however, you receive evidence of the # of employees and you find that the petitioner does in fact have 25 or more FTE employees, then you can RFE for the difference in the fee.

Q: How do we calculate the ACWIA fee when the petitioner has part-time employees? Scenario: The petitioner paid an ACWIA fee of $750, while indicating that he had 35 employees. In response to the RFE, the petitioner indicated they have 24 F/T employees and 11 P/T employees, and therefore does not have to pay the full $1500. Is there a ratio of # of P/T employees equals 1 F/T employee? What is the regulatory cite for a denial? (11th Ed. 5/18/2007)
A: INA 214(c)(9)(B) requires the lesser fee for those with not more than 25 full time equivalent employees. The statute presumes that the ACWIA fee will be $1500 unless the petitioner shows otherwise. In this case 24 F/T and 11 P/T add up to at least 25 F/T equivalent positions. Adjudicators do not routinely challenge the number of employees, but if inconsistencies are found, the adjudicator should look more closely at the case.

Q: The alien has been the beneficiary of multiple I-129 petitions; the current petition appears to be the 1st extension filed by this petitioner for this alien. Does the petitioner qualify for ACWIA fee exemption?
A: Check the petition to make sure that there are no employer name changes, merger, or acquisition changes which may qualify the petitioner for fee exemption before the issuance of RFE for ACWIA fee. (15th Ed.)

SEVIS Printout –
Reminder: ALL F, M, and J Nonimmigrants must have a SEVIS printout in the file (1st ed. 4/12/2007), **unless** the petitioner is requesting consular/POE/PFI notification. (2nd ed. 4/13/2007) ***Expanded*** (12th Ed. 3/31/2008) The purpose of the SEVIS printout is to verify the status of the alien. SEVIS is updated with an F, J, or M alien registers under NSEERS. In lieu of the NSEERS printout, you may print out the NSEERS screen in SEVIS to verify registration.

SEVIS Status –
Q: What is the meaning of Deactivated in the SEVIS record status field? (2nd ed. 4/13/2007)
A: Typically, the student will retain the same N# for the entirety of their student status, and the officer, when doing a search using the N# will see multiple records for a student if these transfers/changes have occurred. The current record will show Active, and the previous records will show Deactivated. If the SEVIS record indicates Deactivated, look to see if the student transferred to another school or educational level. There may be circumstances in which the student is issued

a new N#, so if the officer finds only a deactivated record in SEVIS, it is recommended that the officer run a name/dob search in SEVIS to see if another N# was issued. (b)(7)(e)

[redacted]

I-765's –

Q: What eligibility code do I give the dependent spouse of an L or E on the I-765? (2nd ed. 4/13/2007)

A: The most up-to-date information on the eligibility codes for E and L dependent spouses is listed on the Instructions to the I-765.

I-824's

Q: What do I do with the I-824 that is attached to the I-129? (1st ed. 4/12/2007)

A: Any I-824 attached to the I-129 needs to be adjudicated by the officer – the clerical staff or the officer will update when the I-129 is updated.

CLAIMS Updating –

Q: Does the SEVIS N# needs to be entered into CLAIMS? (2nd ed. 4/13/2007)

A: IF you have an F, M, or J requesting a change of status to an H (or any other classification), verification needs to be made in CLAIMS that the SEVIS N# is correctly listed on the beneficiary screen. If it is not, the officer **MUST** correct it and save the changes. If this is not done, SEVIS will not be updated when the decision on the COS is made.

Previous Filings

Q: How do I determine when the beneficiary first entered as an H1B? (6th Ed. 4/19/2007)

A: You will need to backtrack through the previous petitions in CLAIMS and you may need to check SQ94 afterwards. For instructions on backtracking through CLAIMS, see Archives (f) below…

REMINDER: When adjudicating an amended petition asking for corrected validity dates, be aware of both the to and from dates to ensure they follow the LCA, dates requested AND any licensing issues. (7th Ed. 4/20/2007)

H4 Dependents

Q: How do I process the H4 Dependents when there are multiple applicants on the I-539 and one of the children is about to reach, or has reached the age of 21? (6th Ed. 4/19/2007)

A: If the child has turned 21 prior to the date of adjudication, then a split decision will be done in CLAIMS, and the remaining applicants can be approved, if otherwise eligible, for the time requested. A denial letter will need to be prepared for the 21 year old applicant.

If the child is turning 21 after adjudication and during the time requested, the officer should, if otherwise approvable, approve the decision but limit the "to" date to the day before the child's 21st birthday.

QUOTA Issues

REMINDER: Quota-exempt cases can **IMMEDIATELY** start employment upon approval. These include Universities, Non-profit research institutions, etc. Be sure to look at the petitioner and at the date of requested employment to determine visa availability. (8th ed. 4/23/2007)

Error in Cap Eligibility

Q: What do I do if we receipted a case and found that the petitioner made an error indicating eligibility for the Cap on the petition? (11th Ed. 5/18/2007)

A: We deny the petition. For example, if the petitioner marked on the petition that the beneficiary was the holder of a U.S. Master's degree and we accepted it under the Master's Cap and the adjudicator determined that the degree is actually a foreign degree, then a denial would be issued. There are no fee refunds, because it was a petitioner error. If, however, the petitioner was not aware the master's degree had to be a U.S. school and marked the petition properly as, "no the school was not a U.S. school", and we accepted it under the Master's Cap then it would be our error. It would have to go back to the contractor for a rejection and fee refund because it was a service error.

Already Counted?

Q: What action should I take? A beneficiary is approved from F-1 to H-1B for a well-known university (cap-exempt) for three years. During this three year period, a computer consulting company (which is not cap-exempt) files a petition in behalf of the same beneficiary. This petition is approved and the beneficiary is extended and counted against the H-1B cap. A third company has now filed a petition in behalf of the same beneficiary; evidence submitted with this petition shows that the beneficiary has never worked for the computer consulting company, but rather has continuously worked for the university. Does this beneficiary need to be counted, as they did not actually work for the cap company? (8th ed. 4/23/2007)

A: The beneficiary does not need to be counted against the cap again.

Not Eligible for Recount?

Q: When is an H1B eligible to be recounted? (1st ed. 4/12/2007)

A: If the alien is requesting that the 6 year clock be reset, but you find that they have not spent a continuous year outside the U.S., they are not eligible for recounting. They should, however, be considered as an EOS case.

Q: What if the alien changed to a different nonimmigrant classification for more that one year…Is that considered sufficient for resetting the clock? (3rd Ed. 4/16/2007)

A: The alien must be OUTSIDE the U.S. for one continuous year. The only NI classification that the alien can be admitted as that will not 'break' that continuity is time in B status, however, time in B NI status does not count towards the one year timeframe, either. E.g. – H1B leaves the U.S. and re-enters 9 months later as a B for three months. The alien has not met the 12 month requirement. Even though the B time did not make a break in the 12 months, the 3 months in B status will not count towards the 12 month requirement. The alien will need to stay outside the U.S. another 3 months to have his 6 years reset.

Q: Can the beneficiary's time be reset? The beneficiary was classified as an H for six years, and then changed status in the US to an O-1 which she has been on for the last couple of years. Is the beneficiary now entitled to another six years of H time since it's been at least one year since she's been in H status? The beneficiary does not qualify for any exceptions to the 6 year rule… (11th Ed. 5/18/2007 ***Amended*** (12th Ed. 3/31/2008)

A: The regulations (8 CFR 214.2(h)(13)(iii)(A)) state that a beneficiary once classified as an H-1B may not change back to H-1B unless he or she has been physically outside the U.S. for the immediate prior year. In other words, it's permissible to change from H-1B to another classification such as O-1, but the beneficiary can't change back to H-1B unless they reside out of the U.S. for one year. Be mindful that an alien eligible for AC21 Section 104 or 106 status may change back to H-1B from another non-immigrant status as long as the alien is otherwise maintaining their status (i.e. H-1B to O-1 to H1-B).

Eligibility for Advanced Degree Cap

Q: Can the beneficiary use a U.S. Bachelor's degree and experience to qualify for the Advanced degree cap? (1st ed. 4/12/2007)

A: The Master's degree must be 'earned' from a U.S. institution; the Bachelor's + 5 years of experience do not qualify for this Congressional exception to the overall H-1B cap. Deny.

Q: The H1B Data Collection Form indicates that the alien is in a U.S. doctorate program, but it does not show that a degree was conferred or that the alien has a U.S. Master's degree...Are they qualified for an Advanced Degree cap H1B? (3rd Ed. 4/16/2007)

A: The adjudicator will need to look at a couple items on the alien's transcript and determine how he alien entered the program and with what degree, as well as where they are in the doctorate program. See Archives, section (e) for further instructions...

Requests for Starts earlier than 10/1/2007 –

Q: What do we do if the petitioner is asking for a start date prior to 10/1/2007? (2nd ed. 4/13/2007)

A: There are three options depending upon the facts of the case –

1. Quota exempt cases can start at any time.
2. For those individuals from Chile/Singapore the FY 2007 quota has not yet been met and so would be eligible to have an earlier start date.
3. For all others: on advanced degree cases we will deny because a visa number is not available for FY 2007. If they don't qualify for a 2008 cap number we should deny without refund. They filed and it made it to the floor for adjudication – thus we will make a decision.. (9th Ed. 4/25/2007) ***Amendment***

Advanced Degree vs. regular quota

Q: Why is there an advanced degree quota in addition to the regular quota? (4th ed. 4/17/2007)

A: After WWII, the country needed many individuals with college degrees in order to expand the economy and create jobs. In response, Congress created the H1 program. At that time there were no limitations on the number of aliens who could enter under this program. In 1990, Congress determined that the future numbers should not exceed 65,000. In the late 1990's, Congress raised the quota in response to Y2K concerns and the booming economy. Since then, the basic quota has returned to the congressionally-mandated 65,000. Congress then realized that the quota was limiting the admission of aliens who were job-creators and economy expanders, especially those holding an advanced degree. Further, as a result of 9/11, U.S. colleges and universities were no longer obtaining the diversity of students from abroad as before that contributed to a well-rounded education. To encourage foreign students to study at the graduate level in the U.S. as well as create jobs and improve the economy, congress created the 20,000 per year advanced degree cap.

ELIGIBILITY Issues

Specialty Occupation

Q: How can I tell whether the position is a specialty occupation when the duties listed are so technical that I cannot determine what the beneficiary will be doing? (6th Ed. 4/19/2007)

A: RFE the case, requesting that the petitioner submit a job description, including all duties, in non-technical terms. If the petitioner cannot explain what the beneficiary is doing, then we can deny, as they have not established that the position is a specialty occupation.

Wage

Q: An IT company filed the petition with LCA showing the prevailing wage about $72,000 for the offsite position in San Jose area. However, the wage indicated on the petition was $53,000. Should the officer address the discrepancy?

A: Generally, the enforcement activities relating to prevailing wage is the responsibility of DOL. Under DOL rules, no action can be taken until the employer has not paid the appropriate wage. There is no statutory or regulatory provision for prospective enforcement of this issue. Thus, it is not issue on AMCON notification, Change of Status or Change of Employer cases. If an employer did not pay an alien in the past the appropriate wage, we can consider action under the revocation provisions. See 8 CFR 214.2(h)(11)(B)(iii)(A). (15th Ed.)

Models – H1B3's

Q: What criteria do I look at when I am adjudicating a model? (10th Ed. 5/1/2007)

A: Regarding H1B3 models (in Claims they are just H1Bs): These are so rare, most officers probably won't see any. H1B models obviously do not require a degree. They were included in H1B way back when because HQ didn't know where to put them. When AAO ruled that models with high salaries ($250 per hour and more) could qualify as O1's in the business category, most high profile models use that road. But once in a while we get an H1B.

Look for:

1. The high salary
2. An established agent or agency (like the Ford Model Agency in NY) that represents them. A good way to verify a top agent/agency is to RFE for names of other high profile models they represent. The top agencies listed below in this e-mail is a good reference.
3. A contract with the work itinerary, salary, clients, etc.
4. Past history of work and representation
5. Magazine covers, ads, articles from major model/glamour magazines (always ask for circulation numbers)
6. Awards, recognition, etc.

Internet checks of the model, agency, etc.
Usually H1B3 models command $250 per hour and this would meet one of the H1B3 criterion in establishing distinguished merit and ability. High remuneration is also a criterion for the O classification, as well. $25 an hour would not meet such criteria. Since most of the petitioners are agents please make sure that there is a contract that spells out the terms of the contractual relationship. Also, these aliens need an itinerary of events. Please review your law books for the types of evidence required to establish eligibility for the H1B3 or O classification. Remember, many high profile models are not as well known as Elle MacPherson and Tyra Banks. So use the whole range of considerations listed above when adjudicating H1B models.

Strike/Lockout
Q: I have a petition here from a non-profit organization. Enclosed with the petition is a Collective Bargaining Agreement between the petitioner and UAW. I seem to recall that H-1B1 has a no-strike clause, or can not go on picket/strike. If this is true, how shall I ensure, thru RFE, the petitioner is made aware of this restriction? (10th Ed. 5/1/2007)
A: H1b are not prohibited from striking. They are prohibited from crossing the picket line and the employment of the alien would adversely affect the wages and working conditions of US employees, as certified by DOL. Since this office has not received such a certification, it is not an issue.

Previous Work Authorizations
Q: If the beneficiary is currently working while in L2 status, do we have to count that time? So are they still considered to be under the L2 which is not countable towards the six year maximum time limit? (7th Ed. 4/20/2007)
A: Per the December memo, dependent time – including time in which employment is authorized – is not counted towards the 6 year limit.

Contracts –
Q: What should I be looking at when examining a contract? (6th Ed. 4/19/2007)
A: As a general guideline ONLY – look to see who the parties of the contract are, what the duties or the job being contracted actually is, how long is the contract for, who has control of the persons that are doing the contract work – look at all related supplements – there may be a Purchase Agreement or a Work Order. It is a bonus if the beneficiary's name is listed in the contract, but by no means required. The contract should ideally be good for at least a year.

NOTE: See O:\ADJ_div\ I-129\ H1b1\Computer Consultants.doc for guidance on jobs in the computer industry. Note that this is local internal guidance only and not for public dissemination. (11th Ed. 5/18/2007)

Q: A staffing firm, new business, has income less than 5 million in 2006. It seems to have legitimate work with actual duties for the position. What do I ask for RFE?
A: Contracts showing the described duties & the respective work location and covering the requested employment period or one year whatever is less.

Optometrists –
Q: The petitioner has submitted exam results from the National Board of Examiners…Does this suffice, or do they need a license? (2nd ed. 4/13/2007)
A: Each state requires a license to practice Optometry. Each state decides which methods it will use to issue licenses. The National Board of Examiners gives an examination that is wholly, or in part, incorporated into the licensing process. Some states just go by the exam results, some take part or all of the exam results and combine them with other additional oral, written, or practical exams, or exams in specific topics, such as law or pharmacology. Even though the

alien passed the exam, that test is just one step in the whole state licensing process, so exam results alone are not sufficient evidence of licensure.

Architects –

Q: Do architects need licenses? (3rd Ed. 4/16/2007)

A: As with engineers, it depends on the duties of the architect and who they will be working for/under. If the architect is working directly for the public, they either need a license, or depending on the circumstances/state they are working in, need to be working under a licensed architect that can sign off on their work. Look at the individual state requirements. As a rule, however, licenses for architects are not required when the duties do not include design work but do require knowledge of architecture, urban planning or geography.

Acupuncturists –

Q: Do licensed acupuncturists typically qualify as a specialty occupation? (4th ed. 4/17/2007)

A: As with certain other occupations, the officer will need to see what the licensing requirements are for each state, to determine whether the position qualifies as a specialty occupation. In California, for example, in order to obtain a license to practice acupuncture, the state requires a Master's Degree, making it a specialty occupation. Most states require at least a two year program at a school that teaches Traditional Chinese Medicine, and many of these require a bachelor's degree (in any subject) to qualify for the program.

Private school teacher –

Q: Do private school teachers require licenses? (10th Ed. 5/1/2007)

A: Private schools do not require licensing through the state/area. They do, however, need to demonstrate that the position is a specialty occupation – Private schools are not comparable to public schools, as far as specialty occupation qualifications go. The licensing requirement covers the industry standards prong as far as public schools go, but does not cover private school teachers as they are not required to obtain a license. Without the licensing requirement, they can and often do have difficulty in proving that the position is, indeed, a specialty occupation. The OOH covers public school teachers only. It does mention private school teachers, but only to say that there are vast variations as to the requirements that each individual private school has for their teaching staff. They will have to go through prongs 3 or 4…

Q: Are Montessori Teachers a specialty occupation? Do they require a license? (5th ed. 4/18/2007)

A: The officer will need to make the determination on whether the position is actually that of a teacher, whether the school requires all teachers to have a bachelor's as a requirement, etc. Is this a school that is providing an educational curriculum with lesson plans, etc. or is this a day care provider. A good way to check on some or all of this information, besides the case itself, is to do a search on the Internet. As far as licensing is concerned, generally Montessori teachers do not require state-issued licenses or credentials to teach, because Montessori's are private schools and therefore not subject to the licensing/credentialing requirements.

Medical Workers

Q: Do psychiatric residents require a license? (6th Ed. 4/19/2007)

A: Psychiatry is a field of medicine and psychiatrists are medical doctors. Like any other resident doctor profession, the beneficiary has to be licensed, or if allowed in the state of intended employment, has to be working in a licensed facility/hospital and/or under a licensed physician's supervision. In New York State, for example, residents are not required to have a license, as long as they are working for a licensed facility.

Licensing vs. Certification (Visa Screen)

Q: What is the difference between licensure and certification? (2nd ed. 4/13/2007)

A: Licensing is a requirement for the approval of the petition. It is a classification issue. Essentially, there are three scenarios that the officer may encounter…

1 - Initially the alien may have a temporary or permanent license from the state of intended employment; or

2 - The state may allow the alien to work under the supervision of a licensed professional; or

3 – The alien will submit a letter from the state indicating that a permanent or temporary license will be issued once the alien enters the U.S. or after approval by USCIS.

Certification is an admissibility issue. Therefore, this is only an issue on COS or EOS cases. AmCon cases and POE/PFI cases are resolved at the visa issuance and/or admission to the U.S.

Resources for Licensure Requirements

Q: Where do I find out whether occupations require licensing? (2nd ed. 4/13/2007) ***revised*** (12th Ed. 3/31/2008)
A: The Occupational Outlook Handbook (OOH) gives general guidance in this area. A search of the internet utilizing a search engine such as Google or Yahoo using "License requirements for (occupation)" as the search parameters will generally give you several sites that will either give you general information for all states or state-specific information.

Q: At the time of adjudication, alien's permanent license was expired for a year. If otherwise approvable, should we grant the extension for 3 years as requested or 1 year?
A: Since the license is a permanent one, the fact that it is expired is not relevant to the decision. However, the officer may want to check online sources to make sure the respective permanent license was not revoked before the requested 3 years extension is granted. (15th Ed.)

Q: The petition was filed for the beneficiary with 1 year training level medical license to work for the internal medical residency program in PA area. How many years do I grant the beneficiary for extension?
A: One year due to his/her training license because the beneficiary does not hold a permanent license.

Q: The petition was filed for the position as a resident physician in California. The attorney argued that the beneficiary with a Texas medical license should be granted for 3-year extension since it is just a matter of time for the beneficiary to get his/her CA license with the license & experience he/she has now. Is it true?
A: No. Unless the petitioner provides a copy of the beneficiary's CA medical license, the beneficiary is not qualified to practice medicine in California and cannot immediately engage in his profession.

Q: The petition was filed for the position as a physician resident in pathology in NY area. The beneficiary has not completed #3 exam of USMLE. The attorney argued that the beneficiary does not need a state medical license since he/she won't have direct contact with patients. Is he right?
A: No. As foreign medical graduates, they must complete all exams of USMLE in order to receive graduate medical education or training in the United States. See INA 212(j)(1)(B). Since the beneficiary is not coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in US to teach or conduct research, or both, he/she is not exempt from all the required Federation licensing examination even he/she won't perform direct patient care, to qualify as a H1B. See INA 212(j)(2)(A). The beneficiary apparently is not an international renown physician to be qualified under 8 CFR 214.2(h)(4)(viii), either.

Q: When do we need the license for the position as a civil engineer?
A: If the petitioner is a civil engineering firm specializing in civil engineering project development or research, it must submit evidence showing that the beneficiary has required state civil engineer license to practice the profession or he/she would be supervised by a licensed civil engineer within the company. If the petitioner is a construction company assuming the duties require a civil engineer to perform, he/she must possess state civil engineer license or be supervised by an engineer with such license with-in the company. If the duties described by the construction company are unrelated to those duties of a civil engineer, then the license is not required. However, then examine the duties carefully to make sure them qualified the position (not the job title) as a specialty occupation.

Q: Do law clerks require license?
A: It depends on the claimed duties provided by the petitioner. If a law clerk performs the duties similar to those of a lawyer, he/she must be licensed to fully perform the occupation. Limiting the duties of the position will not exempt the alien from a license. At issue is the occupation not the duties. If the position requires a law degree to perform, then the occupation is law and the alien is required to be licensed. However, if the occupation is that of a law clerk, then whether the position is qualified as a specialty occupation may be in question. See 8 CFR 214.2(h)(4)(v). (14th Ed.)

Import/Export Companies & Iran Sanctions
Q: How do I handle petitions that that are Import/Export companies involving Iranians or sensitive technology and/or services? (6th Ed. 4/19/2007)
A: If you have a case in which a petitioner's business is or relates to the import/export industry, in which the petitioner is linked in any way to Iran OR whose business relates to Sensitive Technology goods or services, the Importer/Exporter and possibly the beneficiary, depending on the position they are petitioning for, is required to be licensed by the Department of Treasury's Export Control Agency. If there is no evidence of this in the file, RFE for the license or proof that they do not need a license.

For more information, take a look at the information in the Iran folder – the link is:
O:\ADJ_div\ I-129\Reference Material\Iran

LCA

Q: Does the LCA need to be certified prior to filing? (2nd ed. 4/13/2007)

A: The ETA-9035 (LCA) must be approved prior to filing, however, for some cases approved in March the DOL website was not allowing the petitioner to print the certification. There is an RFE for this issue in O:Common.

Q: A petition was filed for EOS by the same employer with no change. The submitted LCA indicates the work locations are at Greensboro, NC and Chicago, IL. However, the alien's address is located in Seattle, WA. Should a RFE be sent for this issue?

A: It depends on the alien's status. If at the time of adjudication, the alien's current H1B status is still valid, then RFE for explanation of discrepancy and a new LCA, which may resolve the issue. However, if the alien's H1B status has expired or will expire shortly; the petition should be denied since the LCA does not cover all work locations. Unlike the first scenario, the petitioner would not be able to secure a new LCA since DOL does not issue backdated LCAs. (15th Ed.)

Q: The job title listed on the petition is development analyst and duties described on the petition are marketing duties but the occupation code shown on the LCA is for system analyst. What should do I do?

A: If the start date listed on the petition has passed, deny the petition because the submitted LCA is not for the position shown on that document. If it is a future start date, RFE may be issued for explanation of discrepancy and a new LCA.

H3 Approval

Q: The alien, as an F-1 Student, was recently approved for H3 Status, and is now being petitioned for as an H1B...what should I do with the H1B? (3rd Ed. 4/16/2007)

A: Pull the H3 approval case and take a look at it. If the petitioning company indicates that the alien is required to have the H3 training to do the duties of the petition, then the applicant does not qualify for the H1B at the time of filing because they did not have this training. If, however, the H3 training is valid training but is not requisite for the position applied for on the H1B petition, then the adjudicator can continue adjudicating the petition.

OTHER NONIMMIGRANT CLASSIFICATIONS

L1B

Q: Can a computer consulting company qualify as an L1B petitioner? (11th Ed. 5/18/2007)

A: An L1B cannot work for or at a client as a "an arrangement to provide labor for hire" like an H1B. However, an L1B can work for a client company ONLY if the work involves bona fide L1B specialized knowledge and is in connection with a product or service of specialized knowledge that is offered by the L petitioner.
Additionally, the supervision and control must lie with the L petitioner throughout the time the L1B works at the client company. The client company supervision can provide input, guidance and feedback as it relates to the benefit of the client company, but cannot control of the work in regards to directed tasks and activities. This control must remain with the L petitioner. The contract(s) must show this control and work being PRINCIPALLY related to the specialized knowledge or service provided by the petitioner. If it tangentially (just touches on or is remotely related) to the petitioner's specialized knowledge, this is not enough.

Multiple Beneficiaries

Q: I have a I-129 petition with multiple beneficiaries – but the petitioner did not submit "attachment 1" (page 17 of the I-129). Instead the petitioner included a typed written list of the additional beneficiaries to be included on the petition. Is this acceptable? The petition is otherwise approvable. (10th Ed. 5/1/2007)

A: As long as we have all the required information, you can accept it.

H2B Returning Workers

Q: What is the process followed on returning workers? Do I need to check SQ94 on each beneficiary?- (9th Ed. 4/25/2007) ***Revised*** (12th Ed. 3/31/2008)

A: The returning worker provisions have now sunsetted.

Q: I am working on an H2b petition where the dates being requested exceed the three year limit for one beneficiary. The remaining beneficiaries qualify for the entire period of intended employment. Do we assign a shorter validity period to one beneficiary (up to the 3 year limit)? Also, can you tell me what the proper annotation is for returning workers? (10th Ed. 5/1/2007)

A: R is the correct annotation. Also mark the top middle of the petition with "R", even if there is only one returning worker out of xxxx number. 8CFR 214.2(h)(2)(ii) on multiple H2b petitions, the beneficiaries must be eligible "for the same period of time." Therefore, the officer can either deny one or grant all for the same period of time.

H3

Q: The petitioner filed I-129 H3 petition and I-129 H1B Cap for the same beneficiary. What do I do?

A: To qualify as an H-3 the employer must establish that the training program is not for the purposes of staffing the US operation. The subsequent actions of this employer in this case show to the contrary. Based upon these actions an ITD on the H-3 would be appropriate. See 8 CFR 214.2(h)(7)(iii)(E) & (F). However, if there is a bridge issue for H1B petition, proceed with the H3 adjudication, first.

Q NonImmigrants–

Q: How do we process the following scenario? On a multiple beneficiary application, Alien A is approved and listed on the approval notice. At the consulate, Alien B is substituted for Alien A. After Alien B's admission to the U.S. as a Q-1, a request is submitted to withdraw Alien B and substitute him with Alien C...How do we process this in CLAIMS? (4th ed. 4/17/2007)

A: Add Alien B and C to CLAIMS. In the split decision screen, update Alien A and B as denial, then approve Alien C in the split decision screen.

Q: The Petitioner submitted a letter to withdraw a beneficiary of a Q-1 petition. The regulations do not address this particular issue. The beneficiary they are withdrawing was substituted at the consulate, therefore, this name is not on the approval notice. (11th ed. 3/31/2008) ***Revised*** (12th Ed. 3/31/2008)

A: According to the regulation an automatic revocation does not require Service action if the qualifying business goes out of business, files a written withdrawal of the petition or terminates the approved international cultural exchange program prior to its expiration date. **None of these apply in this case.** A revocation on notice requires an ITR when the international visitor is no longer employed by the petitioner (there are other reasons). If the alien is outside of the US, the regulations require notification of the AMCON or POE **not** CIS. See 8 CFR 214.2(Q)(6). Thus, no action is required.

CAP-GAP Relief Information (F-1 to H-1B) (The interim final rule effective April 8, 2008 expands cap-gap relief for ALL F-1 students with pending H-1B petitions.) (13th ed. 4/16/2008)

Q: What does this mean to officers adjudicating H-1B cap cases?

A: Prior to this interim rule, F-1 students who are beneficiaries of approved H-1B petitions but whose period of authorized stay (including authorized period of OPT + 60-day departure preparation period) expires before October 1st would have a gap in authorized stay and employment. Therefore, the Service would issue a split decision and order the beneficiary to leave the US, obtain the H1B visa abroad and return at the time the H1B status becomes effective. With the interim rule, the authorized period of stay is extended for ALL F-1 students* who have a properly filed H-1B petition and change of status request filed under the cap pending with USCIS. If the petition is approved, the F-1 student will have an extension that will allow them to remain in the U.S. until the requested start date indicated on the H-1B petition takes effect. *The student beneficiary must be in a valid F-1 status at the time of filing the H-1B petition.

Q: What if the petitioner requested consular notification even if the evidence demonstrates that the F-1 student is eligible to change status in the U.S.?

A: If the petitioner requested consular notification as indicated on Page 1 Part 2 #5a of Form I-129, the adjudicating officer will assess the beneficiary's eligibility for a change of status. If the beneficiary is eligible to continue in F-1 status until October 1, 2008 and no request has been received from the petitioner, annotate on the side of the petition (in red) "COS eligible". However, adjudication must be made as "consulate notification" unless otherwise requested by the petitioner.

Q: What if there is an I-539 COS filed for the same H1B beneficiary?

A: In anticipation to close the "gap", some applicants file an I-539 COS from F-1 to B-2. Adjudicating officers are responsible to check the system for any pending cap-related cases. It has been CSC's standard to deny any COS from an F-1 to B-2 because the applicant's ultimate intention is to remain in the U.S. as a nonimmigrant worker.

Q: Is USCIS giving the petitioners opportunity to change their original request for consular notification to a change of status without filing an amended petition?

A: Yes, Service Centers are currently in the process of setting up email addresses so that the petitioners can notify us that they want a change of status rather than consular notification. A USCIS Update will also be posted once the email addresses for both CSC and VSC are set up.

- Premium cases: The USCIS Update will instruct PP petitioners to communicate to us via a designated PP e-mail address once they get the e-mail receipt from us with the receipt number. The file will be flagged to indicate that change of status eligibility has been assessed.
    - If we have not yet adjudicated the case, and the beneficiary is eligible for change of status, the approval notice will indicate H-1B and change of status approval.
    - If we have already adjudicated the case, it will be pulled and an approval notice indicating change of status will be issued. This will be greatly facilitated by the fact that we will have already looked at change of status eligibility while reviewing the I-129 (so we don't have to go back and adjudicate just the change of status portion as it will have been "pre-adjudicated".)
- Non Premium cases: The USCIS Update will instruct non PP petitioners to communicate via designated e-mail address once they get their receipt notice in the mail. We will urge them to do this within 30 days of receiving the receipt notice. Since we have until 10/1 and these cases will be processed after we have worked the PP cases, the likelihood of having made an adjudication before we get the c/s request from the petitioner is lessened. At any rate, if we have already adjudicated the case, the change of status eligibility will already have been noted in the file.

What is new for F-1 students? (13th ed. 4/17/2008)

Effective April 8, 2008, Interim Regulations involving student were published. These regulations both change and add provisions to provide relief for graduating and former students in the areas of maintaining status and OPT.

Changes to Current Regulations:

- F-1 students (and their F-2 dependents) status is automatically extended to 10-01-08, if the F-1 is the beneficiary of a timely filed pending or approved H-1b petition with request for a change of status.
- OPT can now be filed 90 days before or 60 days after the completion of studies but within the 30 days of the DSO's recommendation.
- During the initial 12- months of OPT, the F-1 can have up to 90 days of unemployment; Otherwise the F-1 is not maintaining status.

New Provisions:

- Provides for an extension of 17 months OPT for STEMS students, Science, Technology, Engineering & Math, for a maximum total time of 29 months.
- STEMS students are entitled to max of 120 days total of unemployment.
- Extensions must be filed with CIS prior to the expiration of the initial grant of OPT, that is while the F-1 is in valid status and with 30 days of the DSO recommendation.

- The alien may receive only one 17-month extension.
- The alien must provide the school with updated information and comply with a 6 months reporting requirement.

What is a STEM degree?

To be eligible for the 17-month OPT extension, a student must have received a degree included in the STEM Designated Degree Program List. This list sets forth eligible courses of study according to Classification of Instructional Programs (CIP) codes developed by the U.S. Department of Education's National Center for Education Statistics (NCES). The STEM Designated Degree Program List includes the following courses of study:

- o Computer Science
- o Actuarial Science
- o Engineering
- o Engineering Technologies
- o Science Technologies
- o Biological and Biomedical Sciences
- o Mathematics and Statistics
- o Military Technologies
- o Physical Sciences
- o Medical Scientist

The STEM degree list is included in the preamble to the interim final rule and will be posted on the ICE website.

Note that to be eligible for an OPT extension the student must currently be in an approved post-completion OPT period based on a designated STEM degree. Thus, for example, a student with an undergraduate degree in a designated STEM field, but currently in OPT based on a subsequent MBA degree, would not be eligible for an OPT extension.

What are the eligibility requirements for the 17-month extension of post-completion OPT?

- The student must have a bachelor's, master's, or doctorate degree included in the STEM Designated Degree Program List.
- The student must currently be in an approved post-completion OPT period based on a designated STEM degree.
- The student's employer must be enrolled in E-Verify.
- The student must apply on time (i.e., before the current post-completion OPT expires).

ARCHIVES

(a) Answer: In 2004, Congress established an exception to the H-1B cap for aliens who 'earned' a Master's degree or higher degree from a United States academic institution. Consequently, the regulation cite that provides for a bachelor's degree plus at least five years of progressively responsible experience does not apply for this exception. In addition, all requirements for the U.S. Master's degree must be completed at the time of filing of the petition and not a date in the future. Transcripts of study evidencing completion of the requirements for the Master's degree are acceptable in lieu of the degree certificate or diploma; a letter from the dean of the alien's college without the transcript of study will not suffice.

If all requirements for the Master's degree have not been met, the alien would not be eligible for this exception. The denial shell can be located at O:/Common/ADJ_div/I-129/_H1b1/I-292 Denials/Petitioner Issues/Cap Issue/H-1B Cap FY-2008, No Adv Degree Exemption-Not US Degree.doc.

Section 248 of the INA and parts 214 and 248 of 8 CFR allow for the change of an alien's nonimmigrant classification to another nonimmigrant classification provided the alien is not within one of the classifications precluded from changing

status. The alien must continue to maintain their current classification to the date of intended employment. If the alien is not maintaining their current classification to the date of intended employment, the petition may be approved while the change of status request must be denied (split decision).

(b) Answer: An F-1 academic student is admitted or changed to F-1 while in the U.S. for duration of status (D/S). Duration of status is defined as the time during which the student is pursuing a full course of study or engaged in authorized optional practical training following the completion of studies. The student is considered to be maintaining status if he or she is making normal progress toward completing their course of study. An F-1 student who has completed a course of study and any authorized practical training following completion of studies will be allowed an additional 60-day period to prepare for departure from the U.S. or file a petition for a change of status to another nonimmigrant classification.

Not all F-1 students are permitted the 60-day departure period. A student authorized by the Designated School Official (DSO) to withdraw from classes will be allowed a 15-day departure period (SEVIS indicates this status as 'Withdraw'). A student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for any additional departure period (SEVIS indicates this status as 'Failure to Appear' or 'No Show' for example).

A student may be authorized a maximum of 12 months of optional practical training directly related to the student's major area of study. A student must apply for OPT on Form I-765 and may not begin employment until the date indicated on the EAD card. The student may be granted authorization for employment after completion of all course requirements for the Master's degree (excluding the thesis or thesis equivalent). OPT must be requested through the DSO and the filing of an I-765 prior to the completion of all course requirements for the degree or prior to the completion of the course of study. A student must complete all practical training within a 14-month period following the completion of all course requirements or the completion of study. After completion of OPT, the student is permitted 60 days to depart or file a petition for a change of status.

If the F-1 student's authorized employment and 60-day departure period do not extend to the intended start date of employment (October 1, 2007), the petition may be approved but the change of status request must be denied (split decision).

Please note that the paragraphs above pertain only to F-1 students; issues and time periods for M-1 and J-1 students are not the same.

(c)

If the copy of the NOL is submitted with the I-129 and it is dated on or after October 10, 2006, an officer can check the lists found at http://vsc.cis.dhs.gov/VSC_DOS_612.htm and click on Vermont Service Center "DOS Approvals" or "DOS Denials" to locate the EAC receipt number. Once the officer has the receipt number, he/she can check CLAIMS (National) for the decision. If the case is not worked yet and it needs to be adjudicated, an appointed POC can email Michael J. Paul, Supervisory Adjudications Officer, at the VSC with the information (Name as it appears on the letter, DOB, and COB). Michael can also be contacted at phone number 802-527-4776.

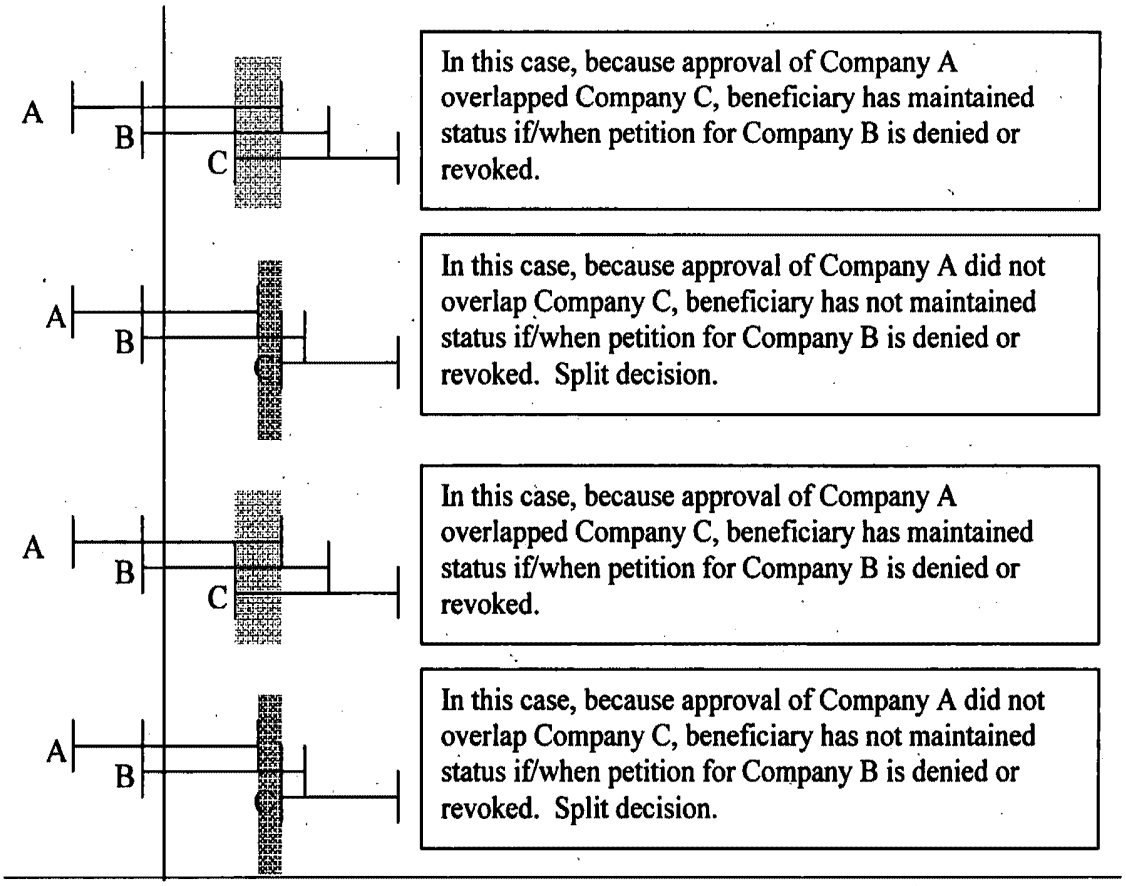
The officer should also do a name, DOB and COB search in CLAIMS LAN and CLAIMS Mainframe first to verify if case was possibly adjudicated here at the CSC or at another service. Even though, the I-612 went electronic and paperless on October 10, there are still a few that were in the pipeline and came in through regular mail.

If the NOL letter is dated prior to 10/10/2006, then we should send out an RFE asking that the case be reconstructed. The applicant would need to submit the NOL letter and biographic data sheet (DS-3035) along with all supporting documentation. These requests can be sent to Marisol De Los Santos, so that someone on her team can adjudicate it for the officer needing the waiver.

(d)

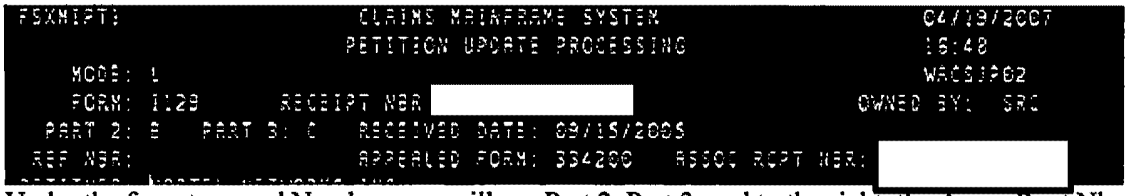
Example: Employer A files a petition for a beneficiary for 3 years as H1B and is approved.
Then the beneficiary finds a job with Employer B. Employer B files a petition for the beneficiary – the beneficiary can go to work for company B as soon as the petition has been filed. While the petition for Company B is pending, the beneficiary finds a job with Company C. The beneficiary can go work for Company C as soon as C has filed the petition. Do not let Premium processing Company C cases precede Company B case decision. The diagram below

shows how the overlap or non-overlap of dates determines whether the beneficiary has maintained status. The lines of A, B, and C represent the span of time granted/requested on the H1B petitions for each company.



(e)
The adjudicator will need to look at a couple items on the alien's transcript and determine how the alien entered the program and with what degree, as well as where he or she is in the doctoral program. The first page should indicate the requirements to enter the doctoral program. Some programs require a Master's Degree and some require only a Bachelor's Degree. The transcript should show what the alien used to enter the program (type of degree and place of issuance). If the basis for entry into the doctoral program is a U.S. based Master's Degree, then the alien has the requisite degree needed for the Advanced degree cap. If not, then further review of the transcript is required. If the alien entered using the program using a foreign master's degree, then in order to qualify for the advanced degree cap they must have completed ALL requirements for conference of the degree (coursework, thesis/dissertation, and orals). If he or she has not completed this, then he or she is not eligible. If however the alien entered the program with a bachelor's degree (foreign or U.S.), and the coursework is completed, then we can, for immigration quota purposes ONLY, consider him or her as having received a U.S. Master's Degree. To determine whether the coursework is complete, review the classes listed in the transcript. If the latest classes are all listed as "thesis research" or "dissertation research," and there are no coursework or instructor-led classes, then the alien has completed the required coursework. The reason for this is that for those entering doctoral programs with a Bachelor's degree who finish all coursework, but fail at the thesis/dissertation and/or the orals, he or she will be given, by default, a Master's degree. NOTE, however, that if the position that the alien is being hired for requires a master's degree or higher to perform the duties, the alien must have all requirements for the requisite degree met OR, if a master's degree is required then look at equivalency.

(f)
First, look at the petition – on the first page, the petitioner should list the prior petition in Section 2, question 3 & 4. Type the previous petition # into CLAIMS MF.
When you look at the previous case in CLAIMS MF, you need to look at three things –



(b)(6)

Under the form type and Number, you will see Part 2, Part 3, and to the right, the Assoc Rcpt Nbr.
"Part 2" corresponds to the Part 2, question 2 of the I-129.
A – New employment
B – Continuation of same employment
C – Change in previously approved employment
D – Concurrent employment.
E – Change of employment.
F – Amended petition.

"Part 3" corresponds to Part 2, question 5 of the I-129.
A – Consular Notification
B – Change of Status Requested
C – Extend the stay of person who holds the status
D – Amend the stay of person who holds the status

Assoc Rcpt Nbr – is the petition filed previous to the petition on the screen.

Looking at the above example, the beneficiary has a petition prior to this one - - keep following the associated receipt numbers back until you see A in the Part 2 field, and A or B in Part 3 field. If Part 3 is an A, you will then need to go to SQ94 and run a Name/DOB search to see when the beneficiary's 1st entry as an H1B occurred – it should be, but not always is, a date within a couple months of the approval of the I-129. If Part 3 is a B, then look at the validity dates of the petition – the start date is the beneficiary's first day in H1B status.

(g)
The number of petitions, which can be an indicator, does not necessarily indicate that there is a concern on the number of employees.
You need to keep in mind a few factors –
1 – Some of the beneficiaries filed for could count for more than one petition – If the company originally filed for them in 2003 and later filed an extension, then the beneficiary would account for 2 of the files…if they have an I-140 pending, that would be a 3rd. Also, as this is 2007, you will only look at those petitions filed in 2004 or later – anyone earlier than that either was extended on a later petition OR is no longer at the company…
2 – Attrition – especially in the IT industry, employees move around quite a bit – some of the beneficiaries may no longer be at the company…
3 – I-129 approval is sometimes a lure to get someone to come work for a company…When a person is looking for a job, they generally send their resume to several companies – those companies compete, in part, for that person by filing an I-129. The approval of the I-129 can be an incentive for the person to choose that particular company…If there are 5 companies competing for the person, 4 companies may have approved petitions for employees who never entered on duty. So, some of the beneficiaries of the petitions you see may never even have started work for the employer…
A general guideline when we become concerned is the 5:1 ratio – 5 petitions to 1 employee… This is not concrete by any means, and if there are more indicators of fraud then the 5:1 ratio may be more or less…
So if you had a company of 61 employees and you saw that they had 305 petitions, this would be more of an indicator of fraud…

Jowett, Haley L

From: Velarde, Barbara Q
Sent: Friday, August 13, 2010 1:04 PM
To: Gooselaw, Kurt G; Chau, Anna K; Fierro, Joseph; Nguyen, Carolyn Q; McMahon, Gerald K; Johnson, Bobbie L; Young, Claudia F; Sweeney, Shelly A; Renaud, Daniel M
Cc: Gregg, Bret S
Subject: FW: Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion
Attachments: order dismissing case.pdf; Court's Memorandum Opinion.pdf

Importance: High

FYI... great news

From: Forney, Geoff (CIV) [mailto:Geoff.Forney@usdoj.gov]
Sent: Friday, August 13, 2010 1:19 PM
To: Beck, Lee; Carr, Prudence; Salem, Claudia S; Jeffries, Lina; Dalal-Dheini, Sharvari P; Kleczek, Marguerite P; Belgrade, Michael J; Symons, Craig M; Rhew, Perry J
Subject: FW: Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion
Importance: High

We won. The H-1B memo stands. The court held that the memo is simply a policy statement with no legally binding effect, and therefore does not constitute final agency action.

The court appears to have blurred the two tests for policy statements and interpretive rules, but we won, so who can complain.

Thanks everyone for all your help on this.

Of course, plaintiffs have sixty days to appeal, so we'll wait to see if the battle continues.

Geoff Forney
[redacted] (b)(6)

From: DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
Sent: Friday, August 13, 2010 12:57 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:10-cv-00941-GK BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al Memorandum & Opinion

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U.S. District Court

District of Columbia

Notice of Electronic Filing

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Case Name:	BROADGATE INC. et al v. UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES et al
Case Number:	1:10-cv-00941-GK
Filer:	
Document Number:	15

Docket Text:
MEMORANDUM OPINION to the Order dismissing the case with prejudice. Signed by Judge Gladys Kessler on 8/13/10. (CL,)

1:10-cv-00941-GK Notice has been electronically mailed to:

Robert P. Charrow charrowr@gtlaw.com

Laura Metcoff Klaus klausl@gtlaw.com

Geoffrey Forney geoff.forney@usdoj.gov

1:10-cv-00941-GK Notice will be delivered by other means to::

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:suppressed
Electronic document Stamp:
[STAMP dcecfStamp_ID=973800458 [Date=8/13/2010] [FileNumber=2643217-0]
[7fd2b89afc94e6a158f9f5635785f0d6c1db408b45e583ec712f3d6a0ddf61faea23
cc477044763dc1f510cc14c1e550b2cfa37a9c3842d4b381c977358c4f94]]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROADGATE, INC., et al,	:	
	:	
Plaintiff,	:	
v.	:	**No. 10-cv-941 (GK)**
	:	
UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, et al,	:	
	:	
Defendant.	:	
	:	

ORDER

Plaintiffs Broadgate, Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and the American Staffing Association ("ASA") bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., against Defendants United States Citizenship and Immigration Services ("USCIS"), Alejandro Mayorkas, Director of USCIS, United States Department of Homeland Security, and Janet Napolitano, Secretary of Homeland Security.

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 3]. On July 7, 2010, the parties submitted a Joint Praecipe indicating their agreement with the Court's proposal to consolidate the hearing on the motion for a preliminary injunction with a determination on the merits under Federal Rule of Civil Procedure 65(a)(2). The parties presented oral argument at a Motions Hearing held on August 5, 2010. Upon

consideration of the parties' arguments, the Motion, Opposition, Reply, and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that this case is **dismissed with prejudice**. This is a final appealable Order subject to Federal Rule of Appellate Procedure 4. See Fed. R.App. P. 4.

/s/
Gladys Kessler
United States District Judge

August 13, 2010

Copies to: Attorneys of Record via ECF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROADGATE INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 09-cv-1423 (GK)**
	)	
UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Plaintiffs Broadgate, Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and the American Staffing Association ("ASA") bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., against Defendants United States Citizenship and Immigration Services ("USCIS"), Alejandro Mayorkas, Director of USCIS, United States Department of Homeland Security, and Janet Napolitano, Secretary of Homeland Security. This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 3]. On July 7, 2010, the parties submitted a Joint Praecipe indicating their agreement with the Court's proposal to consolidate the hearing on the motion for a preliminary injunction with a determination on the merits under Federal Rule of Civil Procedure 65(a)(2). The parties presented oral argument at a Motions Hearing held on August 5, 2010. Upon consideration of the parties' arguments, the Motion, Opposition, Reply, and the entire

record herein, and for the reasons stated below, Plaintiffs' Complaint is **dismissed.**

I. Background

Plaintiffs Broadgate, Logic Planet, and DVR are software development and information technology firms which rely on a pool of foreign citizens and permanent residents in order to meet the hiring needs of their clients. Plaintiffs TechServe and ASA are not-for-profit membership corporations that qualify as small entities under the Regulatory Flexibility Act, 5 U.S.C. § 601(6), which supply temporary employees to other businesses. Plaintiffs Broadgate, Logic Planet, and DVR are third-party employers, as are the members of Plaintiffs TechServe and ASA, and all Plaintiffs are small businesses within the meaning of § 3 of the Small Business Act, 5 U.S.C. § 601(3). Compl. ¶¶ 3-7.

Plaintiffs regularly submit petitions to Defendant USCIS for H1-B visas on behalf of the foreign employees they wish to hire. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (H-1B visa program). The H-1B visa program permits aliens to enter the United States under a visa to perform services in a "specialty occupation," which is an occupation that "requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). If approved, an H-1B visa

lasts for three years, and is renewable. 8 U.S.C. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(15)(ii)(B)(1), 214.2(h)(13)(iii)(A). While only 65,000 H-1B visas are permitted each fiscal year, 8 U.S.C. § 1184(g), USCIS has granted Plaintiffs and their members thousands of H-1B visas. See Pls.' Mot. for Preliminary Injunction [Dkt. No. 3] at 3.

In 2009, USCIS issued an immigration regulation, codified at 8 C.F.R. § 214.2, which sets forth special requirements for the admission, extension, and maintenance of status for certain "non-immigrant classes" ("Regulation"). One of the non-immigrant classes addressed is "temporary employees," which includes the foreign employees that Plaintiffs rely on in order to operate their businesses. The Regulation requires that H-1B petitions be filed by a "United States employer," defined as:

> [A] person, firm, corporation, contractor, or other association, or organization in the United States which (1) engages a person to work within the United States; (2) has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and (3) has an Internal Revenue Service Tax Identification number.

8 C.F.R. § 214.2(h)(4)(ii). Thus, the Regulation establishes five factors, referred to as the "control test," to assess whether there is an "employer-employee relationship" sufficient to grant an H-1B visa: whether the employer hires, pays, fires, supervises, or otherwise controls the work of an employee.

On January 8, 2010, Donald Neufeld, Associate Director of Defendant USCIS, issued a memorandum ("Neufeld Memorandum" or "Memorandum") to Service Center Directors relating to USCIS's H-1B visa program. Memorandum from Donald Neufeld, Associate Director, Serv. Ctr. Operations, USCIS, to Serv. Ctr. Dirs. (Jan. 8, 2010) (Ex. A to Pls.' Mot. for Preliminary Injunction) [hereinafter "Memorandum"]. The Neufeld Memorandum purports to clarify the Regulation's control test by setting forth eleven factors that adjudicators must consider in determining whether an employer-employee relationship exists between a sponsor and a candidate for a H-1B visa program. See Memorandum at 4-5. Plaintiffs argue, however, that the Neufeld Memorandum establishes a different standard from the Regulation's control test, and therefore constitutes a new, binding rule. Because the Memorandum was not issued in accordance with the APA's procedures for agency rulemaking, Plaintiffs argue that this new "rule" must be invalidated.

Plaintiffs bring five counts in their Complaint. In Count I, Plaintiffs claim that Defendants are liable for violation of the notice and comment requirements of the APA, 5 U.S.C. §§ 553, 706. In Count II, Plaintiffs claim that Defendants violated the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., by failing to perform a Regulatory Flexibility Act Analysis before issuing the Memorandum. In Count III, Plaintiffs claim that the Neufeld

Memorandum is in excess of regulatory and statutory authority under 8 C.F.R. § 214.2(h)(4)(ii) and the APA, 5 U.S.C. §§ 706(2)(A) and (C). In Counts IV and V, Plaintiffs claim that Defendants have engaged in arbitrary and capricious rulemaking in violation of 5 U.S.C. § 706(2)(A) and (D) because the Memorandum redefines the employer-employee relationship without justification or authority and was written by Neufeld, a USCIS employee not authorized by law to issue rules.

Defendants respond that the Neufeld Memorandum is not a substantive rule setting forth a new standard, but instead a policy statement or interpretive rule that clarifies the common law background of the Regulation's control test. Defendants therefore argue that Plaintiffs' Complaint is a broad programmatic challenge to one of its general policies--namely, the agency's internal guidelines for determining an employer-employee relationship for the H-1B program--which is not entitled to judicial review under § 702 of the APA. Defendants also argue that Plaintiffs fail to state a claim under the APA in Counts I and III-V because the Memorandum does not constitute final agency action subject to judicial review under § 704 and notice and comment rulemaking under § 553. See Defs.' Opp'n at 13-26. Finally, Defendants argue that Count II fails to state a claim because the Regulatory Flexibility Act does not apply to guidance documents or interpretive statements such as the Memorandum. See 5 U.S.C. §§ 603(a), 604(a).

II. Standard of Review

The first requirement for judicial review under the APA is that the complaint must challenge "agency action." 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001). Programmatic challenges lacking "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him" do not qualify as agency action, and so are not "ripe" for judicial review under the APA. Lujan, 497 U.S. at 891.

Second, the challenged agency action must be "final." 5 U.S.C. § 704 (authorizing judicial review under APA of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court"); Lujan, 497 U.S. at 882. Final agency action "must generally 'mark the consummation of the agency's decisionmaking process' and either determine 'rights or obligations' or result in 'legal consequences.'" Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 800 (D.C. Cir. 2006) (quoting Bennett v. Spear, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)) (emphasis in original). Legislative or substantive rules are, by definition, final agency

action, while interpretive rules and general policy statements are not. Id. at 805-07.

Notice and comment procedures are only required under APA § 533 for legislative rules with the force and effect of law; "interpretive rules, general statements of policy, or rules of agency organization procedure, or practice" are exempted. 5 U.S.C. § 553(b)(A) ; see also Nat'l Ass'n of Broadcasters v. FCC, 569 F.3d 416, 425-26 (D.C. Cir. 2009). Finally, the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, only applies when an agency is required to publish general notice of proposed rulemaking. 5 U.S.C. §§ 603(a), 604(a).

III. Analysis

First, the parties dispute whether USCIS's issuance of the Neufeld Memorandum constitutes agency action. Defendants argue that it is not, and that Plaintiffs' action is a non-justiciable programmatic challenge to USCIS's administration of the H-B1 visa program.

In RCM Technologies, Inc. v. United States Dep't of Homeland Security, 614 F.Supp.2d 39 (D.D.C. 2009), this District Court considered whether a group of employment recruiters could challenge USCIS's alleged policy requiring that foreign occupational and physical therapists possess master's degrees in order to obtain H-1B visas. Relying on Lujan, the court concluded that the plaintiffs' challenge to the alleged policy was not reviewable

under the APA. RCM Technologies, 614 F.Supp.2d at 44-45. Instead, the proper challenge would have been to a specific denial of a visa application by the agency. Id. at 45; see also Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000).

Plaintiffs seek to distinguish RCM Technologies on the ground that Defendant USCIS argues that the Neufeld Memorandum is either a policy statement or an interpretive rule. If the Court accepts the Government's argument that the Memorandum is an interpretive rule, Plaintiffs argue, then the Memorandum constitutes agency action under Lujan and RCM Technologies.[1] At this juncture the Court need not decide whether the Memorandum constitutes a policy statement or an interpretive rule because the parties have raised an equally dispositive issue: whether the Memorandum is a legislative rule, which it must be under the APA to qualify as final agency action subject to judicial review. See Center for Auto Safety, 452 F.3d at 805-07 (only agency rules that establish binding norms or agency actions that occasion legal consequences are subject to review under the APA).

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[1] Plaintiffs also seek to distinguish RCM Technologies on the ground that the parties in that case disputed whether the policy in question even existed. Pls.' Reply at 5 n.2. Because the District Court in RCM Technologies drew its conclusions regarding the action's reviewability on the assumption that the alleged policy did in fact exist, this argument is unpersuasive. 614 F.Supp.2d at 43-45.

If the Memorandum is a legislative rule, then it is final agency action under the APA subject to judicial review, and it is subject to notice and comment rulemaking under § 553. However, as just stated, if the Memorandum is an interpretive rule or general policy statement, the opposite is true: it is not final agency action subject to judicial review under the APA and it is not a "de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by § 533 of the APA." Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006). As explained above, the Memorandum is subject to the Regulatory Flexibility Act only if notice and comment rulemaking is required.

Whether a disputed "rule" is a legislative rule turns on whether it has "the force of law," meaning that "Congress has delegated legislative power to the agency and [] the agency intended to exercise that power in promulgating the rule." Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993). The agency's intent to exercise legislative power may be shown where the second rule effectively amends the previously adopted legislative rule, either by repudiating it or by virtue of the two rules' irreconcilability. Id. Another indication of a legislative rule is whether, in the absence of the rule, the agency would lack an adequate legislative basis to ensure the

performance of duties. Id. at 1112.[2] In contrast, a good indication of a general policy statement is the agency's use of permissive, rather than binding, language; if the "rule" leaves the agency free to exercise discretion, it is likely a policy statement. Id. at 1111.

First, Plaintiffs argue that the Neufeld Memorandum is a legislative rule because it is binding, both on its face and as applied. However, the evidence demonstrates that the Memorandum is intended to provide only guidance for application of the Regulation, not to establish independent binding rules. To begin with, the Memorandum states as much: it declares that it "is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period." Memorandum at 1. In addition, the Memorandum explains that the impetus for its issuance was the "lack of guidance" on the Regulation's application, which in some contexts, including third-party employment, "has raised problems." Id. at 2.

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[2] The parties do not dispute that, in the absence of the Memorandum the agency has an adequate basis--the Regulation--to ensure the performance of its duties in reviewing and approving or denying H-1B visa applications. Am. Mining Congress, 995 F.2d at 1110. The Court's analysis thus focuses on whether the Memorandum is binding on USCIS adjudicators or substantively amends the Regulation.

The Memorandum also explains that the approach it relies on to interpret the definition of "employer-employee relationship" under the Regulation is in keeping with the agency's long-standing approach: "[t]o date, USCIS has relied on common law principles and two leading Supreme Court cases [Nationwide Mutual Ins. Co. V. Darden, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003)] in determining what constitutes an employer-employee relationship." Id. The Memorandum states that its eleven factors are derived from the common law, and the Memorandum emphasizes that "no one factor [is] decisive" and that "the common law is flexible about how [they] are to be weighed." Id. at 5. On its face, then, the Memorandum clearly does not purport to establish a new substantive rule with binding effect.

Turning to the Memorandum's application, there is no evidence that it either binds USCIS adjudicators or requires a different outcome for third-party employers like Plaintiffs than the Regulation does. In fact, in addition to emphasizing that no single factor among the eleven is dispositive, the Memorandum instructs USCIS adjudicators to look to the totality of the circumstances in each case to determine whether there is an employer-employee relationship. Id. at 4.

Plaintiffs respond by arguing that the Memorandum "ordains the result in any petition filed by a third-party contractor" because it describes scenarios involving business models identical to Plaintiffs' and instructs adjudicators that such third-party employers do not exercise sufficient control to find an employer-employee relationship. Pls.' Reply at 10; Memorandum at 6-7, 14-15. However, the Memorandum makes very clear that the scenarios are "meant to be illustrative examples." Memorandum at 5 n.7. Indeed, Plaintiffs do not dispute that USCIS has approved four H-1B visa applications by third-party employers since the Neufeld Memorandum was issued, thereby indicating that the scenarios do not pre-ordain the outcome of Plaintiffs' H-1B visa applications. Defs.' Opp'n at 41-42. Because the Memorandum, both on its face and in its application, leaves USCIS adjudicators considerable discretion in applying the eleven factors, the Court concludes that it is not binding.

Second, Plaintiffs argue that the Memorandum effectively amends the Regulation because its eleven factors "do not merely add crispness to guidelines," but instead replace the five-factor control test. Pls.' Reply at 6. Specifically, Plaintiffs point to three factors in the Memorandum which they argue are unrelated to control: (i) does the beneficiary use proprietary information of the petitioner to perform the duties of employment; (ii) does the beneficiary produce an end product that is directly linked to the

petitioner's line of business; and (iii) does the petitioner provide the tools or instrumentalities needed by the beneficiary to perform the duties of employment. Id. at 11; Memorandum at 4-5.

While Defendants have not identified any common law authority for these three factors, the question before the Court is not whether the agency has properly interpreted the common law, but whether the Memorandum's inclusion of these factors substantively amends the Regulation by repudiating it or by rendering the two irreconcilable. See Ctr. for Auto Safety, 452 F.3d at 808. The control test states that an employer-employee relationship may be established for employers who hire, pay, fire, supervise, or, in a catch-all provision, "otherwise control the work of [an] employee." 8 U.S.C. § 214.2. Because the catch-all provision's breadth means the agency possesses wide latitude in interpreting the Regulation, the three factors that Plaintiffs challenge cannot be said to substantively amend the Regulation's control test.[3]

Plaintiffs argue in the alternative that the Memorandum substantively amends the agency's Adjudicator's Field Manual, which

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[3] Plaintiffs' likely response is that the Memorandum's inclusion of these factors, even if not a substantive amendment of the Regulation, marks a shift in the agency's interpretation of the Regulation which requires notice and comment. See Pls.' Mot. at 11-12; Envt'l Integrity Project v. EPA, 425 F.3d 992 (D.C. Cir. 2005). However, the Neufeld Memorandum constitutes the agency's first written guidance on the definition of "employer-employee relationship" under the Regulation. In the absence of evidence that the use of these three factors is inconsistent with a prior interpretation of the agency, this argument must be rejected.

is binding on USCIS adjudicators. However, as the Government explains, the Manual provides that memoranda lacking the designation "P", such as the Neufeld Memorandum, are merely advisory. See USCIS, Adjudicator's Field Manual § 3.4(a) (2010). In addition, the Manual's statement that "[p]olicy material is binding on all USCIS officers and must be adhered to unless and until revised" simply refers to the fact that an agency's interpretation of its own regulations is binding, see Am. Mining Congress, 995 F.2d at 1110, not that the guidelines establish an independent source of binding legal authority. See also Defs.' Opp'n at 24-25.

To summarize, the Court concludes that the Memorandum establishes interpretive guidelines for the implementation of the Regulation, and does not bind USCIS adjudicators in their determination of Plaintiffs' H-1B visa applications. In addition, the Court is satisfied that the Memorandum does not amend the Regulation by repudiating or being irreconcilable with it. The Memorandum therefore does not constitute a legislative rule.

This conclusion also comports with the more general test established in Bennett v. Spears for determining when agency action is "final": "the action must mark the 'consummation' of the agency's decision making process - it must not be of a merely tentative or interlocutory nature. . . . [and] the action must be one by which rights or obligations have been determined, or from which legal consequences flow." 520 U.S. at 177-78 (citation and

internal quotations omitted). For the reasons stated, even if the Court were to consider the Memorandum to be the "consummation" of the agency's decision making process--which it does not--the Memorandum does not determine, as a matter of law, the rights or obligations of H-1B visa applicants, the agency, or any other entity, and no discernible legal consequences flow from it. See also Ctr. for Auto Safety, 452 F.3d 798 (concluding that guidelines issued by the National Highway Traffic Safety Administration which interpreted the scope of an agency regulation were not final agency action, and therefore not reviewable under the APA).

In short, the Memorandum does not constitute final agency action subject to judicial review and the notice and comment requirements under the APA. Counts I, III, IV, and V alleging violations of the APA must therefore be **dismissed** for failure to state a claim under § 704. The only remaining count in the Complaint, Count II, which alleges a violation of the Regulatory Flexibility Act, must also be **dismissed**, as the Memorandum is not subject to notice and comment or publication, since it is not a legislative rule, and thus the statute does not apply.

CONCLUSION

For the reasons set forth above, this case is **dismissed with prejudice**. A separate Order will accompany this Memorandum Opinion.

August 13, 2010

/s/
Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF

Jowett, Haley L

From: Perkins, Robert M
Sent: Friday, March 19, 2010 5:56 AM
To: Johnson, Bobbie L; Young, Claudia F
Cc: Doherty, Shannon P; Sweeney, Shelly A; Gooselaw, Kurt G; Nguyen, Carolyn Q
Subject: FW: Limiting H-1B Validity Dates
Attachments: RE: Employer-Employee Memo- Cognizant ; Wipro Example.pdf; Infosys Validity Date Example.pdf

Bobbie and Claudia,

As you are aware, VSC did not limit validity dates as a general rule prior to the release of the employer-employee memo and follow-up Q&As (email from Shelly on 2/24/10) noted in blue and red below. Since providing guidance to our officers (see Mandy's message below) we have encountered a few scenarios that we would like further clarification.

1- See attached Wipro example - This petition seeks a COS for two years and 8 months. Until the employer-employee memo came out, we accepted their statements of in-house employment knowing they were liable for their statements and accountable during any site visit. We granted the time requested. The beneficiary of this petition will be working at a Wipro location in East Brunswick, NJ on a project for Cisco Systems, Inc. The project and its length are not documented. Since the employer-employee memo came out we have started requesting evidence of the duration of the in-house project for companies that are H-1B dependent, meet the 10/25/10 criteria, or have fraud concerns. Note: Wipro filed over 2,500 H1B petitions between 10/1/2008 – 9/30/2009. I personally would prefer not to issue thousands of RFEs for our top filers such as Wipro, Tata, Cognizant, Infosys, etc. when the duration of an in-house project is not documented, but will do so if that is what SCOPS expects. The better alternative may be to limit the stay to one year without the benefit of an RFE?

2- See attached Infosys example – The end client letter states "We anticipate a need for the services of 500 Infosys personnel for 2 years commencing from the date they arrive in the US in H-1B status. If the beneficiary is abroad, we won't know the date of arrival, so we intend to grant two years without issuing an RFE and allowing the petitioner to submit additional evidence for the duration of the validity period requested.

On this topic, the Q&A that accompanied the employer-employee memo addresses limiting validity (question 7, page 2). Has any of the further clarification below (specifically the one year rule) been shared with our stakeholders? Now that we are limiting validity periods, AILA is inquiring on individual cases. It would be helpful to know what you have or have not shared with our stakeholders at this point.

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

Thanks,

Rob

From: Bouchard, Armanda M
Sent: Friday, February 26, 2010 4:23 PM
To: VSC Allied Group 3; VSC Allied Group 6
Subject: Limiting H-1B Validity Dates

Hello H-1B Officers,

This email provides guidance on limiting H-1B approval dates for petitioners who are required to provide an itinerary of employment (H-1B dependent employers, employers meeting the 10/25/10 plus 1 criteria, and employers with an SOF). Please consult with the H-1B guide beginning on page 31 if you have questions about the itinerary requirement for these categories. These are the same itinerary requirements that have been in effect since April 2009.

- Effective today, for those employers that we require to establish an itinerary, we will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer. In other words, approvals will be for at least one year or for the duration of the documented work assignment.

- If you are adjudicating a new case and there is sufficient evidence of a work assignment, either in-house or at a client location, but the length of the work assignment is not indicated, send the attached rfe.

- If you already have or you will be sending an rfe in CG using 2134, 2135, or 2139, then the work assignment dates have been requested. Upon reviewing the response, grant an appropriate amount of time, for no less than one year.

- In-house employment follows the same rule. We will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer .

Please forward questions to the AG3 Senior mailbox, as I will be our next Monday and Tuesday.

Thank you,

Mandy

Jowett, Haley L

From: Sweeney, Shelly A
Sent: Wednesday, February 24, 2010 12:57 PM
To: Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
Cc: Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
Subject: RE: Employer-Employee Memo- Cognizant
Attachments: H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

From: Nguyen, Carolyn Q
Sent: Tuesday, February 23, 2010 4:06 PM
To: Perkins, Robert M; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

From: Perkins, Robert M
Sent: Wednesday, February 17, 2010 10:55 AM
To: Nguyen, Carolyn Q; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

From: Nguyen, Carolyn Q
Sent: Tuesday, February 16, 2010 6:35 PM
To: Young, Claudia F; Johnson, Bobbie L
Cc: Perkins, Robert M; Gooselaw, Kurt G
Subject: FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

From: Devera, Jennie F
Sent: Wednesday, February 10, 2010 4:08 PM
To: Nguyen, Carolyn Q
Subject: Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

From: Nguyen, Carolyn Q
Sent: Monday, June 22, 2009 1:53 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

From: Gregg, Bret S
Sent: Monday, June 22, 2009 1:45 PM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Chau, Anna K; Poulos, Christina
Subject: FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

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From: Kruszka, Robert F
Sent: Monday, June 22, 2009 11:18 AM
To: Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
Subject: FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases.
Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

H1B: On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

H1B Extensions: W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

L1B: Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

L1B: Extensions: We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

DRAFT RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

DRAFT RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

QUESTION: On page 3 at the bottom, the third fact is, "Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?" I keep getting tripped on the last clause, "if such control is required". Do you know what this is saying/asking?

DRAFT RESPONSE: We interpret this as referring back to the phrase "day-to-day basis". As mentioned later in the memo, adjudicators are to keep the nature of the business in mind when reviewing the petition. If the nature of the occupation would require supervision and control on a day-to-day basis, then the petitioner should be able to demonstrate the "right to control" the beneficiary's work on a day-to-day basis.

Jowett, Haley L

From: Gregg, Bret S
Sent: Tuesday, March 30, 2010 11:36 AM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Nguyen Ho, Lynn; Fisher, Sheila C; Poulos, Christina
Subject: FW: OCC Cleared Employer-Employee Relationship Templates
Attachments: H-1B Empr-Empe Relation Consolidated RFE 3-30-10 OCC Cleared.doc

Importance: High

From: Velarde, Barbara Q
Sent: Tuesday, March 30, 2010 9:35 AM
To: Renaud, Daniel M; Hazuda, Mark J; Poulos, Christina; Gregg, Bret S
Cc: Johnson, Bobbie L; Young, Claudia F; Neufeld, Donald
Subject: FW: OCC Cleared Employer-Employee Relationship Templates
Importance: High

CSC and VSC:

OCC has cleared the employer-employee relationship RFE templates. Please distribute as appropriate and ensure folks begin using them.

SCOPS would like to stress the following regarding the templates:

- this is not part of the RFE project so the service centers can use this cleared language in their format (letter form for CSC and call-ups for VSC);
- CSC and VSC can tailor introductory/transitional language as needed but the meat of these RFE templates should remain unchanged;
- you must contact SCOPS first if you are seeking to modify the pertinent language of this template;
- the templates should remain in the 2nd person. The Agency has adopted that standard. Change into the 2nd person will be done incrementally as new templates are created; and
- both SCs can remove the highlighting from this document if they choose to do so as it was intended to assist OCC in identifying instructions to the officers.

I would like to remind the service centers that the main issue to be evaluated under the memo is whether the petitioner has the "right to control" the beneficiary. Officers need to keep in mind that right to control is different from actual control. If you have any questions regarding the difference between "right to control" and actual control, please contact BEST. Finally, we still need to have medical professional and sole proprietor cases sent to us. The concern is whether or not we got the standard correct for these folks and that the memo is not causing any unintended consequences. We are not asking for review to second guess your decision, but instead because of the concerns raised by stakeholders and potential impact this could have for some discrete petitioners/beneficiaries. We really need you to cooperate with us on this while we work with OCC and OPS to get these issues right.

Barbara Q. Velarde
Deputy Associate Director
Service Center Operations Directorate
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2134

Washington, DC 20529

The Petitioner

Documentation submitted with your petition indicates that you provide [**INDICATE THE TYPE OF SERVICE PROVIDED SUCH AS:** information technology consulting services, information technology staffing solutions, information technology solutions, healthcare staffing solutions, etc].

Itinerary of Employment and Work Site Information [Use only if this applies]

Your petition was filed without an itinerary of employment. USCIS regulations provide that an H petition which requires services to be performed in more than one location must include an itinerary with the dates and locations of the services to be provided.

Provide an itinerary of services or engagements with the dates and locations of the services. The itinerary may also include documentation from the end-client employer receiving the beneficiary's services to establish:

- The name of the project the beneficiary is assigned to;
- The address where the beneficiary performs the work;
- The title and duties of the beneficiary's position;
- The contracted employment dates;
- Whether there is a vendor through whom the beneficiary's services are provided;
- The name of the vendor, if applicable;
- Contact information from the end-client which includes the name, address, email, and telephone number where the contact can be reached; and/or
- The name, title, and contact information of the person who will supervise the beneficiary at the work site.

Right to Control [Use only if this applies]

As an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation, you are required to establish by a preponderance of the evidence that a valid employer-employee relationship will exist between you and the beneficiary, and that you have the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary. Also, you should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. You have requested a validity period from [**BEGINNING DATE**] to [**ENDING DATE**].

In support of the petition, the following evidence was submitted to establish an employer-employee relationship:

[Carefully review the supporting evidence and delete any of the following items that were not provided in the initial petition or add any not listed below.]

- An itinerary of services or engagements;
- Copy of a signed Employment Agreement between you and the beneficiary;
- Copy of an employment offer letter;
- Copy of relevant portions of valid contracts between you and a client;
- Copies of **[Choose:** contractual agreements, statements of work, work orders, service agreements, and letters] between you and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary;
- Copy of the position description;
- A description of the performance review process; and/or
- Copy of your organizational chart, demonstrating the beneficiary's supervisor chain.
- Other: **[List evidence not included above]**

However, this evidence is insufficient to establish that a valid employer-employee relationship will exist for the duration of the requested validity period.**[ARTICULATE THE REASON(S) WHY THE RECORD DOES NOT ESTABLISH RIGHT TO CONTROL (E.G. DOESN'T COVER THE ENTIRE VALIDITY PERIOD) OR SELECT ONE OR A COMBINATION OF THE FOLLOWING:**

OPTION 1 Your petition does not establish when, where, or for whom the beneficiary is assigned to work pursuant to an end-client engagement for the requested validity period. You have not documented the end-client, the end-client's vendor through whom the beneficiary is assigned to work (if applicable), the physical work location, or the contracted dates of service. Part 5 of your petition **SELECT ONE:** indicates the work location as **XXX**, with no other information about the employer at this address **OR SELECT** does not provide any alternate work location aside from your physical location.

OPTION 2 You indicate that the beneficiary will be engaged to work at **END-CLIENT** at **ADDRESS LOCATION**, however this work arrangement is not documented, nor have you established your right to control when, where, and how the beneficiary performs the job.

OPTION 3 Your petition documents the beneficiary's assignment of work with **DIRECT END-CLIENT** at **ADDRESS LOCATION,** however the documentation provided does not establish your right to control when, where, and how the beneficiary performs the job with your client.

OPTION 4 Your petition documents the beneficiary's assignment of work with **END-CLIENT** at **ADDRESS LOCATION**. **VENDOR NAME** is the vendor through whom the beneficiary works to provide services to **END-CLIENT**. The documentation provided does not establish your right to control when, where, and how the beneficiary performs the job with a third party employer.]

USCIS must determine if you have the right to control the employee through evidence that describes (with no one factor being decisive or exhaustive):

- the skill required to perform the specialty occupation;
- the source of the instrumentalities and tools required to perform the specialty occupation;
- the location of the work;
- the duration of the relationship between you and the beneficiary;
- whether you have the right to assign additional work to the beneficiary;
- the extent of the beneficiary's discretion over when and how long to work;
- the method of payment of the beneficiary's salary;
- the beneficiary's role in hiring and paying assistants;
- whether the specialty occupation work is part of your regular business;
- whether you are in business;
- the provision of employee benefits;
- the tax treatment of the beneficiary;
- whether you can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;
- whether, and if so, to what extent you supervise the beneficiary's work; and/or
- whether the beneficiary reports to someone higher in your organization.

[Also include the next section if the beneficiary is shareholder/owner.]

USCIS will also evaluate the below factors as the record [**Choose one**: suggests/indicates] that the beneficiary is also a shareholder or owner of your organization (again with no one factor being decisive or exhaustive):

- whether your organization can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;
- whether, and if so, to what extent your organization supervises the beneficiary's work;
- whether the beneficiary reports to someone higher in your organization;
- whether, and if so, to what extent the beneficiary is able to influence your organization;
- whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and/or
- whether the beneficiary shares in the profits, losses and liabilities of your organization.

[Only request the following evidence if it has not been submitted or, if it has been submitted, it LACKS SUFFICIENT DETAIL to establish an employer-employee relationship as described above.]

As such, it is requested that you demonstrate an employer-employee relationship with the beneficiary through the right to control the manner and means by which the product or services are accomplished for the duration of the requested H-1B validity period by providing a combination of the following or similar types of evidence. This list is not

inclusive of all types of evidence that may be submitted. You may submit any and all evidence you feel would meet the employer-employee requirement.

[Delete those items below that are already in the record or not applicable]

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employer, and the names and addresses of the establishment venues, or locations where the services will be performed for the period of time requested;

- Copy of signed Employment Agreement between you and the beneficiary detailing the terms and conditions of employment;

- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;

- Copy of relevant portions of valid contracts between you and a client (with whom you have entered into a business agreement for which your employees will be utilized) that establishes that while your employees are placed at the third-party work site, you will continue to have the right to control your employees;

- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between you and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;

- Copy of the position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between you and beneficiary, whether you have the right to assign additional duties, the extent of your discretion over when and how long the beneficiary will work, the method of payment, your role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of your regular business, the provision of employee benefits, and the tax treatment of the beneficiary in relation to you;

- A description of the performance review process; and/or

- Copy of your organizational chart, demonstrating the beneficiary's supervisory chain.

Maintenance of Initial Employer-Employee Relationship [Use only if this applies]

Your extension petition was filed without sufficient evidence to document that a valid employer-employee relationship was maintained with the beneficiary throughout the previous H-1B approval period.

You may provide a combination of the following or similar types of evidence to document that you and the beneficiary maintained the employer-employee relationship throughout the H-1B approval period:

[Delete those items below that are already in the record or not applicable]

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;

- Copies of the beneficiary's payroll summaries and/or W-2 forms, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;

- Copy of work schedules from prior years;

- Copies of your state quarterly wage reports for the last four quarters that contain the name, social security numbers (last four digits only), and number of weeks worked by the beneficiary;

- Copies of the beneficiary's two or three most recently filed federal individual tax returns with all required schedules and statements, as appropriate;

- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews promotional materials, designs, blueprints, newspaper articles, website text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;

- Copy of dated performance review(s); and/or

- Copy of any employment history records, including but not limited to, documentation showing date of hire and dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

In-House Employment to be Used In Instances Where the Petitioner is in the Business of Consulting But Indicates that the Beneficiary Will be Working on a Project In-House [Use only if this applies]

If the beneficiary will work on a project at your own location, provide evidence that demonstrates you have sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period by providing a combination of the following or similar types of evidence. This list is not inclusive of all types of evidence that may be submitted. You may submit any evidence you feel would establish sufficient specialty occupation work.

[Delete those items below that are already in the record or are not applicable]

- Copy of signed Employment Agreement between you and beneficiary detailing the terms and conditions of employment;

- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;

- Copy of relevant portions of valid contracts, statements of work, work orders, service agreements, and letters between you and the authorized officials of the ultimate end-client companies to whom the end product or services worked on by the beneficiary will be delivered;

- Copy of a position description or any other documentation that describes the skills required to perform the job offered, the tools needed to perform the job, the product to be developed or the service to be provided, the method of payment, whether the work to be performed is part of your regular business, the provision of employee benefits, and the tax treatment of the beneficiary by you;

- Signed copies of your two or three most recently filed Federal income tax returns to include all required schedules and statements, as appropriate, if the beneficiary is requesting an extension of stay;

- Copies of company brochures, pamphlets, internet website, or any other printed work published by you which outlines, in detail, the products or services provided by your company;

- Evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work.

[The below are specifically tailored to the IT consulting industry; if this RFE is being used for other consulting industries, the officer must delete or tailor the below items as applicable.]

- Copies of critical reviews of your software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers;

- Proof of your software inventory;
- Proof of sufficient warehouse space to store your software inventory;
- Copy of the marketing analysis for your final software product;
- Copy of a cost analysis for your software product; and/or
- Evidence of sufficient production space and equipment to support the production of your software.

Jowett, Haley L

From: Perkins, Robert M
Sent: Thursday, July 15, 2010 8:52 AM
To: Johnson, Bobbie L; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Young, Claudia F; Doherty, Shannon P; Sweeney, Shelly A; Kermani, Souzan B
Subject: FW: Right to Control
Attachments: Specialty Occupation RFEs.doc; H-1B Guide RTC.doc; RE: wac 10-181-50323 (PP); FW: Final H1B Memo Materials

Bobbie,

Adding Kurt and Carolyn as a follow-up to our discussion yesterday and to ensure we are all on the same page. Prior to the issuance of the EE memo, we typically would not have questioned right to control for staffing entities in the business of staffing hospitals with physicians. Subsequent to said memo, we have continued to approach this particular scenario in a liberal manner (Note: this scenario is specifically mentioned in the RTC portion of the VSC H1B User Guide) and typically find petitions meet the preponderance of the evidence standard without RFE issuance (although we have sent some to HQ for review).

If you do not agree with this approach, please let me know and we will course correct. After a review of the attached email string titled "RE: wac 10-181-50323" I believe that it would serve all of our best interest if you could provide clarification on this issue, as I may have read too much into Barbara's message dated 1/13/2010 (attached) where she states "we don't expect any major shift in adjudication".

Thanks,

(b)(6)

Robert M. Perkins| Assistant Center Director| Vermont Service Center |USCIS | ☎ [redacted]

From: Bouchard, Armanda M
Sent: Wednesday, July 14, 2010 4:28 PM
To: Johnson, Bobbie L; Young, Claudia F; Doherty, Shannon P; Sweeney, Shelly A
Cc: Perkins, Robert M; Shuttle, Peter J; Bolog, Marguerite M; Lamothe, Judy L; Rhodes-Gibney, Cathy S
Subject:

Bobbie and Claudia,

Attached are VSC's specialty occupation rfes. Anything in red or yellow is hidden text. Also attached is the section of the H-1B guide for RTC.

We have several H-1B guide changes pending with our Center Training Unit. Once they are complete, I'll ask the training unit to send you the updated version of the guide.

Armanda Bouchard ISO3
USCIS Vermont Service Center
802 527 4700 1 4906

Specialty Occupation RFEs

Specialty Occupation RFE 1

The record is not persuasive in establishing that the job offered requires the services of a person performing a "specialty occupation," i.e., the holder of at least a baccalaureate degree in a related field. EXPLAIN WHY THE EVIDENCE IS NOT PERSUASIVE.

Submit evidence showing that:

- A baccalaureate or higher degree, or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position; or
- The proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific field of study; or
- In your company or industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered. Attestations to industry standards must be for similar positions among similarly situated companies; or
- The nature of the specific duties for the proffered position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific field of study.

If you publicized the job opening, submitting tear sheets or other advertising documentation may help establish the educational requirements for the proffered position of JOB TITLE.

If you have previously employed individuals in the position of JOB TITLE, submit documentary evidence such as W-2 Forms and copies of degrees and transcripts to verify:

- The number of individuals you have employed in this position in the past;
- The level of education held by each individual and
- The field of study in which the degree was earned.

Specialty Occupation RFE 2

The duties and responsibilities you have described are vague and do not clearly establish the need for an individual who possesses the minimum of a baccalaureate degree in a specific field of study. For example, you state the beneficiary will "EXAMPLE(S) OF VAGUE JOB DESCRIPTION(S)." It is unclear from this limited description how such duties would require the services of someone who holds the minimum of a baccalaureate degree in FIELD OF STUDY or a related field. Therefore, further evidence is required.

Submit a detailed statement to:

- explain the beneficiary's proposed duties and responsibilities,
- indicate the percentage of time devoted to each duty,

- state the educational requirements for these duties, and
- explain how the beneficiary's education relates to the position.

Specialty Occupation RFE 3

This RFE is ONLY to be used by fraud officers when there is an SOF or FVM in the file and the end client is a questionable company claiming to develop IT products.

You indicate that the beneficiary will be assigned to work with END CLIENT at ADDRESS LOCATION. You provide workers to this end client through your vendor, VENDOR NAME.

You have not established that there will be sufficient specialty occupation work with END CLIENT for the entire requested validity period. Submit a combination of the following or similar types of evidence that will demonstrate sustained specialty occupation work for the dates requested.

Delete the items below that are already in the record.

- Documentation between your client and authorized officials of the companies receiving the end product or services that will be worked on by the beneficiary such as:
  - relevant portions of valid contracts,
  - statements of work,
  - work orders,
  - service agreements, and
  - letters;

- Copy of a position description or any other documentation that describes
  - the skills required to perform the job offered,
  - the tools needed to perform the job,
  - the product to be developed or the service to be provided,
  - the method of payment, and
  - whether the work to be performed is part of the client's regular business;

- Copies of company brochures, pamphlets, pages from internet website, or any other printed work published by the client that provides details pertaining to the products or services they provided;

- Evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work;

- Copies of critical reviews of the client's software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers;

- Proof of the client's software inventory;

- Proof of sufficient warehouse space to store the client's software inventory;

- Copy of the marketing analysis for the client's final software product;
- Copy of a cost analysis for the client's software product; and/or
- Evidence of sufficient production space and equipment to support the production of the client's software.

This list is not inclusive of all types of evidence that may be submitted. You may submit any evidence you feel will establish sufficient specialty occupation work.

Specialty Occupation RFE 4

U.S. Citizenship and Immigration Service (USCIS) does not use a job title, by itself, when determining whether a particular position qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that USCIS considers.

Documentation submitted with your petition indicates that your organization is a INDICATE THE PETITIONER'S INDUSTRY E.G., GAS STATION. You currently employ ## individuals and you wish to employ the beneficiary as JOB TITLE.

You have not provided sufficient evidence to establish that an individual must have a bachelor's degree in a specific field of study in order to perform the duties of the position. Also, it is not clear how the beneficiary will be relieved from performing non-qualifying functions because EXPLAIN WHY; E.G., "you have only 2 employees," OR "the beneficiary will also serve as president of your organization". Therefore, additional evidence is required.

Submit documentation highlighting the nature, scope, and activity of your business enterprise along with evidence to establish the beneficiary will be employed with the duties you have set forth. Such evidence could include, but is not limited to:

- Documentation describing your business, such as business plans, reports, presentations, promotional materials, newspaper articles, web-site text, news copy, etc.
- A detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform;
- Copies of written contractual agreements or work orders from each of the companies who will utilize the beneficiary's services to show the beneficiary will be performing duties of a specialty occupation;
- Documentation of how many other individuals in your establishment are currently, or were, employed in this position, supported by copies of the employees' degrees and evidence of employment such as pay stubs or Form W-2s, W-3s, or 1099s.

Groups Being Held to Itinerary and Right To Control Requirements

The following employers will be evaluated for right to control and itinerary:

- H-1B dependent IT employers offering an IT position at more than one possible work location
- IT employers offering an IT position that meets two of the three 10/25/10 criteria at more than one possible work location
- Employers identified in a Statement of Findings (SOF) who have benched employees or who do not have sufficient work available and there is more than one possible work location.
- All types of staffing companies*
- Other scenarios identified on a case by case basis and after consultation with a supervisor.

*Note: The main product of a staffing company is providing people solutions. A company that uses its own proprietary technology, methodologies, tools and instrumentalities to provide IT work solutions is not a staffing company.

Furthermore, right to control will not be applied to companies who develop and/or manufacture their own trademarked software, hardware components, or offer services related to the products they develop.

Exception: Right to control will not be applied to staffing companies in the business of staffing hospitals with physicians/hospitalists.

Jowett, Haley L

From: Renaud, Daniel M
Sent: Wednesday, January 13, 2010 10:42 AM
To: Perkins, Robert M
Subject: FW: Final H1B Memo Materials
Attachments: H-1B QA Final.doc; H-1B ExecSumm H-1B Employer-Employee Memo.doc; H1B Employer-Employee Memo 1-8-10.pdf

fyi

From: Velarde, Barbara Q
Sent: Wednesday, January 13, 2010 10:19 AM
To: Gregg, Bret S; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
Cc: Johnson, Bobbie L; Young, Claudia F
Subject: FW: Final H1B Memo Materials

Before the call to hash through these changes, we don't expect any major shift in adjudication. The major change is that there is a requirement for the itinerary under certain circumstances but with regards to evidence required to establish the relationship we cannot hang our hat on you must give us a contract or we will deny. If we start swinging this way, we will be called to task. We need to focus on the totality of the evidence. I think our folks are very reasonable and will get it. Just wanting to make sure you get a sense of how your officers are interpreting this. We will be monitoring the blogs to see how stakeholders interpret as well because they might feel that they don't have to provide documents to establish the relationship, but clearly that is not what the memo says either. Thanks for all of your support.

Barbara Q. Velarde
Deputy Associate Director
Service Center Operations Directorate
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2134
Washington, DC 20529

From: Johnson, Bobbie L
Sent: Wednesday, January 13, 2010 9:04 AM
To: Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Velarde, Barbara Q; Neufeld, Donald; Kruszka, Robert F; Young, Claudia F
Subject: Final H1B Memo Materials

All,

We have completed our public outreach materials for the H1B memo, and all of the attached documents have been cleared for posting on the USCIS Website at 11 a.m. today. A Leadership Alert will be coming out shortly with the memo as well.

Please distribute all three attachments to your adjudications units. Also, we will be having a call to discuss this memo as soon as possible; if adjudicators have questions on the memo, please provide those to us in advance.

Thank you.

Bobbie

Bobbie Johnson

Acting Branch Chief
Business Employment Services Team
Service Center Operations, USCIS
[redacted]

(b)(6)

Office of Communications

U.S. Citizenship and Immigration Services

Questions & Answers

January 13, 2009

USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions

Introduction

U.S. Citizenship and Immigration Services (USCIS) issued updated guidance to adjudication officers to clarify what constitutes a valid employer-employee relationship to qualify for the H-1B 'specialty occupation' classification. The memorandum clarifies such relationships, particularly as it pertains to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The memorandum is titled: "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements: Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update AD 10-24)." In addition to clarifying the requirements for a valid employer-employee relationship, the memorandum also discusses the types of evidence petitioners may provide to establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

Questions & Answers

Q: Does this memorandum change any of the requirements to establish eligibility for an H-1B petition?

A: No. This memorandum does not change any of the requirements for an H-1B petition. The H-1B regulations currently require that a United States employer establish that it has an employer-employee relations with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. In addition to demonstrating that a valid employer-employee relationship will exist between the petitioner and the beneficiary, the petitioner must continue to comply with all of the requirements for an H-1B petition including:

- establishing that the beneficiary is coming to the United States temporarily to work in a specialty occupation;
- demonstrating that the beneficiary is qualified to perform services in the specialty occupation; and
- filing of a Labor Condition Application (LCA) specific to each location where the beneficiary will perform services.

Q: What factors does USCIS consider when evaluating the employer-employee relationship?

A: As stated in the memorandum, USCIS will evaluate whether the petitioner has the "right to control" the beneficiary's employment, such as when, where and how the beneficiary performs the job. Please see the memorandum in the links in the upper right hand of this page for a list of factors that USCIS will review when determining whether the petitioner has the right to control the beneficiary. Please note that no one factor is decisive and adjudicators will review the totality of the circumstances when making a determination as to whether the employer-employee relationship exists.

Q: What types of evidence can I provide to demonstrate that I have a valid employer-employee relationship with the beneficiary?

A: You may demonstrate that you have a valid employer-employee relationship with the beneficiary by submitting the types of evidence outlined in the memorandum or similar probative types of evidence.

Q: What if I cannot submit the evidence listed in the memorandum?
A: The documents listed in the memorandum are only examples of evidence that establish the petitioner's right to control the beneficiary's employment. Unless a document is required by the regulations, i.e. an itinerary, you may provide similarly probative documents. You may submit a combination of any documents that sufficiently establish that the required relationship between you and the beneficiary exists. You should explain how the documents you are providing establish the relationship. Adjudicators will review and weigh all the evidence submitted to determine whether a qualifying employer-employee relationship has been established.

Q: What if I receive or have received an RFE requesting that I submit a particular type of evidence and I do not have the exact type of document listed in the RFE?
A: If the type of evidence requested in the RFE is not a document that required by regulations (e.g. an itinerary), you may submit other similar probative evidence that addresses the issue(s) raised in the RFE. You should explain how the documents you are providing address the deficiency(ies) raised in the RFE. Adjudicators will review and weigh all evidence based on the totality of the circumstances. Please note that you cannot submit similar evidence in place of documents required by regulation.

Q: Will my petition be denied if I cannot establish that the qualifying employer-employee relationship will exist?
A: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to a request for evidence (RFE). Your petition will be denied if you do not provide sufficiently probative evidence that the qualifying employer-employee relationship will exist for any time period.

Q: What if I can only establish that the qualifying employer-employee relationship will exist for a portion of the requested validity period?
A: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to a request for evidence (RFE). Your petition may still be approved if you provide evidence that a qualifying employer-employee relationship will exist for a portion of the requested validity period (as long as all other requirements are met), however, USCIS will limit petition's validity to the time period of qualifying employment established by the evidence.

Q: What happens if I am filing a petition requesting a "Continuation of previously approved employment without change" or "Change in previously approved employment" and an extension of stay for the beneficiary in H-1B classification, but I did not maintain a valid employer-employee relationship with the beneficiary during the validity of the previous petition?
A: Your extension petition will be denied if USCIS determines that you did not maintain a valid employer-employee relationship with the beneficiary throughout the validity period of the previous petition. The only exception is if there is a compelling reason to approve the new petition (e.g. you are able to demonstrate that you did not meet all of the terms and conditions through no fault of your own). Such exceptions would be limited and made on a case-by-case basis.

Q: What if I am filing a petition requesting a "Change of Employer" and an extension of stay for the beneficiary's H-1B classification? Would my petition be adjudicated under the section of the memorandum that deals with extension petitions?
A: No. The section of the memorandum that covers extension petitions applies solely to petitions filed by the same employer to extend H-1B status without a material change in the original terms of

employment. All other petitions will be adjudicated in accordance with the section of the memorandum that covers initial petitions.

Q: I am a petitioner who will be employing the beneficiary to perform services in more than one work location. Do I need to submit an itinerary in support of my petition?
A: Yes. You will need to submit a complete itinerary of services or engagements, as described in the memo, in order to comply with 8 CFR 214.2(h)(2)(i)(B) if you are employing the beneficiary to perform services in more than one work location. Furthermore, you must comply with Department of Labor regulations requiring that you file an LCA specific to each work location for the beneficiary.

Q: What happens if I do not submit evidence of the employer-employee relationship with my initial petition?
A: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you will be given an opportunity to correct the deficiency in response to a request for evidence (RFE). However, failure to provide this information with the initial submission will delay processing of your petition.

For more information on USCIS and its programs, visit www.uscis.gov or call 1-800-375-5283.

–USCIS –

EXECUTIVE SUMMARY:
DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP FOR ADJUDICATION OF H-1B PETITIONS, INCLUDING THIRD-PARTY SITE PLACEMENTS

On January 8, 2010, Don Neufeld, Associate Director, Service Center Operations, signed a memorandum entitled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements: Additions to the Officer's Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update 10-24)." This memorandum provides the following:

Summary:

Petitioners must establish they will have a valid employer-employee relationship with the beneficiary throughout the requested validity period for the H-1B petition. In addition, they must establish that the position being offered is a specialty occupation and that petitioners have complied with Department of Labor regulations by filing Labor Condition Applications (LCAs) specific to each location where the beneficiary will work.

- Adjudicators must review all the documentation contained in the petition and determine whether the petitioner will have the *right* to control the beneficiary's employment in order to ascertain whether the petitioner has established the employer-employee relationship.
- In assessing the requisite degree of control, adjudicators should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

- The memorandum also lists a variety of factors that should be considered when evaluating the petitioner's right to control the beneficiary including, but not limited to:

  - Does the petitioner supervise the beneficiary
  - Does the petitioner have the right to control the beneficiary's work
  - Does the petitioner evaluate the work-product of the beneficiary
  - Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished.

- No one single factor to be considered is decisive. Adjudicators must review the *totality of the circumstances* to determine whether the petitioner has established its right to control the beneficiary's employment.

- To assist our officers, the memorandum also contains a number of scenarios both where valid employer-employee relationships exist and where valid employee-relationships do not exist. These are only examples and officers may, of course, see a wide-variety of situations and factors when reviewing an H-1B petition.

- It is important to note that this memorandum does not cover amended petitions. Further guidance is under consideration to clarify the requirement to file an amended petition if there is a material change in the terms of employment.

Key Sections:

- *Guidance for Initial H-1B Petitions*:
  - This section of the memorandum covers the types of evidence that could demonstrate a valid employer-employee relationship between the petitioner and the beneficiary in an initial H-1B petition. The examples in the memorandum include, but are not limited to:
    - A complete itinerary of services or engagements;
    - Signed Employment Agreement;
    - Relevant portions of valid contracts , statements of work, work orders, service agreements with end-user clients.

- *Guidance for Extension H-1B Petitions*:
  - This section of the memorandum covers the types of evidence that could be provided to demonstrate that the petitioner and beneficiary continue to have a valid employer-employee relationship in an extension H-1B petition. The examples in the memorandum include, but are not limited to:
    - Copies of the beneficiary's pay records;
    - Examples of work product created by the beneficiary;
    - Copies of employment history records.

  - The extension petition may be denied if the adjudicator determines that the petitioner failed to maintain the employer-employee relationship during the validity of the previous petition, unless there are compelling reasons to approve the new petition.

- Petitioners must submit a complete itinerary of services or engagements for the requested validity period of the petition if the beneficiary will be placed at more than one work location to perform services.

- The memorandum emphasizes that adjudicators must narrowly tailor their RFEs to address the specific deficiency(ies) in the petition and describe "illustrative" types of evidence that will go directly to curing the deficiency(ies). RFEs should not mandate that the petitioner submit a specific type of evidence unless that evidence is listed in regulations. RFEs also should not request information already contained in the petition.

Jowett, Haley L

From: Chong, Jenny
Sent: Thursday, December 10, 2009 12:28 PM
To: #CSC Division I
Subject: H1B validity date issue

Hi.

When determining the "from" validity date, follow this general rule:

The "from" validity date of the petition should be the latest of the following:

- The date of adjudication/ the approval date
- The LCA "from" date; or
- The date requested by the petitioner.

Here are some exceptions only for Same Employer EOS petitions: (Backdate)

If the petition is marked **2/B**. Same employer- Continuation of previously approved employment without change, backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.

If the petition is marked **2/C** -Change in previously approved employment (with Same Employer)- If the beneficiary's status has expired prior to the date of adjudication, AND the petition was filed by the same employer, then backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.
If the beneficiary's status has not expired prior to the date of adjudication, then follow the general rule listed above.
DO NOT backdate if the petition is filed by a different employer.

If you have any questions please see your supervisors.

Thank You. 

Jenny Chong | **Supervisory Adjudications Officer** | Dept. of Homeland Security| USCIS | Laguna Niguel, CA 92677|

☎: [redacted] | 🖷: 949.389.8027 | ✉: jenny.chong@dhs.gov

(b)(6)

Jowett, Haley L

From: Brokx, John B
Sent: Thursday, March 31, 2011 12:42 PM
To: Fierro, Joseph; Goodman, Lubirda L; Lee, Danielle L; Gooselaw, Kurt G; Sun, Catherina C; Steele, Jenny B
Cc: DeJulius, Robert W; Helfer, Wayne D; Phan, Lethuy; Mikhelson, Jack; Cameron, Felicia M
Subject: I-129, H-1B, Concurrent Employment, Validity Period NOT Limited

All,

In a recent inquiry it was asked whether a concurrent employer is given:

- the same validity period as the original employer; **OR**
- whatever validity period it requests up to the maximum period allowed?

The guidance below indicates that we cannot limit the validity period requested by a concurrent employer [up to the maximum allowed].

This email will be posted to **O:_Adjudications\I-129\H1B1\3-Reference Material\1-Beneficiary Issues\Concurrent Employment**

NOTE: Further guidance is under consideration by OCC at the time of this message.

From: Jepsen, Patricia A
Sent: Tuesday, April 15, 2008 2:40 PM
To: Canney, Keith J; Perkins, Robert M; Prince, Rose M; Gooselaw, Kurt G
Cc: Kane, Daniel J; Bouchard, Armanda M
Subject: phone conversation

Just spoke to VSC, we agreed that, given the OCC opinion that we cannot limit the approval time on a petition for an H-1B currently employed by an exempt petitioner seeking concurrent employment with a non-exempt employer, we will approve the non-exempt concurrent work for the full amount of time requested (and covered by the lca)

Patricia Jepsen
Adjudications Officer
Service Center Operations
U.S. Citizenship and Immigration Services
Department of Homeland Security
P: [redacted]
F: (202) 272-1398

(b)(6)

Jowett, Haley L

From: Brokx, John B
Sent: Thursday, March 31, 2011 12:50 PM
To: 'Brokx, John B'
Subject: I-129, H-1B, Concurrent employment, Validity Period NOT limited

----- Original Message -----
From: Haskell, Alexandra P
To: Cummings, Kevin J; Williams, Carol L
Cc: Cox, Sophia; Velarde, Barbara Q; Kruszka, Robert F
Sent: Mon Feb 09 17:27:59 2009
Subject: RE: Cap - concurrent employment issue

Hi Kevin,

This looks correct to me. My understanding is that we will give the full period of time requested if the alien is eligible (we will not approve for a period of time beyond the statutory limitation of stay or AC21 extension time, etc.) However, the alien must demonstrate that s/he continues to be employed by the cap-exempt employer for any further extensions.

Thanks,

Sasha

Alexandra P. Haskell
Adjudications Officer
USCIS SCOPS Business & Trade Services
Phone [redacted]
Fax: (802) 288-7833 (b)(6)

-----Original Message-----
From: Cummings, Kevin J
Sent: Monday, February 09, 2009 5:17 PM
To: Williams, Carol L; Haskell, Alexandra P
Cc: Cox, Sophia; Velarde, Barbara Q; Kruszka, Robert F
Subject: Fw: Cap - concurrent employment issue

Carol and/or Sasha,

I think that the responses below are accurate. Can you please confirm? Thanks.

--Kevin

From: Gooselaw, Kurt G
Sent: Monday, February 09, 2009 1:59 PM
To: Gregg, Bret S
Subject: RE:

Bret,

The latest on this is from the 5/30/08 AC21 memo pages 7-8:

Also this memo does not provide the timeframe for concurrent employment. HQ has advised to give the full three year period if eligible, notwithstanding the length of time given on the exempt employer.

Pursuant to the provisions of INA §214(g)(6), USCIS does not require that an alien who is cap- exempt by virtue of the above types of employment, be counted towards the limitation contained in 214(g)(1)(a) if they accept concurrent employment with a non-exempt employer. INA §214(g)(6) reads as follows:

Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5). (Emphasis added.)

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H-1B alien beneficiary is still employed in a cap-exempt position.

At the time of filing of a concurrent employment H-1B petition that is subject to the numerical limitation of 214(g)(1)(a):

a. If the H-1B alien beneficiary has not "ceased" to be employed in a cap-exempt position pursuant to INA § 214(g)(5)(A) and (B), then he or she will not be counted towards the cap.

b. If the H-1B alien beneficiary has "ceased" to be employed in a cap-exempt position, then the alien will be subject to the H-1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary.

c. If USCIS determines that an H-1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H-1B petition has been approved on his or her behalf, USCIS will deny any subsequent cap-subject H-1B petition filed on behalf of the H-1B alien beneficiary if no cap numbers are available.

From: Gregg, Bret S
Sent: Monday, February 09, 2009 11:20 AM
To: Gooselaw, Kurt G
Subject:

Kurt,

We spoke with Kathy Grzegorek today and she had a few questions and these may also come up in Seattle:

#1 What are the cap implications if someone is working for an exempt petitioner and seeks concurrent employment with a non-exempt petitioner?

#2 What happens in scenario 1 where they quit the exempt petitioner and want to remain working for the non-exempt? Are they then subject to the cap?

Please explain so I can forward the answers to her. I'll get you a CSC update today to bring to Seattle.

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Tuesday, April 27, 2010 10:54 AM
To: #CSC Division II
Cc: Nguyen, Carolyn Q; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject: Meeting 4/22

In response to last Thursday's meeting this is being issued for clarification. This is solely guidance and not a policy memorandum and this is not to be quoted or used in RFEs or distributed to the public. Here are some bullets for your reference to assist with O and H1B adjudication. Should you have questions, please discuss with you supervisors.

Thanks

- O-1 Itineraries – As discussed yesterday events and a series of events can be considered one event. There is no day gap threshold in determining whether two or more related events constitute one event for the validity period. You must evaluate, given the facts, whether a gap in time is reasonable and all events or series of events are related in order to be considered one event. This is a case-by-case determination given the totality of the evidence. For example – should a beneficiary be scheduled to perform at more than two venues look to the purpose and scope of the performance and verbiage describing what the beneficiary will be doing between performances in order to evaluate whether the two or more performances can be considered one event. There is no 45 day rule. We will evaluate these in a way that is beneficial to the petitioner and use a reasonable approach. However, should two performances be so far apart that it appears that each performance is one separate event, we will RFE first to allow the petitioner to describe what the beneficiary will be doing between these two or more performances before making a final decision.

- Sustained acclaim – Sustained acclaim is demonstrated by receiving a major internationally recognized award (O-1A). For O-1B arts the beneficiary must have received or been nominated for a significant national or international award or prizes. If not, the beneficiary may qualify by **adequately** meeting 3 of the 8/6 (O1A and O1B arts) regulatory prongs. The prongs are setup to weigh whether or not someone has demonstrated sustained acclaim and meet the O-1 threshold. There was a totality review adjudication discussion, however, we will continue to adjudicate and ensure that the evidence submitted meets that established level for the prongs in order to determine whether the beneficiary qualifies for O-1. Should the petitioner demonstrate the beneficiary **adequately** (more likely than not) meets the 3 of the 8/6 prongs, the case should be approved.

- O-1B Arts – The evidentiary standard is **prominence, well known or leading** in the field of arts. When evaluating evidence that falls within each prong, this standard needs to be applied. O-1B arts has the lowest standard of the three O-1 classification types.

- O-1B Motion Picture/TV – Receipt or nomination of a significant international/national award (including but not limited to Academy Award, an Emmy, a Grammy, or a Director's Guild Award) in this category is sufficient to establish the beneficiary qualifies for this O-1 classification type without additional evidence to show a demonstrated record of achievement. The evidentiary standard is **outstanding, notable or leading in the motion picture or television field**. If an award is not shown when evaluating evidence that falls within each prong this standard needs to be applied. O-1B motion picture/television has the second lowest standard of the three O-1 classification types.

- O-1 comparable evidence – Should evidence be submitted where it cannot be considered a significant award or evidence that does not readily fit into the prongs, such evidence should be considered and analyzed in accordance with the set standards. It should be noted that there is no provision in the regulations for comparable evidence in the motion picture and television category.

- One hit wonders – these are usually few and far between. However, if a beneficiary received a significant award 30 years ago and did not continue in their field of endeavor this may call into question whether the beneficiary actually meets the standard. This would need to be evaluated on a case-by-case basis.

- H-1B offsite employment initial filing (change of employer) – Should the petitioner have a well-established filing practice or track record with USCIS – unlike H-1B dependent employers, 10/25/10 employers, and CFDO returns with Statement of Findings – an employment support letter (written by the petitioner) and itinerary is sufficient as long as it shows the job description, right of control and validity period of the position. With this evidence it is more likely than not the petitioner has met its burden for the employer-employee relationship aspect and you **have the discretion** to accept this evidence as meeting the EE standard. All other issues such as maintenance of status, beneficiary qualifications, specialty occupation must also be evaluated independently on other evidence. Should the case be approvable in all respects and the itinerary states the validity period and matches what is requested on the petition and LCA, we should use that period of time period as the validity period.

- H-1B offsite employment (initial) continued – Should the employment letter fail to include the pertinent information discussed above and/or the petitioner does not have a well-established filing practice or track record, see above for examples, you would need to evaluate the evidence and identify the deficiencies. You should issue an RFE, but you would need to articulate what was received and what the deficiencies are. In this situation the RFE needs to include the evidence as bulleted in the template.

- Contracts – If a contract combined with the statement of work (SOW), addenda, end user client letter, service agreements, etc. is present the validity within those documents controls the end date. If it is shorter than one year, issue an RFE and provide the petitioner with an opportunity to submit evidence for the full period requested. If an RFE has already been issued for these documents, a second RFE is not needed. If less than one year is shown, then provide one year. If more than one year provide that time as long as the beneficiary is eligible. Should there be a range we would give the shorter period. If the shorter period is less than one year we would provide one year.

- EOS with the same employer – As long as the petitioner can establish that it continues to meet all the regulatory H-1B requirements the case should be approved. If the EOS does not indicate regulatory compliance an RFE is warranted and use the RFE template accordingly.

- EOS with a new petitioner – see above on initial filings.

- Self-petitioning H-1Bs and O-1s – Self-petitioning H-1Bs need to be brought to your supervisor with the intended decision – no clerical or C3 updates. O-1self-petitioners can be adjudicated but do not use H-1B language or the EE memo in your adjudication. The regulation for Os is clear that an O-1 beneficiary cannot self-petition and does not qualify as a US employer.

Jowett, Haley L

From: Phan, Lethuy
Sent: Friday, March 02, 2012 6:48 PM
To: Chong, Jenny
Subject: ONET and OOH
Attachments: 20120117131943515.pdf

I remember we talked about ONET and OOH. Attached is the AAO's decision that disregards the use of ONET on specialty occupation issue. FYI

Jowett, Haley L

From: Sweeney, Shelly A
Sent: Wednesday, February 24, 2010 12:57 PM
To: Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
Cc: Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
Subject: RE: Employer-Employee Memo- Cognizant
Attachments: H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

From: Nguyen, Carolyn Q
Sent: Tuesday, February 23, 2010 4:06 PM
To: Perkins, Robert M; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

From: Perkins, Robert M
Sent: Wednesday, February 17, 2010 10:55 AM
To: Nguyen, Carolyn Q; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

From: Nguyen, Carolyn Q
Sent: Tuesday, February 16, 2010 6:35 PM
To: Young, Claudia F; Johnson, Bobbie L
Cc: Perkins, Robert M; Gooselaw, Kurt G
Subject: FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

From: Devera, Jennie F
Sent: Wednesday, February 10, 2010 4:08 PM
To: Nguyen, Carolyn Q
Subject: Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

From: Nguyen, Carolyn Q
Sent: Monday, June 22, 2009 1:53 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

From: Gregg, Bret S
Sent: Monday, June 22, 2009 1:45 PM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Chau, Anna K; Poulos, Christina
Subject: FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

---

From: Kruszka, Robert F
Sent: Monday, June 22, 2009 11:18 AM
To: Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
Subject: FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases.
Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

H1B: On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

H1B Extensions: W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

L1B: Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

L1B: Extensions: We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

DRAFT RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

DRAFT RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

QUESTION: On page 3 at the bottom, the third fact is, "Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?" I keep getting tripped on the last clause, "if such control is required". Do you know what this is saying/asking?

DRAFT RESPONSE: We interpret this as referring back to the phrase "day-to-day basis". As mentioned later in the memo, adjudicators are to keep the nature of the business in mind when reviewing the petition. If the nature of the occupation would require supervision and control on a day-to-day basis, then the petitioner should be able to demonstrate the "right to control" the beneficiary's work on a day-to-day basis.

Jowett, Haley L

From: Fierro, Joseph
Sent: Thursday, March 03, 2011 10:34 AM
To: #CSC Division I
Cc: Prince, Rose M; Goodman, Lubirda L; Arganoza-Franciliso, Carmen U; McMahon, Gerald K; Oliver, Jamie D; DeJulius, Robert W; Brokx, John B; Helfer, Wayne D; Mikhelson, Jack; Cameron, Felicia M; Phan, Lethuy; Onuk, Semra K; Dewitty-Davis, Janine L; Robinson, Christopher M; Gooselaw, Kurt G; Lee, Danielle L; Mink, Christine; Abram, John P; Chau, Anna K
Subject: RE: H-1B Guidance for consistency of adjudication

All:

Please be aware that SCOPS will continue to review all IBMi decisions before they go out until further notice. Therefore, please continue to forward all IBMi cases to
WS 523

Erik Elias is the supervisory POC in the division if you have any questions.

Thanks,

Joe

From: Fierro, Joseph
Sent: Tuesday, March 01, 2011 1:16 PM
To: #CSC Division I
Cc: Prince, Rose M; Goodman, Lubirda L; Arganoza-Franciliso, Carmen U; McMahon, Gerald K; Oliver, Jamie D; DeJulius, Robert W; Brokx, John B; Helfer, Wayne D; Mikhelson, Jack; Cameron, Felicia M; Phan, Lethuy; Onuk, Semra K; Dewitty-Davis, Janine L; Robinson, Christopher M; Gooselaw, Kurt G; Lee, Danielle L; Mink, Christine; Abram, John P; Chau, Anna K
Subject: FW: H-1B Guidance for consistency of adjudication

Div 1:

Please see below for guidance pertaining to the adjudication of IBM India and all H-1B petitions.

Thanks,

Joe

From: Richardson, Gregory A
Sent: Tuesday, March 01, 2011 12:36 PM
To: Renaud, Daniel M; Melville, Rosemary; FitzGerald, Karen L; Johnson, Bobbie L
Cc: Canney, Keith J; Laroe, Lisa A; Fierro, Joseph; Sun, Catherina C; Velarde, Barbara Q; Harton, Frank A; Sweeney, Shelly A; Tamanaha, Emisa T; Cox, Sophia
Subject: H-1B Guidance for consistency of adjudication

Service Center Directors,

During recent discussions with both the Vermont and California Service Centers, and after reviewing several IBM India (IBMi) cases, we provide additional clarification on a variety of issues and scenarios that have been presented relative to the IBMi filings.

(b)(7)(e)

Background

[redacted]

Case by Case Adjudication

Adjudicators are reminded that each case must be adjudicated on its own individual merit. While many filings may look similar, especially when filed by the same petitioner, each petition is a unique petition for a separate beneficiary and for differing types of employment. While it is important for adjudicators to be cognizant of fraud patterns for referral to the fraud unit, an adjudicator must carefully examine each petition on its merits and must look at the petition and the evidence submitted in its totality. Adjudicators should resist the urge to formulate hard and fast bright line standards. In one case, a certain piece of evidence might be sufficient to establish eligibility, whereas in a subsequent filing there may be material discrepancies within the record which will require the adjudicator to ask for additional evidence to resolve such discrepancies.

Standard of Proof

Absent a statute to the contrary in a particular context, the standard of proof that adjudicators must use in the adjudication of employment-based petitions is preponderance of the evidence. If the petitioner submits relevant, probative, and credible evidence that leads the adjudicator to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. The preponderance of the evidence standard does not require the petitioner to provide clear and convincing evidence nor does a mere scintilla of evidence meet the burden. It is a balancing act. Meaning, adjudicators should avoid applying standards that are either too high/rigid or too low/loose. Please refer to the January 11, 2006 memo titled *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 and the Adjudicators Field Manual for further clarification.*

Objectivity

USCIS must *fairly* adjudicate each case on its merits. All petitioners should be held to the same regulatory and statutory requirements that are applicable to them. An adjudicator cannot begin to make assumptions based merely on the size of a petitioning entity and then effectively waive evidentiary requirements because the petitioner is a recognized entity. Again, the nature and extent of the required documentation will depend upon the record in its totality.

(b)(5)

Third-party placements

[redacted]

[redacted]

Specialty occupation

Each H-1B petition must be accompanied by documentation to establish that the beneficiary will be engaged in a specialty occupation. Thus, an adjudicator must be able to determine from the evidence submitted whether 1) the employment being offered is in fact a specialty occupation and 2) whether specialty occupation work is available for the validity period. Both of these issues are of particular importance when the beneficiary will be working at a third-party client location. Adjudicators are reminded to look at each petition on a case by case basis to ensure that both prongs of the specialty occupation requirement are met.

Thank you,

Greg Richardson
Chief Adjudications Division,
Service Center Operations, USCIS

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, March 10, 2010 11:58 AM
To: Nguyen, Carolyn Q
Subject: RE: AILA H-1B Questions

Where there is an evaluation from a college or university issuing an evaluation based on training and/or experience, the author must present evidence that they are in a position to grant college level credit. They may be a recognized authority but may not be able to grant college level credit. Unless it has been demonstrated that these evaluators are in that position of authority to grant, the evaluation will not be considered.

Regarding independent evaluators, we do see evaluations combining education with training and/or experience and make a determination that the combination is equivalent to a degree. Evaluators in these situations can only evaluate education. Should we receive evidence from recognized experts regarding training and/or experience we review and USCIS makes a determination whether the education evaluation coupled with the recognized authority letters meet the degree requirement.

From: Nguyen, Carolyn Q
Sent: Wednesday, March 10, 2010 9:35 AM
To: Sweeney, Shelly A
Cc: Gooselaw, Kurt G
Subject: FW: AILA H-1B Questions

From: Elias, Erik Z
Sent: Tuesday, March 09, 2010 7:46 AM
To: Nguyen, Carolyn Q
Subject: FW: AILA H-1B Questions

I don't think the officers are discounting the evaluator's opinion just because he/she is paid for it. I've never seen that language in a denial or RFE. What I typically see are letters written by recognized authorities (usually a college professor) detailing how the beneficiary has expertise in the field. The writer typically meets the definition of a "recognized authority". However, the petitioner, at times, fails to establish that the beneficiary's training and/or work experience included "...the theoretical and practical application of specialized knowledge required by the specialty occupation...[and]...that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation..." Experience letters are usually general in nature ("Beneficiary was employed as a software engineer from mm/dd/yyyy – mm/dd/yyyy. His performance was good.") No details are given about the work the beneficiary performed, who the beneficiary worked with or if those individuals have a degree or equivalent in the specialty.

Regarding brief periods of stay as a visitor for business or pleasure I agree with the response that was provided. Brief trips are not interruptive of the one year requirement but should not be counted toward time spent outside the United States. I feel the regulation is pretty clear.

From: Nguyen, Carolyn Q
Sent: Monday, March 08, 2010 4:11 PM

To: Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Harvey, Mark E
Subject: FW: AILA H-1B Questions

Hi,

May I get your take on these scenarios and what we see on the floor?

Are we saying that because these individuals get paid for their evaluations, we are discounting their opinion?

Under 8 CFR § 214.2(h)(4)(iii)(D)(5), education and experience can be considered the equivalent of a corresponding degree, *inter alia*, if the alien's expertise in the specialty occupation has been recognized by "at least two recognized authorities in the specialty occupation." A "recognized authority" is defined in 8 CFR § 214.2(h)(4)(ii) as someone with expertise, special skills or knowledge in a particular field qualifying the person to render the opinion, and the opinion itself must be supported by the writer's qualifications, the writer's experience in giving opinions supported by specific examples, and the methodology and basis for reaching the conclusion. In relation to the proof required under 8 CFR § 214.2(h)(4)(iii)(D)(5), examiners appear to be rejecting "recognized authority" letters written by academics under 8 CFR § 214.2(h)(4)(iii)(D)(5) if these "authorities" are writing the letters at the request and pursuant to payment from credentials evaluation services, as opposed to on behalf of their educational institutions. Again – it does not appear that 8 CFR § 214.2(h)(4)(iii)(D)(5) prohibits anyone seeking to qualify as a "recognized authority" from providing the opinion letter via an evaluation service or other third party, so long as it is clear that it is the opinion of the authority and not the opinion of the third party, and so long as the opinion and its writer meet the other requirements of 8 CFR § 214.2(h)(4)(iii)(D)(5). Please remind examiners that evidence from a "recognized authority" may include opinion evidence found contained in reports from credentials evaluation services

Do the letters referenced below also lack a mention that these individuals have the authority to grant college level credit or are we discounting the evaluations because they simply do not indicate that they were done on behalf of the university?

AILA requests clarification of what the Service requires for credential evaluations that combine education and work experience. The regulations at 8 CFR § 214.2(h)(4)(iii)(D) describe what evidence may be submitted to demonstrate equivalence. The regulation at 8 CFR § 214.2(h)(4)(iii)(D)(1) states that combined education/experience evaluations must come from "an official who has authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training or work experience." Members report denials where the evaluation in support of an 8 CFR § 214.2(h)(4)(iii)(D)(1) determination is presented on the university's letterhead, but, the evaluations do not state that they were "done on behalf" of the university. Please remind adjudicators that there is no requirement that the evaluation have been "done on behalf of the university."

Thanks.

From: Sweeney, Shelly A
Sent: Friday, March 05, 2010 11:26 AM
To: Gooselaw, Kurt G; Nguyen, Carolyn Q; Perkins, Robert M
Cc: Johnson, Bobbie L; Young, Claudia F
Subject: AILA H-1B Questions

Kurt, Carolyn and Rob,

SCOPS has a meeting with AILA scheduled for the 17th. AILA has submitted a few questions/issues on H-1Bs. I have drafted responses to two and had a question for you all on the third. Can you let me know if you have any issues with the two draft responses and let me know what you think on the third by COB on Tuesday, March 9?

Thanks!

Shelly

Shelly Sweeney
Adjudications Officer
Business Employment Services Team
Service Center Operations
20 Massachusetts Ave N.W., Ste 2000
Washington D.C. 20529-2060

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Monday, July 06, 2009 10:46 AM
To: Nguyen, Carolyn Q; Perkins, Robert M
Subject: RE: Cognizent

As far as I understood we are to request documentation that outlines the beneficiary's location and work assignment either through an end user agreement or the pertinent parts of the petitioner's contract with the end user if they are H1B dependent, 10/25/10, etc. The discussion where the petitioner will just identify the end user was discussed but how that would apply was unclear. In the absence of any formal guidance we are still proceeding with our current procedure as identified above. Unless the agreement or other documentation is clear on the time requested, we will give one year. Example: If the validity period is unclear such as the petitioner requesting 2 - 3 years, as we have been seeing, SCOPS agreed that we should be giving 1 year. If less than one year identified, then 1 year as well.

From: Nguyen, Carolyn Q
Sent: Monday, July 06, 2009 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G
Subject: RE: Cognizent

Funny, Kurt questioned me on that as well.

Below was Bret's message when he forwarded Robert's guidance to us. Since I went on leave before Barbara came out here, I don't know what was discussed though I would think it would be applied across the board.

Kurt - did Barbara discuss this when she was out here? Was the validity period mentioned? Thanks.

From: Gregg, Bret S
Sent: Monday, June 22, 2009 1:45 PM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Chau, Anna K; Poulos, Christina
Subject: FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

---

From: Perkins, Robert M
Sent: Monday, July 06, 2009 8:23 AM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Subject: RE: Cognizent

Thanks...is that how you are now proceeding with other staffing agencies as well?

Rob

From: Nguyen, Carolyn Q
Sent: Monday, July 06, 2009 11:21 AM
To: Perkins, Robert M; Gooselaw, Kurt G
Subject: RE: Cognizent

Hi Rob,

For Cognizant cases, we are following the guidance below and interpreting it as requiring just identification of a third party. We do not require that the letter be from the end user.

Thanks.

From: Perkins, Robert M
Sent: Monday, July 06, 2009 5:21 AM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Subject: FW: Cognizent

Quick question...for H1B initial filings, are you accepting a letter from the petitioner as sufficient to meet the area highlighted in green below or are you requiring documentation from the end user? As I alluded to in the attached E-mail string, we are still requiring evidence from the end user.

Thanks,

Rob

From: Velarde, Barbara Q
Sent: Thursday, July 02, 2009 3:16 PM
To: Cummings, Kevin J; Hazuda, Mark J
Cc: Perkins, Robert M; Kane, Daniel J; Kruszka, Robert F
Subject: RE: Cognizent

With regards to the question posed at the end of the email: for now yes on extensions the issue of specialized knowledge should only be revisited if there was misrepresentation in the initial filing or a change in the nature of the duties or change in position. Working for a new third party would trigger the review.

Barbara Q. Velarde
Chief, Service Center Operations
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, Room 2132
Washington, DC 20529

From: Cummings, Kevin J
Sent: Thursday, July 02, 2009 1:58 PM
To: Hazuda, Mark J
Cc: Perkins, Robert M; Kane, Daniel J; Kruszka, Robert F; Velarde, Barbara Q
Subject: RE: Cognizent

Perfect, Mark. Thanks.

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

From: Hazuda, Mark J
Sent: Thursday, July 02, 2009 1:51 PM
To: Cummings, Kevin J

Cc: Perkins, Robert M; Kane, Daniel J
Subject: RE: Cognizent

Kevin,

Sorry for the delay,

Here are the responses for the H1B cap and EOS Cognizant scenarios...the informal guidance has had no impact with the H1B petitions, as it is consistent with how we were previously processing these petitions.

H1B Cap – To date, Cognizant has identified the city/state where the beneficiary will purportedly be employed, but has failed to identify the actual client (third party) where the beneficiary will provide services. The language in the denials (done prior to SCOPS meeting with Mike) does allude to contracts. However, Cognizant was also afforded the opportunity to submit statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate end client companies and has failed to do so.

H1B EOS – VSC requires a letter from the end client requiring (see exemplar attached):

- The name of the project the beneficiary is assigned to;
- Whether there is a vendor through whom the beneficiary's services are provided;
- The name of the vendor, if applicable;
- Whether the end client or the vendor supervises the beneficiary;
- The name, title, and contact information of the person who primarily supervises or will supervise the beneficiary at the work site; and
- Whether the work site has the ability to assign the beneficiary to a different employer.

With respect to the L1B questions we are currently adjudicating these petitions in the following manner:

L1B Initials: In general the two major areas of concern with the initial filings are:

1) Specialized knowledge- VSC is reviewing files for evidence of the beneficiary's specialized knowledge of the petitioning organization's products or services and that the position requires specialized knowledge. The beneficiary's specialized knowledge must be specific to that of the petitioner. If the beneficiary's specialized knowledge is specific to the 3rd party, the beneficiary would be ineligible for the L1B classification and the petition would be denied.
1) Control and supervision of the offsite beneficiary- If the beneficiary is stationed primarily at the worksite of an unaffiliated employer and the alien is principally under the control and supervision of the unaffiliated employer the petition will be denied under the provisions of the 2004 Reform Act.

L1B Extensions:

VSC has been having our officers take a hard look at all L1B extensions with respect to the issue of specialized knowledge and the 2004 Reform Act provisions. Due to a variety of reasons (AAO decisions, evolving understandings of the computer industry, 2004 Reform Act guidance, etc.) that have been recently confirmed in recent meetings with petitioners such as IBM, we have made the determination that the beneficiaries do not possess specialized knowledge of the petitioner's organization products or services. In fact over time we have determined that many of these beneficiaries actually only have a basic or very common level of knowledge and do not qualify for the L1B classification.

We do understand that this manner of adjudication impacts the expectations of businesses filing L1B extension petitions. Although VSC has been looking at the issue of specialized knowledge on certain L1B extensions, over time it is anticipated that this will become less of an issue at the extension phase.

We would like SCOPS/BOSS to confirm that VSC should only revisit the issue of specialized knowledge on extensions if it is found there was misrepresentation in the initial filing or the nature or duties of the position change. Examples of changes would include things such as working for a different third party at the time of extension or that the natures of the duties are changing.

Thanks,

Mark J. Hazuda
Deputy Director, Vermont Service Center
US Citizenship and Immigration Services

From: Cummings, Kevin J
Sent: Thursday, July 02, 2009 1:48 PM
To: Gregg, Bret S
Cc: Devera, Jennie F; Nguyen, Carolyn Q; Gooselaw, Kurt G; Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q; Kruszka, Robert F; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
Subject: RE: Cognizent

Thank you, Bret. VSC?

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

From: Gregg, Bret S
Sent: Wednesday, July 01, 2009 6:55 PM
To: Cummings, Kevin J
Cc: Devera, Jennie F; Nguyen, Carolyn Q; Gooselaw, Kurt G; Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q; Kruszka, Robert F; Poulos, Christina; Renaud, Daniel M; Hazuda, Mark J
Subject: FW: Cognizent

For CSC - Thanks

From: Devera, Jennie F
Sent: Wednesday, July 01, 2009 3:53 PM
To: Gregg, Bret S
Cc: Nguyen, Carolyn Q
Subject: RE: Cognizent

Bret,

Yes, we are following the guidance below. Attached is a list of the Cognizant cases we've approved so far. We are still seeing cases where the proposed place of employment does not match with the LCA. These are being denied.

Thanks

Jennie

From: Gregg, Bret S
Sent: Wednesday, July 01, 2009 3:21 PM
To: Devera, Jennie F
Subject: FW: Cognizent

We don't really get L's from them but what are we seeing with H's and are we following the below for cognizant? Thanks

---

From: Cummings, Kevin J
Sent: Wednesday, July 01, 2009 12:06 PM
To: Kruszka, Robert F; Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Williams, Carol L; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
Subject: RE: Cognizent

VSC and CSC:

Please see the e-mail below from Robert once again. Can you please confirm whether you are following the admittedly informal guidance outlined below at present? If so, how is this impacting what you have been doing previously in relation to the scenarios listed below?

Finally, are the Cognizant cases still being denied by both CSC and VSC? Thanks.

--Kevin

Kevin J. Cummings
Branch Chief, Business & Trade Services
USCIS Service Center Operations
Department of Homeland Security

From: Kruszka, Robert F
Sent: Monday, June 22, 2009 2:18 PM
To: Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
Subject: FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases. Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

H1B: On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

H1B Extensions: W2 or other appropriate wage documents are necessary to establish that the beneficiary maintained status. A contract or similar documentation as above is appropriate to support the offer of employment as well as the LCA requirement given the fact that Cognizant contracts out.

L1B: Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

L1B: Extensions: We generally will not re adjudicate the initial finding regarding the beneficiary's specialized knowledge. We generally will defer to the past adjudication when the present duties at the extension phase are essentially the same as those outlined in the initial filing. However, given the fact that Cognizant is involved in supporting offsite employment, even at the extension phase sufficient documentation must be provided to detail and show that Cognizant rather than the end client will exert control over the beneficiary. In addition, to determine maintenance of status, appropriate wage documents may be requested.

The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

Jowett, Haley L

From: Sweeney, Shelly A
Sent: Wednesday, February 24, 2010 12:57 PM
To: Nguyen, Carolyn Q; Perkins, Robert M; Gooselaw, Kurt G
Cc: Velarde, Barbara Q; Young, Claudia F; Johnson, Bobbie L; Doherty, Shannon P
Subject: RE: Employer-Employee Memo- Cognizant
Attachments: H1B Memo Questions OCC Cleared 2-24-10.doc

Please see attached responses regarding questions that came up during/after our teleconference on the employer-employee memo.

From: Nguyen, Carolyn Q
Sent: Tuesday, February 23, 2010 4:06 PM
To: Perkins, Robert M; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

Hi,

Are we on status quo for Cognizant cases or are we to apply the memo and require the establishment of the employer-employee relationship throughout the period requested?

Thanks.

From: Perkins, Robert M
Sent: Wednesday, February 17, 2010 10:55 AM
To: Nguyen, Carolyn Q; Johnson, Bobbie L
Cc: Gooselaw, Kurt G; Sweeney, Shelly A; Young, Claudia F
Subject: RE: Employer-Employee Memo- Cognizant

I believe this was a SCOPS action item following our conference call on January 20th....VSC has remained "status quo" while waiting further clarification on this issue. On a related note, attached are the RFE templates (view in print layout) that we intend to start utilizing as a result of the employer-employee memo.

Rob

From: Nguyen, Carolyn Q
Sent: Tuesday, February 16, 2010 6:35 PM
To: Young, Claudia F; Johnson, Bobbie L
Cc: Perkins, Robert M; Gooselaw, Kurt G
Subject: FW: Employer-Employee Memo- Cognizant

Hi,

Just wanted to give you a heads up....the new memo dated 01/08/2010 states that a petitioner must establish that there exists a valid employer-employee relationship throughout the requested H-1B period. This may be a change on the validity period for some of the Cognizant cases.

Thanks.

From: Devera, Jennie F
Sent: Wednesday, February 10, 2010 4:08 PM
To: Nguyen, Carolyn Q
Subject: Employer-Employee Memo- Cognizant

Hi, Carolyn,

Does the 1/8/10 "Employer-Employee" memo change the way we are reviewing Cognizant cases?

- Prior to the memo if they did not provide a contract end-date or the estimated end-date is speculative, we have been giving them one year validity date. I understand that we will no longer assign **one-year** validity date on cases that have less than a year contract. The case will be granted for time that they can prove. We will give them the benefit of an RFE before limiting the validity dates.
- To establish an employer-employee relationship, page 8 of the memo provides a list of documentation that can be provided. However, on Cognizant filings, at a minimum we will take a statement from them which identifies the end-client.

Please confirm if these are correct.

Thanks

Jennie

From: Nguyen, Carolyn Q
Sent: Monday, June 22, 2009 1:53 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Subject: FW: Cognizent

Although the guidance below is specific to Cognizant cases, it will probably be adopted for other off-site H-1B employment and the L-1B specialized knowledge cases. We'll get confirmation this week. Thanks.

From: Gregg, Bret S
Sent: Monday, June 22, 2009 1:45 PM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Chau, Anna K; Poulos, Christina
Subject: FW: Cognizent

Carolyn/Kurt – please advise your divisions. I assume this is the same approach we will take with similar companies and can discuss with Barbara tomorrow. Thanks

---

From: Kruszka, Robert F
Sent: Monday, June 22, 2009 11:18 AM
To: Poulos, Christina; Gregg, Bret S; Renaud, Daniel M; Hazuda, Mark J
Cc: Williams, Carol L; Cummings, Kevin J; Young, Claudia F; Richardson, Gregory A; Velarde, Barbara Q
Subject: FW: Cognizent

Don and Barbara met with Mike Aytes on Friday regarding the Cognizant cases.
Their discussion focused on the H1B and L1B scenarios and Mike articulated the following expectations:

H1B: On an initial filing since Cognizant is an H1B dependant company and also engages in 3rd party contracting. At a minimum there needs to be an LCA specific to the location where the beneficiary will be working, documentation that clearly outlines the duties and documentation that identifies the third party employer. He stated his support in obtaining this documentation but said it didn't have to be specifically contained within a contract. So it would appear the documentation CSC just received while arguably sufficient for purposes of identifying specialty occupation work at a third party site, the LCA for a different geographical area would be a disqualifier. Mike agrees the LCA on record must comport with the identified third party employment site

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L1B: Initial filings need to appropriately evidence the specialized knowledge requirement and beneficiary's qualifications. He indicated a level of concern with 3rd party employer scenarios being able to meet the L1B standard per the Visa Reform when the beneficiary's specialized knowledge is specific to the petitioner not clear how that translates to the 3rd party employer. Evidence must be provided to show that Cognizant rather than the end client will exert control over the beneficiary.

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The bottom line is if we did not apply the proper L1B specialized knowledge standard at the time of the initial decision, we will not revisit it unless there was misrepresentation in the initial filing. We have to make the right decision the first time and folks will be able to rely to a substantial degree on that initial finding. These types of cases will over time become less of an issue since the post Visa Reform standard is now the norm.

Guidance on the general adjudication's standard relative to the L1B specialized knowledge extension cases will be forthcoming. However, please use this email in focusing the adjudication of these cases. Please let me know if a call is needed and as always feel free to pose any follow up questions.

Thank you as always for your continued cooperation and support

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Thursday, November 19, 2009 4:11 PM
To: Nguyen, Carolyn Q
Subject: RE: H-1B

yes

From: Nguyen, Carolyn Q
Sent: Thursday, November 19, 2009 1:33 PM
To: Gooselaw, Kurt G
Subject: RE: H-1B

How about this? I will send it our when we get the revised RFE.

Hi,

With Kurt's concurrence and in an effort to produce consistency in our adjudication, the following guidance should be used until we receive an official policy memorandum from SCOPS or DOMO.

The four criteria for requesting additional documentation will remain the same as below. However, in lieu of contracts, we will accept letters from the authorized officials of the ultimate end-user clients where the specialty occupation will be performed. The letter(s) must include detailed description of the duties to be performed by the beneficiary. It must be established that a specialty occupation exists for the full period requested.

Attached is a revised RFE for your use. Please remove any items from the RFE template that have already been submitted with the petition.

Please see your supervisor if you have questions.

Thanks.

Carolyn & Kurt

From: Nguyen, Carolyn Q
Sent: Thursday, May 28, 2009 9:53 AM
To: #CSC Division I
Cc: Gooselaw, Kurt G; Nguyen Ho, Lynn
Subject: H-1B

Hi,

In determining eligibility for the H-1B category, it is necessary, at times, to request for submission of contracts to establish that the services the beneficiary is to perform are in a specialty occupation. Regulations at 8 C.F.R. 214.2(h)(4)(iv)(A)(1) supports such requirement. The request for contracts is essential for cases where the beneficiary will be working off-site for a third party.

Here are the criteria for which to request such documentation:

- Cases where the petitioner falls under the 10/25/10 guidelines (gross annual income of <$10 million; employ 25 employees or less; and business was established within the last 10 years).
- Cases where the petitioner is an H-1B Dependent
- Cases where the petitioner has an inordinate amount of filings compared to the number of employees listed on the petition
- Cases where the petitioner is on the active FID list

Validity Period – once it has been established that there is a job immediately available for the beneficiary and the proffered position is that of a specialty occupation, the petition should be approved for the period specified on the contract or one year, which ever is longer.

Continuation Without Change cases - please request for W-2s and the beneficiary's income tax documents to establish that the petitioner did indeed pay the wages indicated on the previous H-1B petition.

As a reminder, it is imperative to request only the documents needed to determine eligibility. When requesting additional evidence, the RFE should be tailored to the instant case. The attached RFE includes documentary evidence that normally satisfactorily establishes that a specialty occupation exists for the beneficiary.

If further systems checks or a site check is needed, please refer the case to CFDO.

Please see your/a supervisor if you have questions.

Thanks.

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, March 31, 2010 12:48 PM
To: Steele, Jenny B
Cc: Wolcott, Rachel A; Torres, Lory C; Dyson, Howard E; Dela Cruz, Charity R; Onuk, Semra K
Subject: RE: H-1B EE RFE

If the EE relationship has not been established for the period requested, we issue an RFE to allow the petitioner to submit evidence to establish eligibility for the validity period being requested. Upon response should the period be less than one year established then we provide one year. Should the evidence show the more than one year but less than the entire period requested, we only provide through EE relationship. If the entire period is established then the full time will be accorded.

From: Steele, Jenny B
Sent: Wednesday, March 31, 2010 10:07 AM
To: Gooselaw, Kurt G
Cc: Wolcott, Rachel A; Torres, Lory C; Dyson, Howard E; Dela Cruz, Charity R; Onuk, Semra K
Subject: H-1B EE RFE

If the initial petition is filed with an end-client letter, contract, or SOW and the validity period listed on the evidence is less than what is requested on the petition, do you want officers sending an EE RFE?

Ex: Initial petition requests 3 years validity and the initial evidence includes a letter signed by the end-client with a validity period of two to three years. Do we just grant for two years or should we RFE and give them an opportunity to come up with the 3 years they are requesting?

Thanks.

Jenny Steele| Supervisory Immigration Service Officer | Division 2| USCIS | DHS |

Laguna Niguel, CA 92677 | ☎ [redacted] **| 🖷: 949-389-8601 |** ✉: **jenny.steele@dhs.gov**

(b)(6)

Jowett, Haley L

From: Devera, Jennie F
Sent: Wednesday, November 03, 2010 5:11 PM
To: Helfer, Wayne D; Fierro, Joseph; Chong, Jenny; Elias, Erik Z; Harvey, Mark E; Avetyan, Kurt H; Wolfert, George S; Ecle, Lynette C
Subject: RE: H1B Limited Validity Date Memo
Attachments: 2008-12-16, Standardized Notation Abbreviations.dot; Limited Validity Dates Memo Amended - 11-25-09.dot

The attached documents are actually the same but in different formats.

Division 1 is the only one using the memo to the file. The idea came up when we were getting so many inquiries on cases with shortened validity dates; even on cases that had the standardized abbreviation. I think this memo helped reduce the amount of inquiries.

I just thought I'd share that....

Thanks

Jennie

From: Helfer, Wayne D
Sent: Wednesday, November 03, 2010 2:19 PM
To: Fierro, Joseph; Chong, Jenny; Devera, Jennie F; Elias, Erik Z; Harvey, Mark E; Avetyan, Kurt H; Wolfert, George S; Ecle, Lynette C
Subject: H1B Limited Validity Date Memo

All,

I just noticed that the location of the attached document was only accessible from the DIV 1 O common folder. When the O common renovation project was undertaken, we wanted to avoid storing any adjudicative related templates or documents within division specific folders. As result, the attached document is now saved directly to the H1B adjudications directory as a document template. The specific file path is as follows:

O:_Adjudications\I-129\H1B1\4-Memos - to file

Please inform your officers that they can access this document directly at the aforementioned location.

Thanks

Wayne Helfer | Senior Adjudication Officer | DHS | USCIS | California Service Center

Laguna Niguel, CA 92677 | Tel [redacted] Fax: 949-389-8677 | Cell: [redacted] wayne.helfer@dhs.gov (b)(6)

STANDARDIZED NOTATION ABBREVIATIONS FOR LIMITED AUTHORIZED STAY AS AN H-1B NONIMMIGRANT

On H1B cases where an officer has determined that the authorized stay should be limited to less time than the requested stay it would assist all parties involved if the officer notated the petition as to the reason the stay is limited. *Note: For efficiency and legibility purposes, the codes have changed. Use only the new codes provided below.*

NEW CODE	PREVIOUS CODE	DEFINITION
LTD-A	(no previous code)	Stay limited to dates on contract with end-user.
LTD-B	LTD-LCA	Beneficiary's stay limited to the validity period shown on the LCA.
LTD-C	LTD-LISC	Stay limited-Beneficiary does not have permanent license.
LTD-D	LTD-MIS CALC	Stay limited-Attorney/Petitioner miscalculated dates (including counting travel days).
LTD-E	LTD-RT NOT DOC	Stay limited-Some dates claimed on recaptured time-not documented.
LTD-F	LTD-RT EVID NOT LEG	Stay limited-Evidence supporting recaptured time-not legible.
LTD-G	LTD- RT BEYOND 7TH YR	Stay limited-Recaptured time limited to the 6 year Rule.
LTD-H	LTD- AC 21/106 NO 365 DYS	Stay limited-Not eligible for AC 21 Sec 106: Labor Certificate/I-140/I-485/Immigrant Visa is or was not pending 365 days.
LTD-J	LTD-AC 21/104 FINAL	Stay limited-Not eligible for AC 21 Sec 104: Final Decision to deny Labor Certificate/I-140 or final decision is made on I-485/Immigrant Visa Application.

LTD-K	**LTD-AC 21/104 NO I40**	No approved I-140.
LTD-L	**LTD-AC 21/104 VISA #**	Visa number now available.

U.S. Department of Homeland Security
P. O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

Memo to File

Date:

Re: Limited Validity Date
WAC__ ___ _____

The authorized stay was limited to less time than the requested stay for the following reason(s):

☐ The beneficiary's stay was limited to the validity period shown on the LCA.

☐ The beneficiary does not have a permanent license.

☐ The Attorney/Petitioner miscalculated dates (including counting travel days).

☐ The dates claimed on recaptured time were not documented.

☐ The evidence supporting recaptured time was not legible.

☐ Recaptured time is limited to the 6 year Rule.

☐ The beneficiary is not eligible for AC 21 under Section 106:

Labor Certificate/I-140/I-485/Immigrant Visa is or was not pending 365 days. Stay limited-Not eligible for AC 21 Sec 104:

☐ The beneficiary is not eligible for AC 21 under Section 104:

Final Decision to deny Labor Certificate/I-140 or final decision is made on I-485/Immigrant Visa Application.

☐ The beneficiary has no approved I-140.

☐ Visa number is now available for the beneficiary.

☐ The beneficiary's stay was limited to the validity period specified on the contract/end-user letter.

☐ The beneficiary's stay was limited to the duration of the temporary/restricted license (or one year, whichever is longer)

☐ Other:

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Thursday, May 28, 2009 12:36 PM
To: #CSC Division II
Subject: RE: H1B
Attachments: H-1B Consultants & Staffing Contracts D1.dot

Please see the attachment

From: Gooselaw, Kurt G
Sent: Thursday, May 28, 2009 9:57 AM
To: #CSC Division II
Subject: H1B
Importance: High

In determining eligibility for the H-1B category, it is necessary, at times, to request for submission of contracts to establish that the services the beneficiary is to perform are in a specialty occupation. Regulations at 8 C.F.R. 214.2(h)(4)(iv)(A)(1) supports such requirement. The request for contracts is essential for cases where the beneficiary will be working off-site for a third party.

Here are the criteria for which to request such documentation:

- Cases where the petitioner falls under the 10/25/10 guidelines (gross annual income of <$10 million; employ 25 employees or less; and business was established within the last 10 years).
- Cases where the petitioner is an H-1B Dependent
- Cases where the petitioner has an inordinate amount of filings compared to the number of employees listed on the petition
- Cases where the petitioner is on the active FID list

Validity Period – once it has been established that there is a job immediately available for the beneficiary and the proffered position is that of a specialty occupation, the petition should be approved for the period specified on the contract or one year, which ever is longer.

Continuation Without Change cases - please request for W-2s and the beneficiary's income tax documents to establish that the petitioner did indeed pay the wages indicated on the previous H-1B petition.

As a reminder, it is imperative to request only the documents needed to determine eligibility. When requesting additional evidence, the RFE should be tailored to the instant case. The attached RFE includes documentary evidence that normally satisfactorily establishes that a specialty occupation exists for the beneficiary.

If further systems checks or a site check is needed, please refer the case to CFDO.

Please see your/a supervisor if you have questions.

Thanks.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the Service containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

Provide the following to establish that the present petition meets the criteria for H-1B petitions involving a specialty occupation:

- Consultants and Staffing Agencies: It appears that the petitioner is engaged in the business of consulting, employment staffing, or job placement that contracts short-term employment for workers who are traditionally self-employed. As such, submit evidence to establish that a specialty occupation exists for the beneficiary.

  Regardless of whether the beneficiary will be working within the employment contractor's operation on projects for the client or at the end-client's place of business - USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Please clarify the petitioner's employer-employee relationship with the beneficiary and, if not already provided, submit the following evidence:

  - copies of signed contracts between the petitioner and *INSERT BENEFICIARY NAME*;

  - a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; and

  - copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists *INSERT BENEFICIARY NAME* on the contract and provides a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence.

NOTE: The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Friday, February 26, 2010 11:39 AM
To: Wolcott, Rachel A; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C
Subject: RE: Memo questions

Importance: High

The one year minimum changed just the other day when SCOPS received these responses back from OCC. Apparently VSC was providing one year based on previous guidance. Since this issue has been brought up we were advised to follow the responses and RFE if the full validity period has not been established and provide up to one year if the employer/ee relationship is less than one year. All other aspects of the memo remain in force. Please ensure your officers are aware of this.

Thanks

From: Wolcott, Rachel A
Sent: Friday, February 26, 2010 9:26 AM
To: Gooselaw, Kurt G; Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C
Subject: RE: Memo questions

In reading the responses, we are on board with all except the date given. Based on your guidance per our meeting they are instructed to give only to the end date of the contract. Do you this changed?

From: Gooselaw, Kurt G
Sent: Friday, February 26, 2010 9:03 AM
To: Dela Cruz, Charity R; Dyson, Howard E; Onuk, Semra K; Steele, Jenny B; Torres, Lory C; Wolcott, Rachel A
Subject: Memo questions

All,
See attached clarification on the H1B memo – the major change at this point is to provide 1 year if less than 1 year established on the relationship. It indicates to RFE if the relationship has not been established for the requested time and allow them to supplement the record. Please provide some feedback if we are already doing that as VSC just asked me.

Thanks

(b)(6)

Tanya L. Howrigan|Senior Adjudications Officer (ISO 3)| Vermont Service Center |USCIS | ([redacted])*: tanya.howrigan@dhs.gov

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From: Perkins, Robert M
Sent: Wednesday, April 07, 2010 2:36 PM
To: VSC, Allied Group 3 Senior
Cc: Hall-Archambault, Melissa R; Bolog, Marguerite M; Bouchard, Armanda M; Chadwick, Donna; Howrigan, Tanya L; Janson, Nancy D; Lamothe, Judy L; Lockerby, Beth A; Montgomery, Laura; Perkins, Robert M; Rhodes-Gibney, Cathy S; Shuttle, Peter J; Sweeney, Mark M
Subject: Sorted Cap Cases

Melissa stopped by and indicated that there is a crate of Cognizant files set aside for review. Please review a random sampling and let me know what you find…

Thanks,

Rob

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Friday, September 11, 2009 7:59 AM
To: Brokx, John B; Phan, Lethuy; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
Subject: RE: Validity Dates

Follow Up Flag: Follow up
Flag Status: Completed

Good morning,

I incorporated Erik and LeThuy's comments and added some of my own. Please review this draft instead of the one sent yesterday. Thanks.

Scenarios	Validity Period	Comments/References
Health Care Workers o Unrestricted license o Restricted license o No license – lack of SS card or valid immigration document o No license – physical presence	 Up to 3 years One year or duration of restricted license, which ever is longer 1 year 1 year – if provided a letter from the State Licensing Agency indicating that the beneficiary is fully qualified to receive the required license upon admission	Velarde Memo dated 05/20/09 Cook Memo dated 11/20/01 Neufeld Memo dated 03/21/08 Notes – o eligibility must be established at time of filing o Letter of a scheduled exam is not sufficient
Teachers	Same guidance as Health Care Worker above	Cook Memo dated 11/20/01
Off-site Employment o 10/25/10 o FID List (Active) o H-1B Dependent o Inordinate amount of filings compared to the number of employees	1 year or duration of contract/letter, whichever is longer	Note – policy memo forthcoming
Professions that allows for one to work under the supervision of someone who possesses an unrestricted license	Up to 3 years	
Medical Resident o State does not require licensing o State requires licensing	Up to 3 years 1 year or duration of the license, whichever is longer	
Unrestricted license but with	Up to 3 years	

annual renewals		
AC21 - §106	Remaining of the 6-yr period plus 1 year	A denied/revoked I-140 with a pending appeal is considered "pending" for the purpose of §106 extensions. See Aytes Memo dated 12/27/05.
AC21 - §104	Up to 3 years	
O-1 and P-1 filed by a U.S. Agent	Validity period should be given based on the validity of the contract between the petitioner and the beneficiary and the validity of the contract(s) between the actual employer(s) and the beneficiary	Notes – o there may be a reasonable gap between each assignments or performance o we may accept a letter from the actual employer indicating the intent to use the beneficiary's services in lieu of a contract
Note – if the H-1B extension request does not put the beneficiary over the 6-year limit, do NOT limit the validity date simply because there is a pending or approved I-140.		

From: Nguyen, Carolyn Q
Sent: Thursday, September 10, 2009 3:38 PM
To: Brokx, John B; Phan, Lethuy; Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Moran, Karla
Subject: Validity Dates

Hi,

We have had an inordinate number of inquiries on the validity dates issue. Can you please review the below and let me know of any changes before I share with the officers? Feel free to add any other scenarios that we commonly encounter in our adjudication.

Thanks.

Jowett, Haley L

From: Young, Claudia F
Sent: Friday, May 07, 2010 1:13 PM
To: Perkins, Robert M; Boudreau, Lynn A; Nguyen, Carolyn Q; Gooselaw, Kurt G
Cc: Gregg, Bret S; Hazuda, Mark J; Johnson, Bobbie L; Velarde, Barbara Q
Subject: Subpart H of restructured 214.2
Attachments: Subpart H masterclean.docx

Importance: High

VSC and CSC,

Happy Friday! We have been working with the Transformation team on a DHS initiative to restructure 8 CFR 214.2. The biggest chunk of that restructuring is the H classification. Attached is the most recent version of the restructured H section. We would like you to review the section and provide any edits and comments you may have.

Please don't hold back on this. We want your comments. We are looking to have this back by noon on Thursday, May 13th. This way we can consolidate everyone's comments and get this back to Transformation on Friday.

Please let me know if you have any questions. We appreciate your help with this.

Thanks,
Claudia

Claudia F Young
Branch Chief (Business Employment Services)
Service Center Operations
20 Massachusetts Ave., NW Suite 2000
Washington, DC 20529-2060
[redacted]

(b)(6)

Subpart H: Temporary Employees.

§ 214.180 Applicability.

The provisions of this subpart apply to nonimmigrants described in section 101(a)(15)(H) of the Act.

§ 214.181 Requirements for admission; time limits.

(a) Requirements for admission; time limits. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily in accordance with the terms of an approved petition filed by an employer. The limits on petition validity periods are prescribed in 8 CFR 214.186. There are several specific types of H visa classifications:

(1) H-1B specialty occupation worker, fashion model of distinguished merit and ability or cooperative research and development or co-production project worker. An alien who is coming to perform services in a specialty occupation, as a fashion model of distinguished merit and ability or to perform services of an exceptional nature requiring exceptional merit and ability relating to a cooperative research and development project or a co-production project provided for under a Government-to-Government agreement administered by the Secretary of Defense may be initially admitted or extended for the validity period of the approved petition plus a period of up to 10 days before the petition validity period begins and 10 days after the validity period ends. Petition requirements are described in 8 CFR 214.195 through 8 CFR 214.197;

(2) H-1B1 specialty occupation worker (admitted pursuant to an agreement listed in section 214(g)(8)(A) of the Act). A national of a country listed in section 214(g)(8)(A) of the Act coming to perform services in a specialty occupation may be initially admitted or extended for the validity period of the approved petition plus a period of up to 10 days before the petition validity period begins and 10 days after the validity period ends. H-1B1 petition requirements are described in 8 CFR 214.195;

(3) H-1C registered nurse. An alien coming temporarily to the United States to perform services as an H-1C registered nurse must have been initially admitted on or before December 20, 2009, for the validity period of the approved petition. The period of admission for an H-1C alien begins on the actual H-1C admission date and ends on the third anniversary of that date. Periods of time spent out of the United States for business or personal reasons during the validity period of the H-1C petition count towards the alien's maximum period of admission. An H-1C admitted initially for less than 3 years may be extended for the balance of the validity period of the approved petition in accordance with 8 CFR 214.187(f).

(4) H-2A temporary agricultural workers. An alien coming to perform agricultural labor of a temporary or seasonal nature may be initially admitted or extended for the validity period of the approved petition . Such alien may be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite and a 30-day period following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. H-2A petition requirements are described in 8 CFR 214.199;

(5) H-2B temporary workers. An alien coming to perform other services of a temporary or seasonal nature may be initially admitted for the validity period of the approved petition. H-2B petition requirements are described in 8 CFR 214.200;

(6) H-3 trainees. An H-3 nonimmigrant may be admitted or extended for the validity of the petition approved on their behalf. H-3 petition requirements are described in 8 CFR 214.201; or

(7) H-4 spouse and dependents. The spouse and children of an H nonimmigrant, if they are accompanying or following-to-join the beneficiary in the United States, may, if otherwise

admissible, be admitted as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. Neither an H-4 spouse nor H-4 child may accept employment while in such status.

(b) Limitations on subsequent admission. Except as provided in paragraph (c) of this section, when an H nonimmigrant has spent the maximum allowable period of stay in the United States, a new petition or period of admission under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the following time periods:

(1) One year for H-1B specialty occupation worker or fashion model;

(2) One year for H-1B involved in a DOD research and development or coproduction project, except that such alien may not be readmitted to work on a DOD research and development or coproduction project;

(3) Six months for H-3 trainee or special education worker;

(4) Three months for H-2A temporary agricultural worker or H-2B temporary worker.

(c) Exceptions to limitations on admission. (1) H-1B, H-2B and H-3 aliens. There are several exceptions to the limitations on subsequent admission of H-1B, H-2B and H-3 aliens described in paragraph (b) of this section. To qualify for such an exception, the petitioner and the alien must provide clear and convincing evidence of eligibility for the exception. Evidence may consist of documentation such as arrival and departure records or entry and exit stamps, copies of tax returns, or records of employment abroad. The exceptions are:

(i) Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad specified in paragraph (b) of this section;

(ii) The limitations in paragraphs (b)(1) and (b)(3) of this section do not apply to H-1B, H-2B, and H-3 aliens who do not reside continually in the United States and whose employment in the United States is seasonal or intermittent or is for an aggregate of 6 months or less per year.

(iii) The limitations specified in paragraph (b) of this section do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment.

(2) H-2A workers. Except as provided in 8 CFR 214.181(a)(4), an alien's stay as an H-2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of 3 years may not again be granted H-2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H-2A nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. The determination regarding such interruption will be determined in admission, change of status or extension proceedings.

(3) H-2B workers. An absence from the United States can interrupt the accrual of time spent as an H-2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months but less than three years, an absence is interruptive if it lasts for at least two months.

(d) Limitation on employment. An alien in H nonimmigrant status may engage solely in the employment specified in H petition filed in his or her behalf. Employment is not authorized

during any additional period of H admission authorized either before or after the actual petition validity.

(e) Effect of approval of permanent labor certification or filing of preference petition on H status. (1) H-1B or H-1C classification. The approval of a permanent labor certification or the filing of a preference petition for an alien is not a basis for denying an H-1B or H-1C petition or a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may come to the United States for a temporary period as an H-1B or H-1C nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(2) H-2A, H-2B, and H-3 classification. The approval of a permanent labor certification or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner is a reason, by itself, to deny the alien's admission or extension of stay.

(f) Effect of strike or other labor dispute. The provisions of 8 CFR 214.9 are applicable to all H nonimmigrants if there is a strike or other labor dispute at their place of employment.

§ 214.182 Temporary worker petitions: petitioner requirements.

(a) Initial petition. A U.S. employer seeking to classify an alien as H temporary worker or trainee must file a petition on the form specified by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) and in accordance with the form instructions. Except for an H-2B petition, the petitioner may not file, nor may USCIS approve, a petition earlier than 6 months before the date of actual need for the beneficiary's services or training. An H-2B petition may not be filed earlier than 120 days before the actual date of need identified on the temporary labor certification. The petitioner must establish at the time of filing that:

(1) The position offered meets the requirements of the classification sought; and

(2) The beneficiary is qualified for the position.

(b) Amended petition. Whenever there are any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition, the petitioner is required to file an amended petition with the fee specified in 8 CFR 103.7(b)(1) of this chapter and in accordance with the form instructions. An amended or new H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application. An exception to the labor certification requirement is provided for H-2A petitions in emergent circumstances in accordance with 8 CFR 214.199(i).

(c) Change of employer. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition and, if needed, request an extension of the alien's stay. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition, within the limits specified in 8 CFR 214.181. Except as provided by section 214(n) of the Act for certain H-1B workers, the alien is not authorized to begin the employment with the new employer until the petition is approved.

(d) Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training. For purposes of this paragraph, the petitioner's location is the address specified on the petition.

(e) Services or training for more than one employer. If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition unless an established agent files the petition.

(f) Agents as petitioners. (1) Function of an agent. A U.S. agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A U.S. agent may be:

(i) The actual employer of the beneficiary;

(ii) The representative of both the employer and the beneficiary; or

(iii) A person or entity authorized by the employer to act for, or in place of, the employer as its agent.

(2) Requirements for use of an agent. (i) Agent serving as employer. An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested;

(ii) Agent not serving as employer. A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries, if the supporting documentation includes a complete itinerary of services or engagements. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation; and

(3) Use of agent by foreign employer. A foreign employer who, through a U.S. agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

(4) H-2A petition. An agent filing an H-2A petition must also comply 8 CFR 214.199(a)(6)(ii).

§ 214.183 Temporary worker petitions: beneficiary requirements.

(a) Multiple beneficiaries. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will perform the same service or receive the same training, for the same period of time, and in the same location. H-2A and H-2B petitions for workers from countries not designated in accordance with 8 CFR 214.189 must be filed separately. Title 8 CFR 214.199(a)(2) prescribes special conditions for filing H-2A petitions with multiple beneficiaries.

(b) Unnamed beneficiaries. H-1B and H-3 petitions must include the name of each beneficiary. Unnamed baneficiaries for H-2A and H-2B petitions are permitted in accordance with 8 CFR 214.199 and 8 CFR 214.200, respectively.

(c) License requirements. (1) State or local requirement. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to approval of the petition.

(2) Temporary license. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, USCIS will consider the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the

alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(3) Duties without license. In certain occupations which generally require a license, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS will consider the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(4) Limitation on approval of petition. Where a license is required in an occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires a license may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

(d) Beneficiary previously admitted as H or L nonimmigrant. If an alien beneficiary has previously been admitted to the United States as an H or L nonimmigrant, the petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

§ 214.184 Numerical limitations.

(a) Limits on affected categories. During each fiscal year, the total number of aliens who can be provided nonimmigrant classification is limited as follows:

(1) Aliens classified as H-1B nonimmigrants, excluding those involved in Department of Defense research and development projects or coproduction projects, may not exceed the limits prescribed in section 214(g)(1)(A) of the Act;

(2) Aliens classified as H-1B nonimmigrants to work for DOD research and development projects or coproduction projects may not exceed 100 at any time;

(3) Aliens classified as H-1B1 nonimmigrants may not exceed the limits prescribed in section 214(g)(8)(B) of the Act;

(4) Aliens classified as H-2B nonimmigrants may not exceed the limits prescribed in section 214(g)(1)(B) of the Act; and

(5) Aliens classified as H-3 nonimmigrant participants in a special education exchange visitor program may not exceed 50.

(b) Procedures. (1) Each alien issued a visa or otherwise provided nonimmigrant status is counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. Requests for petition extension or extension of an alien's stay are not counted for the purpose of the numerical limit. The spouse and children of principal H aliens are classified as H-4 nonimmigrants and are not counted against numerical limits applicable to principals.

(2) Procedures for counting. When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals,

taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the "final receipt date"). The day the news is published will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to a numerical limitation or the exemption under section 214(g)(5)(C) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first.

(3) Unused numbers. When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner must notify USCIS that the number(s) has not been used. The petition will be revoked and USCIS will take into account the unused number during the appropriate fiscal year.

(4) Rejection of petitions. If the total numbers available in a fiscal year are used, new petitions and the accompanying fee will be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

(5) Denial of petitions. Petitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied and filing fees will not be returned or refunded if USCIS later determines that such beneficiaries are subject to the numerical limitation.

§ 214.185 Petitioner obligations.

(a) Liability for transportation costs. (1) Applicability. Pursuant to section 214(c)(5) of the Act, the employer of an H-1B or H-2B nonimmigrant will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission. Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B or H-2B status.

(2) Voluntary resignation. Voluntarily resignation by the beneficiary during the validity period of the petition is not a dismissal and the employer is not liable for return transportation in such a case.

(3) Complaint procedure. If the beneficiary believes that the employer has not complied with this provision, the beneficiary may, in writing, advise USCIS. The complaint will be retained in the file relating to the petition.

(b) Reporting unused petition. When an approved petition is not used because one or more beneficiaries does not apply for admission to the United States, the petitioner must notify USCIS.

(c) Reporting change in employment. The petitioner must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. When the petitioner proposes to employ the beneficiary in a capacity which is significantly different than that stated on the petition, the petitioner is obligated to file an amended petition as described in 8 CFR 214.182(b).

(d) Special H-2A and H-2B obligations. Unique obligations applying to H-2A petitioners are described in 8 CFR 214.199(e). Unique obligations applying to H-2B petitions are described in 8 CFR 214.200(e).

§ 214.186 Petition adjudication and validity.

(a) Period of approval. USCIS will notify the petitioner whenever a visa petition, an extension of a visa petition, or an alien's extension of stay is approved under any H classification. Except as otherwise provided in this subpart H, petitions may not be approved beyond the validity period of any required labor certification, labor condition application, or labor attestation. The approval period for an initial petition or an extension is further limited as described in 8 CFR 214.182 and the special requirements prescribed elsewhere in this subpart H. Except as otherwise provided in this subpart H the approval period of an H petition will be as follows:

(1) H-1B petition in a specialty occupation. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation will be valid for a period of up to 3 years and may be extended for a total of 6 years but may not exceed the validity period of the supporting labor condition application.

(2) H-1B petition involving a DOD research and development or coproduction project. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien involved in a DOD research and development project or a coproduction project will be valid for a period of up to five years and may be extended for a total of 10 years.

(3) H-1B petition involving an alien of distinguished merit and ability in the field of fashion modeling. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien of distinguished merit and ability in the field of fashion modeling may be valid for a period of up to three years and may be extended for a total of 6 years.

(4) H-2A petition. An H-2A petition will be approved through the expiration of the approved temporary agricultural labor certification.

(5) H-2B petition. The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act may be valid for the period of the approved temporary labor certification.

(6) H-3 petition for alien trainee. An approved petition for an alien trainee classified under section 101(a)(15)(H)(iii) of the Act may be valid for a period of up to two years.

(7) H-3 petition for alien participant in a special education training program. An approved petition for an alien classified under section 101(a)(15)(H)(iii) of the Act as a participant in a special education exchange visitor program may be valid for a period of up to 18 months.

(b) Partial approval. A petition for more than one beneficiary or services at multiple locations may be approved in whole or in part. The approval notice will include only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(c) Special rules for determining petition validity. (1) Early approval. If a new H petition is approved before the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show the actual dates requested by the petitioner as the validity period, not to exceed the limits specified in paragraph (a) of this section or other USCIS policy.

(2) Late approval. If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (a) of this section or other USCIS policy.

(3) Licensed occupations. Limitations on H petitions for beneficiaries requiring licensure to engage in their occupation are subject to the limitations described in 8 CFR 214.183(c)(4).

(d) Approval period shorter than requested by petitioner. If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (a) of this section or elsewhere in this subpart H, the petition will be approved only up to the limit specified in that paragraph.

(e) Use of approval notice. The beneficiary of an H petition who does not require a nonimmigrant visa, including an alien described in 8 CFR 212.1 or in 22 CFR 41.112(d), may present a copy of the approval notice at a port-of-entry to facilitate entry into the United States.

A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use a copy the approval notice to apply for a new or revalidated visa during the validity period of the petition. The beneficiary may retain the copy and present it at the port-of-entry during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(f) Denial. If USCIS proposes to deny an initial H petition, the petitioner will be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition in accordance with the procedures described in 8 CFR 103.2(b) and 8 CFR 103.3. A petition for multiple beneficiaries may be denied in whole or in part.

§ 214.187 Petition extension; extension of nonimmigrant stay.

(a) Filing requirements. The petitioner may apply for both a petition extension and an extension of the alien's stay in the United States on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1) and in accordance with the form instructions and 8 CFR 214.4. The dates of the requested petition extension and the extension of the beneficiary's authorized stay must be the same. The beneficiary must be physically present in the United States and the original petition must not have expired at the time of requesting an extension.

(b) Supporting documents. Supporting evidence required for the initial petition is not required for an extension unless requested by USCIS. However, any labor certification, labor condition application or attestation which was required for the initial petition must remain valid or be renewed for the period of the requested extension.

(c) Travel while extension request is pending. If the alien is required to leave the United States for business or personal reasons while an extension request is pending, the petitioner may request USCIS notify the Department of State of the petition extension.

(d) Exception for H-2A petition. A single H-2A petition may be extended without a labor certification as prescribed in 8 CFR 214.199(i).

(e) Decision. (1) Approval. Even though the requests to extend the petition and the alien's stay are combined, USCIS makes a separate determination on each. When the total period of stay described in 8 CFR 214.186 has been reached, no further extensions may be requested or approved. USCIS will notify the petitioner of the action taken on the petition extension and extension of stay.

(2) Petition denial. If USCIS proposes to deny a petition extension, the petitioner will be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition in accordance with the procedures described in 8 CFR 103.2(b) and 8 CFR 103.3. A petition extension for multiple beneficiaries may be denied in whole or in part.

(3) Extension denial. The petitioner will be advised of the decision. There is no appeal from a decision to deny an extension of stay.

(f) Extension for H-1C nurses. An H-1C nurse who is otherwise eligible and maintaining H-1C status and who was granted admission or a change of status for less than the maximum period described in 8 CFR 214.181(a)(3) may apply for and receive an extension for the remainder of that period.

§ 214.188 Revocation of petition.

(a) Immediate and automatic revocation. The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

(b) Grounds for revocation on notice. USCIS may send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(i) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition;

(ii) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact;

(iii) The petitioner violated terms and conditions of the approved petition;

(iv) The petitioner violated requirements of section 101(a)(15)(H) of the Act or the requirements of this subpart H; or

(v) The approval of the petition violated the requirements of this subpart H or involved gross error.

(c) Procedure. The procedures for revocation are prescribed in 8 CFR 214.10.

§ 214.189 H-2A and H-2B eligible countries.

(a) Designation. Except as provided in paragraph (b) of this section, an H-2A or H-2B petition will only be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the Federal Register, taking into account factors, including but not limited to:

(1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(2) The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;

(3) The number of orders of removal executed against citizens, subjects, nationals and

residents of that country; and

(4) Such other factors as may serve the interests of the United States.

(b) Exception. A national from a country not on the list described in paragraph (a) of this section may be a beneficiary of an approved H-2A or H-2B petition upon the request of a petitioner or potential petitioner, if the DHS, it its sole and unreviewable discretion, determines that it is in the interest of the United States for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(1) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers (and, in the case of an H-2A beneficiary, from among U.S. workers) from a country currently on the list described in paragraph (a) of this section;

(2) Evidence that the beneficiary has been admitted to the United States previously in H-2A or H-2B status;

(3) The potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B visa program through the potential admission of a beneficiary from a country not currently on the list; and

(4) Such other factors as may serve the interests of the United States.

(c) Duration of certification. Once published, any designation of participating countries pursuant to paragraph (a)(1) of this section will be effective for one year after the date of publication in the Federal Register and will be without effect at the end of that one-year period.

§ 214.190 Fees for certain nonimmigrant workers.

Some H-1B and H-2B employers are required to pay additional fees prescribed in 8 CFR 103.7(b)(1). Petitioners must follow instructions for determining liability for these additional fees and for calculating the amount of such fees on the form and instructions provided by

USCIS.

The following definitions apply to H-1B petitioners who may seek exemption from the additional ACWIA fees:

Affiliated or related nonprofit entity means a nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

Applied research means research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met; investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services, and research and investigation in the sciences, social sciences, or humanities.

Basic research means research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities.

Governmental research organization means a U.S. Government entity whose primary mission is the performance or promotion of basic research and/or applied research.

Institution of higher education means one defined in section 101(a) of the Higher Education Act of 1965;

Nonprofit organization or entity means an organization that has been approved as a tax-

exempt organization for research or educational purposes by the Internal Revenue Service.

Nonprofit research organization or governmental research organization means a nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research.

§§ 214.191 – 214.194 [Reserved]

§ 214.195 Special requirements: H-1B and H-1B1 specialty occupation workers.

(a) Petition requirements. A petitioner described in paragraph (d) must submit the following documentation with an H-1B or H-1B1 petition filed in accordance with 8 CFR 214.182 involving a specialty occupation defined in section 214(i)(1) of the Act:

(1) Labor condition application. A certification from the Secretary of Labor that the petitioner has filed a labor condition application as described in paragraph (e) of this section with the Secretary;

(2) Petitioner agreement. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay;

(3) Other evidence. (i) Form and substance. Evidence, as described in paragraphs (b) and (c) of this section, that the position offered to the alien is a specialty occupation and that the alien is qualified for such a position. Evidence must be in the form of certifications, affidavits, declarations, degrees, diplomas, writings, reviews, or other similar materials.

(ii) Education and training. School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation must reflect periods of attendance, courses of study, and similar pertinent data, and be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

(iii) Affidavits. Affidavits or declarations, made under penalty of perjury and submitted by present or former employers or recognized authorities, must specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information. Expert opinions must conform to the standards described in paragraph (g) of this section.

(iv) Contracts and agreements. Copies of any written contracts between the petitioner and beneficiary, or if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed, may also be submitted as evidence.

(b) Evidence to establish a position qualifies as a specialty occupation position. To qualify as a specialty occupation, the petitioner must establish that the position meets one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

(c) Beneficiary qualifications. To qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

(1) Hold a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent, as prescribed in paragraph (f) of this section, to completion of a U.S. baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

(d) Petitioner qualifications. An H-1B petitioner must be a U.S. employer. A U.S. employer includes a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

(e) Labor condition application (LCA). (1) Requirement. An LCA is a certification from an H-1B petitioning employer which meets the requirements of section 212(n) of the Act and 20 CFR 655.700. When filing a petition for H-1B classification in a specialty occupation or as a fashion model of distinguished merit and ability, the petitioner is required to submit a notice

from the Department of Labor that it has filed such an LCA in the occupational specialty in which it will employ the alien(s).

(2) Effect of an LCA. Receipt by the Department of Labor of an LCA in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. USCIS determines if the application involves a specialty occupation. USCIS also determines whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation.

(3) Multiple petitions using a single LCA. If all of the beneficiaries covered by an H-1B LCA have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the LCA using photocopies of the same application. Each petition must refer by file number to all previously approved petitions for that LCA.

(4) Restriction on substitution of beneficiaries. When petitions have been approved for the total number of workers specified in the LCA, substitution of aliens against previously approved openings cannot be made. A new LCA is required.

(5) Effect of violation of terms of an LCA. If the Secretary of Labor notifies USCIS that the petitioning employer has failed to meet a condition of section 212(n)(1)(B) of the Act, has substantially failed to meet a condition of section 212(n)(1)(C) or (D) of the Act, has willfully failed to meet a condition of section 212(n)(1)(A) of the Act, or has misrepresented any material fact in the application, USCIS will not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least one year from the date of receipt of such notice.

(6) Effect of suspension on other approved petitions. If the employer's LCA is suspended or invalidated by the Department of Labor, USCIS will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the LCA for the duration of the authorized stay of aliens it employs.

(f) Equivalence to a college degree. USCIS will review the education and experience claimed in the supporting documentation and determine whether an H-1B beneficicary has the equivalent of a U.S. baccalaureate degree or higher. In order to establish such equivalence, documentation must establish that the beneficiary possesses a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty. One or more of the following determine equivalence:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to

persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, 3 years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least 5 years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or U.S. association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

(g) Expert opinions submitted as supporting evidence. An expert opinion is a written opinion from a recognized authority. Such authority must be a person or an organization with expertise in a particular field, special skills or knowledge in that field and the ability to render an expert opinion concerning a particular subject. An expert opinion must include:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

(h) Multiple H-1B petitions. (1) General prohibition. Except as provided in paragraph (h)(2) of this section, an employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act.

(2) Exception. An employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, if the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation, if the original H-1B petition was denied for reasons other than fraud or misrepresentation. If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien subject to the numerical limitations of section

214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.

(3) Consequences of violation. Filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions.

§ 214.196 Special requirements: H-1B Department of Defense project workers.

(a) Petition requirements. The petitioner must submit the following documentation with an H 1B petition filed in accordance with 8 CFR 214.182 involving services of an exceptional nature relating to DOD cooperative research and development projects or a co-production project:

(1) A verification letter from the DOD project manager for the particular project stating that the alien will be working on a cooperative research and development project or a co-production project under a reciprocal Government to Government agreement administered by DOD. Details about the specific project are not required;

(2) A general description of the alien's duties on the particular project, indicating the actual dates of the alien's employment on the project. For purposes of this classification, services of an exceptional nature include only those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties;

(3) A statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner must also indicate the names of aliens whose employment on the project ended within the past year;

(4) Evidence, as described in paragraph (b) of this section, that the alien is qualified for such a position.

(b) Beneficiary qualifications. The beneficiary must hold a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing services.

(c) Non-exclusive use of special program. The existence of this special program does not preclude the DOD from utilizing the regular H 1B provisions provided the required guidelines are met.

§ 214.197 Special requirements: H-1B fashion models.

(a) Petitioner requirements. The petitioner must submit the following documentation with an H-1B petition filed in accordance with 8 CFR 214.182 involving prominent fashion models:

(1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary;

(2) Evidence the work which the alien is coming to perform in the United States requires the services of a prominent fashion model, such as involvement in events which have a distinguished reputation or with organizations with a record and reputation for production of such events.

(3) Evidence, as described in paragraph (b) of this section, that the alien is qualified for such a position.

(4) Copies of any written contracts between the petitioner and beneficiary, or a summary

of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

(b) Beneficiary qualifications. The beneficiary must be a fashion model of distinguished merit and ability, as described in paragraph (c) of this section. Documentation must include at least two of the following forms of documentation showing that the alien:

(1) Has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

(2) Has performed and will perform services as a fashion model for employers with a distinguished reputation;

(3) Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized authorities in the field; or

(4) Commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.

(c) Distinguished merit and ability. Distinguished merit and ability for an alien in the field of fashion modeling requires a determination by USCIS that the beneficiary is prominent in that field and that the services described in the petition require a model of prominence. USCIS will find a fashion model to be prominent if the documentation indicates the beneficiary has attained a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling.

§ 214.198 Special requirements: H-1B physicians.

(a) Petitioner requirements. In addition to the requirements specified in 8 CFR 214.195,

the petitioner must establish that the alien physician, other than a physician described in paragraph (c) of this section:

(1) Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or

(2) The physician has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a U.S. medical school; and

(i) Has competency in oral and written English, demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates; or

(ii) Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

(b) Beneficiary's qualifications. An H-1B petition for a physician must be accompanied by evidence that the physician:

(1) If he or she will perform direct patient care, holds a license or other authorization required by the state of intended employment to practice medicine, or is exempt by law from the license requirement, and

(2) Has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

(c) Exception for physicians of national or international renown. A physician who is a graduate of a medical school in a foreign state and who is of national or international renown in the field of medicine is exempt from the requirements of paragraph (a) of this section.

§ 214.199 Special requirements: H-2A agricultural workers.

(a) Petition requirements. (1) Eligible petitioners. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of U.S. agricultural producers named as a joint employer on the temporary labor certification.

(2) Multiple beneficiaries. A single H-2A petition can include multiple beneficiaries if the total number does not exceed the number of positions on the relating temporary agricultural labor certification. The total number of beneficiaries on a petition or series of petitions based on a single temporary agricultural labor certification may not exceed the number of workers on the certification. If multiple petitions are filed using the same temporary agricultural labor certification, the petitioner must reference all prior petitions associated with that temporary agricultural labor certification. The nationalities of all beneficiaries on a petition must be provided. The names of all beneficiaries must be provided except for workers outside the United States who are nationals of eligible countries as described in 8 CFR 214.189.

(b) Initial supporting evidence. (1) Application. The petitioner must file an H-2A petition in accordance with 8 CFR 214.182 with a single valid temporary agricultural labor certification as described in paragraph (c) of this section.

(2) Temporary labor certification. An H-2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the temporary labor certification including that the principal duties to be performed are those on the certification, with other duties minor and incidental. Representations required for the purpose of labor certification are initial evidence of this intent. However, the requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H-2A worker

in a position other than that described in the relating petition.

(3) Nature of employment. An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status. The petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature.

(i) Seasonal. Seasonal employment is employment which is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations; or

(ii) Temporary. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

(4) Beneficiary's qualifications. An H-2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. The petitioner must establish at time of application for an H-2A visa, or at the time of application for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required. These requirements include:

(i) Evidence of employment/job training. Evidence must be in the form of the past employer or employers' detailed statement(s) or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from persons who worked with the beneficiary that demonstrate the claimed employment training.

(A) Named beneficiaries. For petitions with named beneficiaries, a petition must submit

evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application.

(B) Unnamed beneficiaries. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States.

(ii) Evidence of education and other training. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s), that show periods of attendance, majors and degrees or certificates accorded.

(A) Named beneficiaries. For petitions with named beneficiaries, the petitioner must submit evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application.

(B) Unnamed beneficiaries. For petitions with unnamed beneficiaries, the petitioner must submit such evidence at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States.

(iii) Eligible countries. The beneficiary must be a national of a country which meets the requirements of 8 CFR 214.203.

(c) Temporary agricultural labor certification. (1) Department of Labor considerations. In temporary agricultural labor certification proceedings the Secretary of Labor determines:

(i) Whether employment is as an agricultural worker;

(ii) Whether it is open to U.S. workers;

(iii) If qualified U.S. workers are available and if there would be any adverse impact caused by the employment of a qualified alien;

(iv) Whether employment conditions, including housing, meet applicable requirements; and

(v) Whether employment qualifies as temporary or seasonal.

(2) USCIS consideration of DOL findings. A DOL determination that employment qualifies is normally sufficient for the purpose of an H-2A petition. However, notwithstanding that determination, USCIS will not find that employment is temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. A petitioner can only overcome this finding by demonstrating that there will be at least a 6-month interruption of employment in the United States after H-2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

(d) Special filing situations. (1) Joint employer. Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H-2A eligibility.

(2) Agent. A petition filed by an agent must include an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H-2A eligibility.

(e) Consent and notification requirements. (1) Consent. In filing an H-2A petition, a

petitioner and each employer consents to allow access to the site by DHS officers where the labor is being performed for determining compliance with H-2A requirements.

(2) Agreements. The petitioner agrees to the following requirements:

(i) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the Federal Register if:

(A) An H-2A worker fails to report to work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by his or her employer, whichever is later;

(B) The agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H-2A petition; or

(C) The H-2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

(ii) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(iii) To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(iv) To pay $10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(3) Process. If DHS has determined that the petitioner has violated the notification requirements in paragraph (e)(2) of this section and has not received the required notification, the

petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(4) Failure to pay liquidated damages. If the petitioner fails to pay liquidated damages within 10 days of assessment, USCIS will not process an H-2A petition for that petitioner or any joint employer shown on the petition until such damages are paid.

(5) Abscondment. An H-2A worker has absconded if he or she has not reported for work for a period of 5 consecutive workdays without the consent of the employer.

(f) Effect of violations of status. An alien may not be accorded H-2A status who, at any time during the past 5 years, USCIS finds to have violated, other than through no fault of his or her own (e.g., due to an employer's illegal or inappropriate conduct), any of the terms or conditions of admission into the United States as an H-2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(g) Limit on petition approval. If, due to the application of 8 CFR 181(c)(2), USCIS finds an alien eligible for a shorter H-2A admission period than that requested by the petition, the petition approval period will be adjusted accordingly.

(h) Substitution of beneficiaries after admission. An H-2A petition may be filed to replace H-2A workers whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work; who fail to report to work within five days of the employment start date on the H-2A petition or within five days of the start date established by his or her employer, whichever is later; or who abscond from the worksite. The petition for the replacement worker(s) must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (b) of this section. The petitioner must also submit a statement giving

each terminated or absconded worker's name, date and country of birth, termination date, and the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable. A petition for a replacement will not be approved where the requirements of paragraph (e) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (e) of this section.

(i) Extension in emergent circumstances. In emergent circumstances, as determined by USCIS, a single H-2A petition may be extended for a period not to exceed 2 weeks without an additional approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved H-2A petition. The previously approved H-2A petition must have been based on an approved temporary labor certification, which will be considered to be extended upon the approval of the extension of H-2A status.

(j) Consequences of a determination that fees were collected from alien beneficiaries.

(1) Denial or revocation of petition. As a condition of approval of an H-2A petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of H-2A employment (other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has

agreed with the alien to pay such costs and fees).

(i) Fee collected by petitioner. If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such prohibited fee or compensation, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner has reimbursed the alien in full for such fees or compensation, or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(ii) Fee collected by agent. If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner or the facilitator, recruiter, or similar employment service has reimbursed the alien in full for such fees or compensation or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(iii) Information disclosed after filing or approval of petition. If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition, the petition will be denied or revoked on notice.

(iv) Reimbursement of fee, termination of collection agreement. If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition and with the knowledge of the petitioner, the petition will be denied

or revoked unless the petitioner demonstrates that the petitioner or facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated, or notifies DHS within 2 workdays of obtaining knowledge in a manner specified in a notice published in the Federal Register.

(2) Effect of petition revocation. Upon revocation of an employer's H-2A petition based upon paragraph (j)(1) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(3) Reimbursement as condition to approval of future H-2A petitions. (i) Filing subsequent H-2A petitions within 1 year of denial or revocation of previous H-2A petition. A petitioner filing an H-2A petition within 1 year after the decision denying or revoking on notice an H-2A petition filed by the same petitioner on the basis of paragraph (j)(1) of this section must demonstrate to the satisfaction of USCIS, as a condition of approval of such petition, that the petitioner or agent, facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or that the petitioner has failed to locate the beneficiary. If the petitioner demonstrates to the satisfaction of USCIS that the beneficiary was reimbursed in full, such condition of approval will be satisfied with respect to any subsequently filed H-2A petitions, except as provided in paragraph (j)(3)(ii) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate the beneficiary with respect to each H-2A petition filed within 1 year after the decision denying or revoking the previous H-2A petition on the basis of paragraph (j)(1) of this section but has failed to do so, such condition of

approval will be deemed satisfied with respect to any H-2A petition filed 1 year or more after the denial or revocation. Such reasonable efforts include contacting any of the beneficiary's known addresses.

(ii) Effect of subsequent denied or revoked petitions. An H-2A petition filed by the same petitioner subsequent to a denial under paragraph (j)(1) of this section will be subject to the condition of approval described in paragraph (j)(3)(i) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(4) Treatment of alien beneficiaries upon revocation of labor certification. The approval of an employer's H-2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H-2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

§ 214.200 Special requirements: H-2B temporary workers.

(a) Petition requirements. (1) Eligible petitioners. An H-2B petition submitted in accordance with 8 CFR 214.182 may be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through a U.S. agent. For purposes of this section, a foreign employer is any employer who is not amenable to service of process in the United States. A foreign employer may not directly petition for an H-2B nonimmigrant but must use the services of a U.S. agent to file a petition for an H-2B nonimmigrant. A U.S. agent petitioning on behalf of a foreign employer may file the petition and accept service of process in the United States in proceedings under section 274A of the Act, on behalf of the employer. The petitioning employer must

consider available U.S. workers for the temporary services or labor, and must offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States.

(2) Multiple beneficiaries. A single H-2B petition can include multiple beneficiaries if the total number does not exceed the number of positions on the relating temporary labor certification. The total number of beneficiaries on a petition or series of petitions based on a single temporary labor certification may not exceed the number of workers on the certification. If multiple petitions are filed using the same temporary labor certification, the petitioner must reference all prior petitions associated with that temporary labor certification. The nationalities of all beneficiaries on a petition must be provided. The names of all beneficiaries must be provided except if the beneficiaries:

(i) Are outside the United States;

(ii) Are nationals of eligible countries as described in 8 CFR 214.189; and

(iii) The positions do not include education and experience requirements which must be documented for each beneficiary.

(b) Initial supporting evidence. (1) Application. The petitioner must file an H-2B petition in accordance with 8 CFR 214.182 with a single valid temporary labor certification as described in paragraph (c) of this section.

(2) Evidence of qualifications. In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification.

(3) Statement of need. The employer must provide a statement describing in detail the

temporary situation or conditions which make it necessary to bring the alien to the United States and whether the need is a one-time occurrence, seasonal, peakload, or intermittent. If the need is seasonal, peakload, or intermittent, the statement must indicate whether the situation or conditions are expected to be recurrent. Generally, a temporary period will be limited to one year or less, but in the case of a one-time event it could last up to 3 years.

(i) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(ii) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(iii) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(iv) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

(c) Temporary labor certification. Prior to filing a petition to classify an alien as an H-2B worker, the petitioner must obtain a temporary labor certification issued by the appropriate certifying authority in accordance with the procedures described in this section and in 22 CFR 655, subpart A.

(1) Temporary labor certification (except Guam). (i) Secretary of Labor determination. An H-2B petition for temporary employment in the United States, except for temporary employment on Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers.

(ii) Validity period. The Secretary of Labor may issue a temporary labor certification for a period of up to one year.

(iii) U.S. Virgin Islands. Temporary labor certifications for H-2B employment in the U.S. Virgin Islands may be approved only for entertainers and athletes and only for periods not to exceed 45 days.

(2) Temporary labor certification (Guam). (i) Scope of certification. An H-2B petition for temporary employment on Guam must include an approved temporary labor certification issued by the Governor of Guam in accordance with 8 CFR 214.203. The certification must state that qualified workers in the United States are not available to perform the required services and that the alien's employment will not adversely affect the wages and working conditions of U.S. resident workers who are similarly employed on Guam.

(ii) Validity period. The Governor of Guam may issue a temporary labor certification for a period up to one year. USCIS may invalidate a labor certification issued by the Governor of Guam in accordance with paragraph (j) of this section.

(d) Employment start date. Beginning with petitions filed for workers for fiscal year 2010, an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification. A petitioner filing an amended H-2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification accompanying the amended H-2B petition.

(e) Petitioner obligations. (1) Reporting violations. The petitioner agrees to notify DHS, within 2 work days, and beginning on a date and in a manner specified in a notice published in the Federal Register if:

(i) An H-2B worker fails to report for work within 5 work days after the employment start date stated on the petition;

(ii) The nonagricultural labor or services for which H-2B workers were hired were completed more than 30 days early; or

An H-2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired. An H-2B worker has absconded if he or she has not reported for work for a period of 5 consecutive work days without the consent of the employer.

(2) Maintaining records. The petitioner also agrees to retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(f) Traded professional H-2B athletes. In the case of a professional H-2B athlete who is traded from one organization or another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new H-2B petition. If a new petition is not filed within 30 days, employment authorization will be cease. If a new petition is filed within 30 days, the professional athlete will be considered to be in valid H-2B status and employment will continue to be authorized until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(g) Substitution of beneficiaries after petition approval. Beneficiaries of H-2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certification. Beneficiaries who were admitted to the United States may not be substituted without a new petition accompanied by a newly approved temporary labor certification.

(1) Alien outside the U.S. To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are outside of the United States, the petitioner must, by letter and a copy of the petition approval notice, notify the consular office at which the alien will apply for a visa or the port of entry where the alien will apply for admission. The petitioner must also submit evidence of the qualifications of beneficiaries to the consular office or port of entry prior to issuance of a visa or admission, if applicable.

(2) Alien in the U.S. To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner must an amended petition, with the fee prescribed in 8 CFR 103.7(b)(1).

The amended petition must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new temporary labor certification issued by DOL or the Governor of Guam and subsequent H-2B petition are required. The petitioner must also provide:

(i) A copy of the original petition approval notice;

(ii) A statement explaining why the substitution is necessary;

(iii) Evidence of the qualifications of beneficiaries, if applicable;

(iv) Evidence of the beneficiaries' current status in the United States, and

(v) Evidence that the number of beneficiaries will not exceed the number allocated on the approved temporary labor certification, such as employment records or other documentary evidence to establish that the number of visas sought in the amended petition were not already issued.

(h) Consequences of a determination that fees were collected from alien beneficiaries. (1) Denial or revocation of petition. As a condition of approval of an H-2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H-2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).

(i) Fee collected by petitioner. If USCIS determines that the petitioner has collected or entered into an agreement to collect such fee or compensation, the H-2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(ii) Fee collected by agent. If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H-2B employment, the H-2B petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to filing the petition, either the petitioner or the agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(iii) Information disclosed after filing or approval of petition. If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of an offer of H-2B employment after the filing of the H-2B petition, the petition will be denied or revoked on notice.

(iv) Reimbursement of fee, termination of collection agreement. If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation after the filing of the H-2B petition and that the petitioner knew or had reason to know of the payment or agreement to pay, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full, that the parties terminated any

agreement to pay before the beneficiary paid the fees or compensation, or that the petitioner has notified DHS within 2 work days of obtaining knowledge, in a manner specified in a notice published in the Federal Register.

(2) Effect of petition revocation. Upon revocation of an employer's H-2B petition based upon paragraph (h)(1) of this section, the alien beneficiary's stay will be authorized and the beneficiary will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H-2B petition filed by a different employer.

(3) Reimbursement as condition to approval of future H-2B petitions. (i) Filing subsequent H-2B petitions within 1 year of denial or revocation of previous H-2B petition. A petitioner filing an H-2B petition within 1 year after a decision denying or revoking on notice an H-2B petition filed by the same petitioner on the basis of paragraph (h)(1) of this section must demonstrate to the satisfaction of USCIS, as a condition of the approval of the later petition, that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed in full each beneficiary of the denied or revoked petition from whom a prohibited fee was collected or that the petitioner has failed to locate each such beneficiary despite the petitioner's reasonable efforts to locate them. If the petitioner demonstrates to the satisfaction of USCIS that each such beneficiary was reimbursed in full, such condition of approval will be satisfied with respect to any subsequently filed H-2B petitions, except as provided in paragraph (h)(3)(ii) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to

locate but has failed to locate each such beneficiary within 1 year after the decision denying or revoking the previous H-2B petition on the basis of paragraph (h)(1) of this section, such condition of approval will be deemed satisfied with respect to any H-2B petition filed 1 year or more after the denial or revocation. Such reasonable efforts include contacting all of each such beneficiary's known addresses.

(ii) Effect of subsequent denied or revoked petitions. An H-2B petition filed by the same petitioner subsequent to a denial under paragraph (h)(1) of this section is subject to the condition of approval described in paragraph (h)(3)(i) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(i) Enforcement. The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H-2B worker.

(j) Invalidation of temporary labor certification issued by the Governor of Guam. (1) Basis for invalidation. A temporary labor certification issued by the Governor of Guam may be invalidated by USCIS if it is determined by USCIS or a court of law that the certification request involved fraud or willful misrepresentation. A temporary labor certification may also be invalidated if USCIS determines that the certification involved gross error.

(2) Notice of intent to invalidate. If USCIS intends to invalidate a temporary labor certification, a notice of intent will be served upon the employer, detailing the reasons for the intended invalidation. The employer will have 30 days in which to file a written response in rebuttal to the notice of intent. USCIS will consider all evidence submitted upon rebuttal in reaching a decision.

(3) Appeal of invalidation. An employer may appeal the invalidation of a temporary labor certification in accordance with 8 CFR 103.3.

§ 214.201 Special requirements: H-3 trainees.

(a) Alien trainee. The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. Physicians are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.

(1) Externs. A hospital approved by the American Medical Association or the American Osteopathic Association for either an internship or residency program may petition to classify as an H-3 trainee a medical student attending a medical school abroad, if the alien will engage in employment as an extern during his/her medical school vacation.

(2) Nurses. A petitioner may seek H-3 classification for a nurse who is not H-1 if it can be established that there is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country and such training is designed to benefit the nurse and the overseas employer upon the nurse's return to the country of origin, if:

(i) The beneficiary has obtained a full and unrestricted license to practice professional nursing in the country where the beneficiary obtained a nursing education, or such education was obtained in the United States or Canada; and

(ii) The petitioner provides a statement certifying that the beneficiary is fully qualified under the laws governing the place where the training will be received to engage in such training, and that under those laws the petitioner is authorized to give the beneficiary the desired training.

(b) Supporting evidence. (1) Conditions of training. The petitioner is required to demonstrate that:

(i) The proposed training is not available in the alien's own country;

(ii) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(iii) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(iv) The training will benefit the beneficiary in pursuing a career outside the United States.

(2) Description of training program. Each petition for a trainee must include a statement which:

(i) Describes the type of training and supervision to be given, and the structure of the training program;

(ii) Sets forth the proportion of time that will be devoted to productive employment;

(iii) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(iv) Describes the career abroad for which the training will prepare the alien;

(v) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(vi) Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.

(3) Restrictions on training program for alien trainee. A training program may not be approved which:

(i) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(ii) Is incompatible with the nature of the petitioner's business or enterprise;

(iii) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(iv) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(v) Will result in productive employment beyond that which is incidental and necessary to the training;

(vi) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(vii) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(viii) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

§ 214.202 Special requirements: Participants in a special education exchange visitor program.

(a) Petitioner requirements. (1) Program description. The H-3 participant in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(2) Petitioner facilities. The petition must be filed by a facility which has professionally trained staff and a structured program for providing education to children with disabilities, and

for providing training and hands-on experience to participants in the special education exchange visitor program.

(3) Restriction. The requirements in 8 CFR 214.201 for alien trainees do not apply to petitions for participants in a special education exchange visitor program.

(b) Supporting evidence. The petitioner for an H-3 petition for a participant in a special education exchange visitor program must submit:

(1) A description of the training program and the facility's professional staff and details of the alien's participation in the training program (any custodial care of children must be incidental to the training), and

(2) Evidence that the alien participant is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities.

§ 214.203 Guam labor certification program.

(a) Criteria for Guam labor certifications. The Governor of Guam will, in consultation with USCIS, establish systematic methods for determining the prevailing wage rates and working conditions for individual occupations on Guam and for making determinations as to availability of qualified U.S. residents.

(1) Prevailing wage and working conditions. The system to determine wages and working conditions must provide for consideration of wage rates and employment conditions for occupations in both the private and public sectors, in Guam and/or in the United States (as defined in section 101(a)(38) of the Act), and may not consider wages and working conditions outside of the United States. If the system includes utilization of advisory opinions and consultations, the opinions must be provided by officially sanctioned groups which reflect a

balance of the interests of the private and public sectors, government, unions and management.

(2) Availability of U.S. workers. The system for determining availability of qualified U.S. workers must require the prospective employer to:

(i) Advertise the availability of the position for a minimum of three consecutive days in the newspaper with the largest daily circulation on Guam;

(ii) Place a job offer with an appropriate agency of the Territorial Government which operates as a job referral service at least 30 days in advance of the need for the services to commence, except that for applications from the armed forces of the United States and those in the entertainment industry, the 30-day period may be reduced by the Governor to 10 days;

(iii) Conduct appropriate recruitment in other areas of the United States and of its territories if sufficient qualified U.S. construction workers are not available on Guam to fill a job. The Governor of Guam may require a job order to be placed more than 30 days in advance of need to accommodate such recruitment;

(iv) Report to the appropriate agency the names of all U.S. resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring; (v) Offer all special considerations, such as housing and transportation expenses, to all U.S. resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring;

(vi) Meet the prevailing wage rates and working conditions determined under the wages and working conditions system by the Governor; and

(vii) Agree to meet all Federal and Territorial requirements relating to employment, such as nondiscrimination, occupational safety, and minimum wage requirements.

(b) Approval and publication of employment systems on Guam. (1) Systems. USCIS must approve the system to determine prevailing wages and working conditions and the system

to determine availability of U.S. resident workers and any future modifications of the systems prior to implementation. If USCIS, in consultation with the Secretary of Labor, finds that the systems or modified systems meet the requirements of this section, it will publish them as a notice in the Federal Register and the Governor will publish them as a public record in Guam.

(2) Approval of construction wage rates. USCIS must approve specific wage data and rates used for construction occupations on Guam prior to implementation of new rates. The Governor must submit new wage survey data and proposed rates to USCIS for approval at least eight weeks before authority to use existing rates expires. Surveys must be conducted at least every two years, unless USCIS prescribes a lesser period.

(c) Reporting. The Governor must provide USCIS statistical data on temporary labor certification workload and determinations. This information must be submitted quarterly no later than 30 days after the quarter ends.

§§ 214.204 - 214.205 [Reserved]

Jowett, Haley L

From: Nguyen, Carolyn Q
Sent: Tuesday, May 19, 2009 5:57 PM
To: Bessa, Jane M; Chong, Jenny; Devera, Jennie F; Ecle, Lynette C; Elias, Erik Z; Faulkner, Elliott C; Harvey, Mark E; Henson, John C
Cc: Gooselaw, Kurt G
Subject: validity period

Hi,

Please confirm that for cases where the work is performed for a third party, we are requesting contracts/SOWs/letters to ensure the proffered position is that of a specialty occupation. Further, we would limit the H-1B approval to the period specified in the contract.

Thanks.

Jowett, Haley L

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 7:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods

Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

Provide clarification on whether the officer should issue a split decision on an EOS case if there is a gap between the validity of the previous LCA and the current LCA, specifically an EOS by the same employer as stated in current SOP.

The regulation at 8 § CFR 214.2(h)(15)(ii)(B)(1) states that –

> An extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation or an alien of distinguished merit and ability. The alien's total period of stay may not exceed six years. The request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.

Additionally, 8 CFR § 214.2(h)(9)(iii)(A)(1) states that:

> An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

Guidance in the H-1B National SOP (page 5-69 of 9/30/04 version; page 5-48 of 11/21/01 version) states that –

> ***Same Employer Exception (EOS petitions only):***
> If the beneficiary's status has expired prior to the date that you selected as the "from" date (according to the general rule listed above), AND the petition was filed by the same employer, then backdate the validity date to the day after the beneficiary's status expires to eliminate gaps. If the petition is filed by a ***different*** employer, DO NOT backdate the "from" validity date.

The H-1B National SOP goes on to state that–

> A gap between the expiration of the beneficiary's existing status and either the requested "from" date or the LCA "from" date does not automatically require that you deny the EOS request. Look at the evidence provided to determine if the reason for the gap is excusable.

While the National SOP permits us to close a gap by backdating an EOS with the same employer when there is a gap between the expiration of the beneficiary's existing status and the LCA "from" date, the Service Centers have pointed out that the SOP appears to be in conflict with the regulatory requirement at 8 CFR § 214.2(h)(9)(iii)(A)(i) that the H-1B approval period "may not exceed the validity period" of the LCA and regulation takes precedence over the SOP.

"The regulation at 8 CFR § 214.2(h)(9)(iii)(A)(i) is vague and ambiguous as to whether the word "exceed" applies to extension periods where the petitioner has an approved

petition but not an approved LCA. The regulation may be read to mean that the approved petition may not "go beyond" the ending validity period, rather than meaning that the approved petition may not "precede" the starting validity period of the LCA. The SOP confirms that our past practice in interpreting the regulation, in light of other regulatory provisions that allow for untimely extensions in certain circumstances, is to approve "closing the gap" by backdating the validity date . To depart from that past practice and interpretation may create a variety of operation, policy, and legal concerns.

Further, during the period from 11/5/09 to 3/9/10, when USCIS was temporarily accepting H-1B petitions filed without a certified LCA, one of the examples provided in the Questions and Answers document on USCIS's website at USCIS - Questions and Answers: Temporary Acceptance of H-1B Petition Filed without DOL's Certified Labor Condition Applications (LCAs) stated that:

> An H-1B petition requesting an extension of stay is filed with evidence of a pending LCA. The requested starting validity date listed on both the H-1B petition and pending LCA corresponds to the date the beneficiary's current H-1B status expires. However, because of the various delays in the ICERT system and the fact that the DOL cannot backdate the starting validity of an LCA, the LCA *originally filed with petition* is certified with a starting date that is subsequent to the date the beneficiary's current H-1B status has expired. Although the H-1B petition was timely filed with USCIS before the beneficiary's status expired, there is a gap between the starting date requested on the H-1B petition and the starting date authorized on the certified LCA *originally filed with the petition* (aka "LCA-gap").
>
> A: USCIS will not deny an H-1B petition filed during this temporary extension on the basis that the LCA originally filed with petition was certified after the petition was filed, as long as the case is found to be otherwise eligible. In the example above, USCIS will exercise discretion based on the totality of circumstances to determine whether to issue a Form I-94 showing continuous authorized stay and extension of stay.

8 CFR § 214.1(c)(4) allows us the discretion to excuse a late EOS filing. OCC interprets 214.1(c)(4) to grant USCIS the discretion to excuse a late filed petition despite the language of 214.2(h)(14) stating that a request for a petition extension may be filed only if the validity of the original petition has not expired. A strictly literal reading of the petition extension provision in (h)(14) would render the untimely extension provision in 214.1(c)(4) meaningless as nonimmigrant beneficiaries would, under this approach, not be able to obtain an approval of the underlying petition on which an untimely extension of stay request could be approved. These provisions have been, to date, read together and consistently and in a manner that benefits the petitioner and beneficiary if they are otherwise eligible under the criteria set forth in 214.2(h)(15) and 8 CFR § 214.1 (c)(4).

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~~This regulatory provision~~ 8 CFR § 214.1(c)(4) would be rendered meaningless if we did not interpret 8 CFR § 214.2(h)(9)(iii)(A)(1) to allow USCIS to accept a late-filed LCA as well. Example: USCIS decides, in its discretion, to accept a late-filed EOS where the lateness of filing was due to ineffective assistance of counsel. The attorney also late-filed the LCA. If we change our policy, and fail to close the gap, USCIS would be foreclosed from granting the late-filed EOS, despite our decision to accept the late EOS filing. A decision to change our policy and decide not to close the gap would moot the late-filed EOS regulatory provision.

Therefore, it would be appropriate to close the gap between LCA validity dates on an extension petition with the same employer, provided there are no other eligibility issues.

Scenarios	Validity Period	Comments/References
Health Care Workers o Unrestricted license o Restricted license o No license – lack of SS card or valid immigration document o No license – physical presence required	 Up to 3 years 1 year or duration of restricted license, which ever is longer 1 year 1 year – if the records include a letter from the State Licensing Agency indicating that the beneficiary is fully qualified to receive the required license upon admission	Velarde Memo dated 05/20/09 Cook Memo dated 11/20/01 Neufeld Memo dated 03/21/08 Notes – o eligibility must be established at time of filing o Letter of a scheduled exam is not sufficient
Teachers	Same guidance as Health Care Worker above	Cook Memo dated 11/20/01
Off-site Employment o 10/25/10 o FID List (Active) o H-1B Dependent o Inordinate amount of filings compared to the number of employees	1 year or duration of contract/letter, whichever is longer	Note – this instruction may change when we get the H-1B Policy Memo
Professions that allows for one to work under the supervision of someone who possesses an unrestricted license	Up to 3 years	
Medical Resident o State does not require licensing o Temporary License o Permanent License	 Validity period depends on the exemption stipulated (or not stipulated) by each State during the residency program. (See Examples) 1 year or duration of the license, whichever is longer Up to 3 years	Examples – if no State license is required for: ▪ First year of residency – give 1 year ▪ The first 4 years of residency – give 3 years; or ▪ The duration of the residency program (or, conversely, if no time limitations are clearly stipulated) – give 3 years
Unrestricted license but with annual renewals	Up to 3 years	
AC21 - §106	Remaining of the 6-yr period plus 1 year	A denied/revoked I-140 with a pending appeal is

		considered "pending" for the purpose of §106 extensions. See Aytes Memo dated 12/27/05.
AC21 - §104	Up to 3 years	Notes – o Visa must be unavailable at time of filing not date of adjudication o Visa number charged to Country of Birth
O-1 and P-1 filed by a U.S. Agent	Validity period should be given based on the validity of the contract between the petitioner and the beneficiary and the validity of the contract(s) between the actual employer(s) and the beneficiary	Notes – o There may be a reasonable gap between each assignments or performances o We may accept a letter from the actual employer(s) indicating the intent to use the beneficiary's services in lieu of a contract. These must be the same employers listed on the itinerary.
Note – if the H-1B extension request does not put the beneficiary over the 6-year limit, do NOT limit the validity date simply because there is a pending or approved I-140.		

H-1B Extension Beyond the Six-Year Limit
All Scenarios
(Rev. 07-10-09, D2)

DOL Final Rule and the Effect on AC21

The Department of Labor issued its Final Rule effective July 16, 2007. Part of that rule affects the adjudication of AC21 petitions. As of July 16, 2007, all approved labor certifications must be filed in support of an I-140 petition within 180 days of the approval date. If no I-140 is filed within 180 days of the labor certification approval date that labor certification becomes invalid.

H & L's Admitted As Parolees Applying for AC21 Exemption: see Federal Register, Vol 72, 61791 (11-01-2007)

All H or Ls that were admitted at the POE as parolees (DA or DT) can be re-admitted (read COS) by CSC officers in H or L status and extended pursuant to AC2 if they remain eligible for H or L status (I-797 validity period has not expired at the time of filing) and are eligible for AC21. If they do not meet the requirements above, the beneficiary will have to go to a consulate and apply for a visa. Do a split decision if the position qualifies as a specialty occupation.

H & L's working with an Employment Authorization Document (EAD) pursuant to 8 CFR 274a.12(c)(9) based on a pending I-485 applying for AC21 Exemption:

As long as the beneficiary remains eligible for H or L status (I-797 validity period has not expired at the time of filing) and is eligible for AC21, then the beneficiary can extend his or her stay beyond the six-year time limit.

AC21 Eligibility

Step	Action
1.1	**Section 104**: Only TWO Requirements – An approved I-140 and no visa is immediately available.

IF...	THEN...
At the time of filing, the I-140 has been approved and the visa **IS NOT** available [regardless of whether an I-485 is pending].	Grant up to 3 years of AC 21 if the petitioner requests it and the LCA covers the requested time.
At the time of filing, the I-140 has been approved and the visa **IS** available	They do not qualify for AC 21 under Section 104. Go to step 1.2 to determine eligibility under Section 106.

1.2 **Section 106:** Exemption of the 6-year limit due to lengthy adjudication.

IF...	THEN...

• The labor certification is unexpired* at the time of filing the Form I-129 H-1B extension; **and**
• The labor certification was filed with DOL or the I-140 was filed with USCIS at least 365 days:
  o prior to the six-year limit date, or
  o prior to the requested start date [if the 6-year limit has already been reached]; **and**
• No final decision (including pending appeals) is made to:
  o Deny the application for labor certification;
  o Revoke the approved labor certification;
  o Deny the I-140 petition**; or
  o Grant or deny the alien's application for immigrant visa or for adjustment of status [Form I-485].
	Grant up to one year of AC21 beyond any time remaining on the alien's 6-year maximum stay - including recaptured time – not to exceed a total of three (3) years.

The petitioner fails to comply with any one (1) of the above.	Deny AC21 benefits. Grant additional time for the balance of the 6-year limit if eligible, including recaptured time, or other exempt time – not to exceed a total of three (3) years.

***Unexpired Labor Certification Explained:** DOL Perm Fraud rule [see 20 CFR 656.30(b)]

On or after July 16, 2007: The petitioner has 180 calendar days after the permanent labor certification was approved by DOL in which to file the certification in support of a Form I-140 with USCIS - or the labor certification becomes invalid.

Prior to July 16, 2007: Certifications approved by DOL, must have been filed in support of an I-140 petition prior to January 13, 2008, in order to be valid (180 calendar days after the effective date of the DOL final rule).

Second or Subsequent I-140 Filed: If the first I-140 was denied, the filing of any subsequent I-140's using the same (original) labor certification that was submitted in support of the previously denied I-140 - keeps that labor certification valid for AC21 eligibility unless the labor certification is revoked by DOL.

****Approved I-140 & Visa Available:**

If the I-140 was recently approved, HQ stated that we need to give time to file an I-485. So officers can use discretion here and grant 1 year AC 21 on a recently approved I-140 (visa available) to allow time for the beneficiary to file an I-485, if either the I-140 or labor cert is more than 365 days old at the time of the six year anniversary date.

EOS – SAME EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will begin one day after the current H-1B status expires and will be valid for at most three years or until the beneficiary has reached the six year limit; unless, the petitioner requests less time and/or the LCA's validity dates restrain the adjudicator from granting three years or up to the six year limit.

EOS – DIFFERENT EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity date will begin no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

CHANGE OF STATUS

Make note of:
- Beneficiary's current status
- Date current status expires
- Dates listed on LCA
- Dates requested by Petitioner

Questions to ask:
- Is the beneficiary currently in valid status and/or will the beneficiary be in valid status when the COS is to begin? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **reclaimed time?** If so see *Note 3*

Validity dates will begin no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will be valid for at most three years or until 1) the beneficiary has reached the six year limit, and/or 2) the petitioner requests less than a three year extension, and/or 3) the LCA is valid less than a full three year extension.

Note 1: Beneficiary out of Status
If otherwise approvable, but the beneficiary's status expires before the extension or change of status is requested to or legally can begin (e.g. due to H-1B cap), the officer must issue a split decision, denying the extension or change of status while approving the nonimmigrant classification.

Note 2:Extension Beyond 6-Year Limit
Four circumstances exist which enable validity dates to range beyond the six year H-1B limit:
1) AC-21 issues (see below)
2) Itinerant/seasonal work*
3) Border crossers/border commuters*
4) Reclaiming time (see note 3)

* itinerant/seasonal work and border crossers/commuters are relatively rare and will not be discussed here. See your supervisor and/or coach for more information.

AC-21 questions:
- *Is there evidence of a labor certification or immigrant petition that has been pending over 365 days?* If so, the adjudication can extend beyond the sixth year in one year increments.
- *Is there evidence of an approved I-140, but the visa is not available?* If so, the adjudicator can approve beyond the 6th year for up to three years.

Note 3: Reclaimed time
Days spent outside the United States during the validity period will not be counted toward the maximum period of stay; the petitioner must submit independent evidence documenting any and all periods of time spent outside the United States. *See Matter of IT Ascent and Aytes memo dated 10/21/2005.*

U.S. Citizenship and Immigration Services

CSC H-1B Matters

July 7, 2014 Issue 7

Reminders

- **Unscheduled VIBE Outages**

When VIBE is experiencing unscheduled outages or issues, officers should follow these procedures:

1. Report the unscheduled VIBE outage to the SISO and the CSC-VIBE e-mail box;

2. Continue adjudicating cases while the unscheduled VIBE outage is being resolved;

3. Do not hold cases while waiting for the unscheduled VIBE outage to be resolved; and

4. If officers still have unchecked cases when the unscheduled VIBE outage is resolved, officers should complete the VIBE checks at that time.

- **H-1B Adjudicative Priorities**

At the H-1B meeting on June 24, 2014, officers are reminded of the following adjudicative priorities:

- An appeal should have an adjudicative action (treating the appeal as a motion and granting motion and the Form I-129 or forwarding the appeal to the AAO) within 5 days of receipt into the officer's workstation;

- Finish any remaining untouched H-1B Cap cases; and

- H-1B Cap resubmits should be adjudicated within two weeks of the responses.

Procedural Guidance

- **AC21 benefits for derivatives**

An H-1B petition beneficiary does not qualify for AC21 benefits based on pending or approved permanent labor certification, Form I-140, or Form I-526 filed on behalf of the beneficiary's family members.

Whenever an officer adjudicates a request for AC21 benefit, the officer must first check whether the permanent labor certification, Form I-140, and/or Form I-526 was filed for the H-1B petition

beneficiary, not for his or her spouse or other family member. AC21 benefits cannot be granted to an H-1B petition beneficiary if the petition beneficiary does not have a pending or approved permanent labor certification, Form I-140 or Form I-526 filed on his or her own behalf.

CFDO Corner

There has been a change in the CFDO referral process for Form I-129 EOS where the beneficiary already changed status from F-1 through a prior petition. The reason for streamlining these SOFs is that the hit is on the suspect school and not the beneficiary.

Referral process for suspect schools where the hit relates to the school and not the beneficiary:

(b)(7)(c)

1. The ISO will send an e-mail to the Duty Officer (DO) at [redacted] with the following message in the subject line "Standard SOF Request for TECS hit on Suspect School_____" (fill in the suspect school's name). The body of the email should include the receipt number and beneficiary information;

2. The DO will input the receipt number, beneficiary information, and other pertinent information into DS;

3. The DO will pull the requested school's SOF and email it to the ISO;

4. The ISO will print out the SOF and place it on the non-record side of the file;

5. This process will take a maximum of five business days to complete, from when the ISO first emails the DO to when the DO sends the SOF; and

6. If there are requests exceeding this five business days timeframe, the ISO will ask the SISO to send an e-mail to SIO Debbie Lopez. CFDO will then follow up with the request.

For all other TECS hits (COS from F-1 to H-1B) where research on the beneficiary and the suspect school is needed, please continue to send those files to CFDO with a fraud referral sheet.

Questions and Answers

Question 1: For concurrent employment, must the validity end-date match the existing H-1B employment end-date?

Answer 1: No. USCIS may grant H-1B concurrent employment for end dates that do not match the existing H-1B employment end-date. Of course, all H-1B requirements must be met such as the three-year maximum, the six-year limit, AC21, LCA, or licensing. Concurrent employment start date is the date of adjudication or the requested start date, whichever is later.

Furthermore, maintenance of status should be verified for the existing H-1B employment. Maintenance of status is especially important when the existing H-1B employer was approved as a cap-exempt employer and the beneficiary is seeking concurrent employment at a cap-subject employer. A

2004's policy memorandum from Donald Neufeld states that when an H-1B worker who works for a cap-exempt employer seeks concurrent employment with a cap-subject employer, the officer should verify that the H-1B worker is still employed with the cap-exempt employer. If the H-1B worker "ceased" employment at the cap-exempt employer, the H-1B worker will become cap-subject and the worker may be ineligible for the requested benefit.

Question 2: For AC21 Section 104(c) purposes, do we use the H-1B worker's country of birth or country of citizenship to determine whether an immigrant visa is available?

Answer 2: INA 202(b) states that the foreign state to which an immigrant is chargeable is determined by birth within that foreign state. There are several exceptions to this country of birth chargeability. These exceptions are generally requested when an alien applies for an immigrant visa or adjustment of status. For AC21 104(c) purposes, use the H-1B worker's country of birth to determine immigrant visa availability. Please see your supervisor if the Form I-129 requests cross-chargeability.

H-1B in the News

Immigration reform is dead, so is raising the H-1B cap | **June 27, 2014 | Computerworld**

U.S. Citizenship and Immigration Services

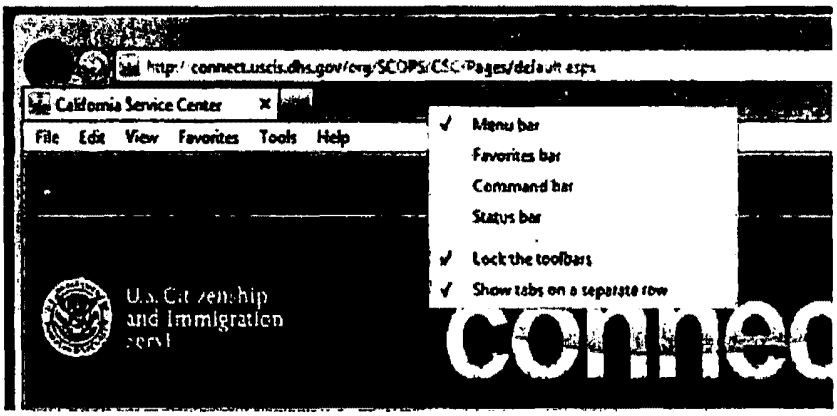
CSC H-1B Matters

April 17, 2014 Issue 2

Reminders

• The contractors will not place ADIS printouts into FY2015 Cap cases from April 8, 2014 through April 19, 2014 (the first two weeks of FY2015 Cap data entry). This is for FY2015 Cap filings only. On April 22, 2014, the contractors will resume placing ADIS printouts into FY2015 Cap cases. If there are no ADIS printouts in the file, officers must place ADIS printouts into all H-1B cases seeking a change of status, extension of stay, or amendment of stay. The ADIS printouts must be within 15 days of the adjudication date. Follow these instructions to place date and FOUO marks into Internet Explorer 9 (Windows 7) printouts:

1. Open Internet Explorer, right click on the Tabs bar and select Menu bar. See picture.



2. Click File and then Page setup.

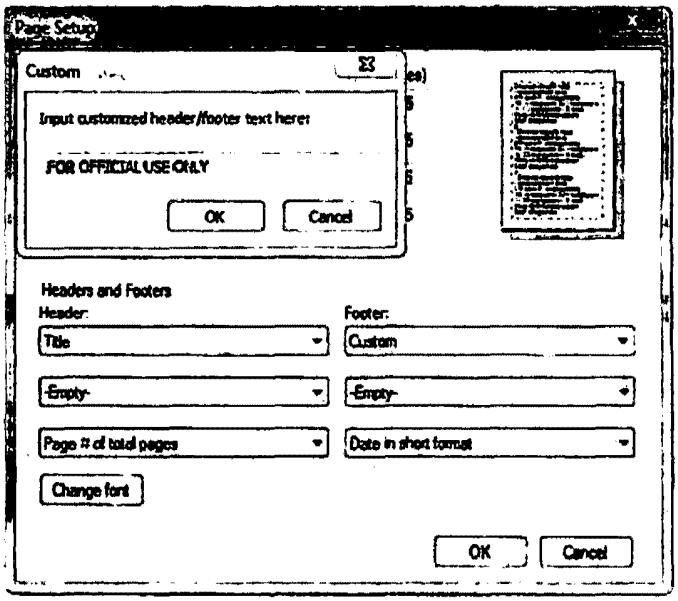
3. Select Custom in the first drop down menu under Footer.

4. Replace the footer in the Custom dialog box with FOR OFFICIAL USE ONLY.

5. Click OK on the Custom dialog box.

6. Ensure that one of the next two drop down menus under Footer shows "Date in short format." If not, select that footer.

7. Click OK in the Page Setup dialog box to save settings.



• The EB-1 and EB-3 sections have dedicated fraud POCs for H-1B related cases. The POCs are currently working on cases in the lookout list and untouched cases from CFDO. If officers made referrals to CFDO, those referrals will be returned to the referring officers. If officers see fraud indicators or emerging trends in their cases, they can contact one of the following POCs for guidance.

- Wendy Clark (SISO)
- Ken Luu (SISO)
- Lorri Aguilar
- Christel Artuz
- Josef Avecilla
- Rachel Baca
- Keith Brandino
- Renato Crisostomo
- Yen Kim Dao
- Quan Diep
- Gwendolyn Itpick
- Beverly Lin
- Hui-Lan Lin
- John Mikalson
- Jason Nguyen
- Hernando Quandt
- Linda Rasson
- Rekha Rangaswamy

Procedural Guidance

- **New six years for a beneficiary previously in H-1B or L-1 status**

8 CFR 214.2(h)(13)(iii)(A) and 8 CFR 214.2(l)(12)(i) provide that a beneficiary who has spent a total of six years in the U.S. in H-1B status, five years in L-1B status, or seven years in L-1A status and combinations of all three may not be readmitted as an H-1B unless the alien has been outside the U.S. for the immediate prior year. Immediate prior year has been interpreted to mean that the alien was outside the U.S. for a total of one year prior to his or her last admission. Brief trips to the U.S. as a visitor for pleasure or business do not interrupt the one year requirement but those trips also do not count toward the one year requirement.

Numerous H-1B cases have been approved where the beneficiaries did not meet the one year requirement. Whenever a petitioner seeks a new H-1B stay for a beneficiary, officers must determine whether the beneficiary was previously in H-1B or L-1 status through checks of ADIS, TECS, CLAIMS National, and/or CCD. Do not rely on the petitioner to fully disclose all periods the beneficiary has spent in H-1B or L-1 status. The petitioner may not know or has not been told of all periods the beneficiary has spent in H-1B of L-1 status. These checks must be done even if the beneficiary is consular processing because the beneficiary may not have met the one year requirement. If there are unexplained gaps in the beneficiary's H-1B or L-1 stays, an RFE should be issued to address these gaps.

A common scenario is for an H-1B worker to change status to F-1 at the end of the H-1B worker's sixth year. The worker did not leave the U.S. after changing status. Several years later, the now F-1 student seeks another six years in H-1B. This student does not qualify for another six years in H-1B because the student did not spend at least one year outside the U.S. after the end of the student's prior H-1B stay. Please do not assume that just because this student is in F-1 status that the student has met the one year requirement. Officers must verify a beneficiary's prior H-1B or L-1 stays with system checks.

Numerous factors such as a beneficiary's prior H-1B or L-1 stays; when the beneficiary departed the U.S.; when the Form I-129 was filed; when the beneficiary returned to the U.S.; when the beneficiary will begin work; or the beneficiary's nonimmigrant status, will determine whether a Form I-129 for another six years in H-1B can be approved. Officers are encouraged to send detailed e-mails to the CSC H1B MATTERS mailbox for questions on this issue.

- **H-1B Cap VIBE Checks and Printouts**

Each H-1B case requires at least one VIBE score check prior to an adjudicative action (RFE, ITD, ITR, Approval, Denial, or Revocation). VIBE score can be checked in VIBE through the VIBE Status Reports ("VSRs") or the score can be found in CLAIMS GUI and/or Mainframe. VIBE printouts, either the VSRs or CLAIMS printouts, are not required to be placed into the file.

If an RFE/ITD was issued, the following If-Then table provides for follow-up VIBE checks for H-1B Cap cases only:

H-1B CAP VIBE CHECKS

If VIBE score in VSR or CLAIMS is	and VIBE score is	and an RFE/ITD addressing petitioner's issues was	Then

* All RFEs for VIBE related issues require supervisory concurrence (b)(7)(e)

- **RFE for H-1B fees**

The current practice is to include all other requests (if necessary) on an RFE for H-1B required fees. Please do not send an RFE for the H-1B required fees and then a subsequent RFE for other requests.

Questions and Answers

Question 1: What should an officer do if the beneficiary's passport has expired at the time the Form I-129 requesting extension of stay was filed?

Answer 1: USCIS has some discretion regarding passports on extensions of stay. 8 CFR 214.1(a)(3)(i) provides that a beneficiary seeking an extension of stay must present a passport only if requested to do so by DHS. The passport must be valid at the time the Form I-129 was filed. Also, a beneficiary who is required to present a passport to be admitted to the U.S. must keep his or her passport valid for the entire period of his or her stay in the U.S.

If the beneficiary's passport is expired at the time the Form I-129 extension of stay was filed, the current practice is to send an RFE for a valid passport. If evidence is presented that the beneficiary subsequently obtained a valid passport; made an effort to obtain a valid passport; or the beneficiary reasonably articulates why a valid passport cannot be obtained, the current practice is to grant the extension of stay. A denial of the extension of stay for not having a valid passport should be rare and such denial must be discussed with a supervisor.

If no passport copy is present in the file, system searches in ADIS, TECS, and/or CCD should be conducted to find a valid passport. Discretion can be applied whether a copy of a passport should be requested in an RFE.

Also, on extension of stay, please do not limit a beneficiary's stay to the validity of the passport because there are no regulatory provisions for such limits.

Question 2: When a issuing a split decision, should the officer change Part 2, Question 4 of the Form I-129 to "a. Notify the office in Part 4 so each beneficiary can obtain a visa or be admitted"? Should the officer update Part 2, Question 5 of CLAIMS GUI to "A: General Petition – no COS or EOS requested"?

Answer 2: No. Do not change Part 2, Question 4 of the Form I-129 to "a. Notify the office in Part 4 so each beneficiary can obtain a visa or be admitted". Instead, officers must write "Split Decision" in the Partial Approval box of the Form I-129 and attach a Form I-541 denial. Officers must also designate a consular post, PFI or POE on the Form I-129. Do not forget to annotate the duplicate Form I-129 (if any).

Also, do not update Part 2, Question 5 of CLAIMS GUI to "A: General Petition – no COS or EOS requested". When the clerk updates the split decision in CLAIMS GUI, the clerk will select the proper approval language and send the Form I-541 denial instead of a Form I-94.

CFDO Corner

(b)(7)(c) (b)(7)(e)

Exciting changes have been happening in the CFDO! Immigration Officers have been added to Team 2 – the CFDO team that is dedicated to H-1B fraud cases. The CFDO H-1B Fraud Team is:

PREMIUM PROCESSING ROUTING

If you have a Premium Processing case, please walk the case down to the CFDO so that the case can be processed in a timely manner. A PP Incoming Box (Goldenrod) has been set up outside of SIO Lopez workstation WS12014.

H-1B in the News

- Founder of bogus Pleasanton college is guilty in "visa mill" case | March 25, 2014 | Contra Costa Times

- Pr. George's schools' decision on visas leaves Filipino teachers uncertain about their futures | April 11, 2014 | The Washington Post

- Massachusetts' clever immigration reform workaround | April 14, 2014 | Fortune

Please send your suggestions, topics or questions to the CSC H1B Matters mailbox.

Jowett, Haley L

From: Gooselaw, Kurt G
Sent: Wednesday, March 24, 2010 11:48 AM
To: Wolcott, Rachel A; Dela Cruz, Charity R
Subject: FW: Limiting H-1B Validity Dates

Please advise on this. I believe we are issuing an RFE where the EE relationship has not been established for the period requested – whatever time is being requested whether less than or more than 1 year. Right?

From: Sweeney, Shelly A
Sent: Wednesday, March 24, 2010 9:37 AM
To: Nguyen, Carolyn Q; Gooselaw, Kurt G
Subject: FW: Limiting H-1B Validity Dates

Kurt and Carolyn,

Does the CSC handle these cases the same way that VSC outlines below, or do you handle them in a different manner?

Thanks!

Shelly

From: Perkins, Robert M
Sent: Wednesday, March 24, 2010 11:12 AM
To: Johnson, Bobbie L
Cc: Doherty, Shannon P; Sweeney, Shelly A; Bolog, Marguerite M; Bouchard, Armanda M; Howrigan, Tanya L; Parascando, Bridgette H; McCarthy, Thomas F; Burford, Mary H; Young, Claudia F
Subject: RE: Limiting H-1B Validity Dates

Bobbie,

The Q&A accompanying the employer-employee memo states:

"If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you **may** be given an opportunity to correct the deficiency in response to a request for evidence (RFE)".

In order to minimize the number of RFEs issued, we intend to proceed as follows until further clarification is provided:

- If an employer-employee relationship has been established for a year or more and the petition is otherwise approvable, we will limit the petition's validity to the time period of qualifying employment established by the evidence. If we have to request evidence for some other reason, we will give the petitioner an opportunity to correct the deficiency in said RFE.

- If an employer-employee relationship has been established for less then a year, we will give the petitioner an opportunity to correct the deficiency in response to a request for evidence.

Thanks,

Rob

From: Perkins, Robert M
Sent: Friday, March 19, 2010 6:56 AM

To: Johnson, Bobbie L; Young, Claudia F
Cc: Doherty, Shannon P; Sweeney, Shelly A; Gooselaw, Kurt G; Nguyen, Carolyn Q
Subject: FW: Limiting H-1B Validity Dates

Bobbie and Claudia,

As you are aware, VSC did not limit validity dates as a general rule prior to the release of the employer-employee memo and follow-up Q&As (email from Shelly on 2/24/10) noted in blue and red below. Since providing guidance to our officers (see Mandy's message below) we have encountered a few scenarios that we would like further clarification.

1- See attached Wipro example - This petition seeks a COS for two years and 8 months. Until the employer-employee memo came out, we accepted their statements of in-house employment knowing they were liable for their statements and accountable during any site visit. We granted the time requested. The beneficiary of this petition will be working at a Wipro location in East Brunswick, NJ on a project for Cisco Systems, Inc. The project and its length are not documented. Since the employer-employee memo came out we have started requesting evidence of the duration of the in-house project for companies that are H-1B dependent, meet the 10/25/10 criteria, or have fraud concerns. Note: Wipro filed over 2,500 H1B petitions between 10/1/2008 – 9/30/2009. I personally would prefer not to issue thousands of RFEs for our top filers such as Wipro, Tata, Cognizant, Infosys, etc. when the duration of an in-house project is not documented, but will do so if that is what SCOPS expects. The better alternative may be to limit the stay to one year without the benefit of an RFE?

2- See attached Infosys example – The end client letter states "We anticipate a need for the services of 500 Infosys personnel for 2 years commencing from the date they arrive in the US in H-1B status. If the beneficiary is abroad, we won't know the date of arrival, so we intend to grant two years without issuing an RFE and allowing the petitioner to submit additional evidence for the duration of the validity period requested.

On this topic, the Q&A that accompanied the employer-employee memo addresses limiting validity (question 7, page 2). Has any of the further clarification below (specifically the one year rule) been shared with our stakeholders? Now that we are limiting validity periods, AILA is inquiring on individual cases. It would be helpful to know what you have or have not shared with our stakeholders at this point.

QUESTION: For in-house work assignments will we accept the petitioner's statement regarding the work assignment or can we request evidence to validate the petitioner's claim? For example, the beneficiary will work on a project at the petitioner's location. The petitioner indicates the project is for their client Whirlpool. Can we request documentation that serves as evidence of the agreement between the petitioner and Whirlpool? We would probably avoid this line of questioning with large well known companies, however I have concerns that the small IT staffing-type companies will try to make the in-house claim after receiving an rfe for an itinerary and right to control, when in reality they probably don't have facilities to house their workers. Many of these small IT staffing companies have mail and phone services at an office building, without renting space (aka a virtual office).

RESPONSE: If an adjudicator is not satisfied with the evidence submitted by the petitioner to establish that a valid employer-employee relationship will exist when the beneficiary is placed at an in-house work assignment, the adjudicator may request additional evidence as needed. Please remember, you cannot specifically require submission of a particular type of document unless it is required by regulations.

QUESTION: How much time do we provide for a validity period if there is evidence of an employer-employee relationship for less than one year?

RESPONSE: If sufficient evidence of an employer-employee relationship for the duration of the requested validity period is not demonstrated, you may issue an RFE to give the petitioner the opportunity to correct the deficiency. If the response to the RFE still does not demonstrate an employer-employee relationship for the entire period requested then a validity period of no less than one year (but up to the duration of the period of time that a valid employer-employee relationship has been established) may be granted if the petitioner establishes the employer-employee relationship for a period of time less than the validity period requested as long as:

- the petition is otherwise approvable;
- the beneficiary will not exceed the maximum allowable period of time in H-1B status (or under AC21); and
- the LCA is valid for that period of time.

QUESTION: If the petitioner is an IT consulting firm and there is evidence of an in-house project for one year, but three years is requested, do we give the one year or the three years?

RESPONSE: The petition may be approved for the duration of time in which an employer-employee relationship has been demonstrated (please see the response above for further information).

Thanks,

Rob

From: Bouchard, Armanda M
Sent: Friday, February 26, 2010 4:23 PM
To: VSC Allied Group 3; VSC Allied Group 6
Subject: Limiting H-1B Validity Dates

Hello H-1B Officers,

This email provides guidance on limiting H-1B approval dates for petitioners who are required to provide an itinerary of employment (H-1B dependent employers, employers meeting the 10/25/10 plus 1 criteria, and employers with an SOF). Please consult with the H-1B guide beginning on page 31 if you have questions about the itinerary requirement for these categories. These are the same itinerary requirements that have been in effect since April 2009.

- Effective today, for those employers that we require to establish an itinerary, we will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer. In other words, approvals will be for at least one year or for the duration of the documented work assignment.

- If you are adjudicating a new case and there is sufficient evidence of a work assignment, either in-house or at a client location, but the length of the work assignment is not indicated, send the attached rfe.

- If you already have or you will be sending an rfe in CG using 2134, 2135, or 2139, then the work assignment dates have been requested. Upon reviewing the response, grant an appropriate amount of time, for no less than one year.

- In-house employment follows the same rule. We will limit the validity dates to the duration of the documented work assignment or one year, whichever is longer .

Please forward questions to the AG3 Senior mailbox, as I will be our next Monday and Tuesday.

Thank you,

Mandy

Jowett, Haley L

From: Sweeney, Shelly A
Sent: Friday, July 17, 2009 10:23 AM
To: Gregg, Bret S; Nguyen, Carolyn Q; Gooselaw, Kurt G; DeLosSantos, Marisol; Hazuda, Mark J; Perkins, Robert M; Lockerby, Beth A
Cc: Kruszka, Robert F; Cummings, Kevin J; Williams, Carol L
Subject: FW: USCIS Update Guidance to Employers
Attachments: USCISUpdate1(PT-OT)July172009.doc; USCISUpdate1(PT-OT)July172009.pdf

All,

The PT/OT press release was issued today.

Thanks!

Shelly

From: Clark, Matthew J
Sent: Friday, July 17, 2009 10:37 AM
To: Alfonso-Royals, Angelica M; Ash, Matthew L; Bacon, William H; Bentley, Christopher S; Blauvelt, Sally; Brown, Katherine HS; Brown, Meddie; Cabrera, Marilu; Carter, Constance L; Chandler, Matthew; Chang, Carrol; Clark, Matthew J; Ellis, Rachel; Frymyer, John M; Garcia-Upson, Maria; Garner, Angela L; Gradowski, Leonard S; Herrmann, Mary K; Jones, Rendell L; Key, Donnell E; Kielsmeier, Lauren; Kuban, Sara; Kudwa, Amy; Lacot, Rosalina; Mattingly, Kathryn A; McCament, James W; Mcgee, Ramona L; Melero, Mariela; Metellus, Harry SJ; Murnane, Kristin M; Murray, Jeff J; Nicholson, Claire K; Ostapowich, Stephanie A; Prince, Lillian L; Rhatigan, Chris; Rodriguez, Miguel E; Roles, Rebecca J; Rummery, Sharon; Santiago, Ana E; Santos, David M; Scarborough, Sarah Frances; Scheidhauer, Sharon E; Sebrechts, Marie T; Strong, Susan; Tintary, Ruth E; USCIS Web Publishing; Vick, Frank R; Wheeler, Shannon L; Wilcox, Julia D; Wright, William G
Cc: Sweeney, Shelly A; Cummings, Kevin J; Salem, Claudia S
Subject: USCIS Update Guidance to Employers

Hello All,

Summary:
U.S. Citizenship and Immigration Services (USCIS) today issued guidance to certain employers who received a denial of Form I-129, *Petition for Nonimmigrant Worker*, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation prior to May 20, 2009.

Documents: USCIS Update (This time without Draft watermark, my apologies for the recall)

Date for Release: For Immediate Release Friday, July, 17, 2009

Guidance:
- Regional Media Managers- For your Information and your use as appropriate.
- Community Relations- For your information and distribution as appropriate (I have included the PDF for your use as appropriate).
- Congressional- For your information and distribution as appropriate.
- Internal- For your information and your use as appropriate.
- Customer Service – For your information.
- New Media- Please post on the home page and in the press room.

Best Regards,

Matt Clark

Matthew J. Clark
Communications Strategist
Office of Communications
U.S. Citizenship and Immigration Services
matthew.j.clark@dhs.gov
[redacted] office
[redacted] Blackberry
www.uscis.gov

(b)(6)

Office of Communications

U.S. Citizenship and Immigration Services

USCIS Update

July 17, 2009

USCIS Issues Additional Information to Employers Whose H-1B Petitions for Health Care Specialty Occupations Have Been Denied

WASHINGTON—U.S. Citizenship and Immigration Services (USCIS) today issued guidance to certain employers who received a denial of Form I-129, *Petition for Nonimmigrant Worker*, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation prior to May 20, 2009.

If the Form I-129 was denied solely on the basis that the beneficiary did not possess a Master's or higher degree in the field, the petition may be reopened on service motion and will be adjudicated in accordance with the May 20, 2009 memorandum on "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation," which provides clarification on the standards for H-1B health care specialty occupations. USCIS will only review denials of petitions for which it has received a written request for review from the petitioning employer or its representative.

USCIS is requesting that employers whose petitions were denied on the above basis send an email to the Service Center that issued the denial of Form I-129 to request review of the denial. An affirmative request for review from the petitioner or its representative is required to expedite this process. In light of recently-issued guidance, USCIS is providing a special accommodation to the public by initiating Service Motions to Reopen (upon receiving an email request) in lieu of requiring petitioners to file an appeal. Therefore, USCIS is **not** requiring petitioners to submit an appeal fee or any other fee in this instance.

Requests should include "PT/OT Service Motion Request" in the subject line of the email, and will be accepted through August 14, 2009. Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the California Service Center should be sent to: csc-ncsc-followup@dhs.gov.

Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the Vermont Service Center should be sent to: vsc.ncscfollowup@dhs.gov.

Affected petitioners requesting USCIS review of their H-1B petition(s) are not required to submit a copy of the May 20, 2009 memorandum, but should explain how the beneficiary meets the standards set forth in that memorandum. Also, as with the reopening on a Service Motion, USCIS must be satisfied prior to approval that the beneficiary is currently eligible to practice in their respective health care occupation in the state of intended employment. Petitioners are advised to document this evidence. In any case where USCIS cannot make a final decision on the record before it, USCIS may request additional information. If the petition was denied upon additional grounds, or if the petitioner fails to submit requested evidence of the beneficiary's continuing eligibility, the original denial of the case will be affirmed.

For additional information, call the National Customer Service Center at (800) 375-5283.

– USCIS –

I-129 H-1B Requirements & Authority Adjudication Guide	
REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.

Filing Requirements		
Filing – when to		
...no more than six months prior to the start date or end of the current validity period.		8 CFR 103.2(a)(1). Instructions hold same weight as regulation. See I-129 Instructions. "Generally, a Form I-129 petition cannot be filed more than six months prior to the date employment is scheduled to begin."
Fees		
Base Fee	$ 325	8 CFR 103.7 & I-129 Instructions
Employer Fees – ACWIA		Omnibus Appropriations Act for FY 2005 (effective December 08, 2004) reinstituted the American Competitiveness in the Workforce Improvement Act (ACWIA). See 214(c)(9) of the Act. • Applies to initial & first extension filing only. • Does not apply to second or subsequent extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the $1,500 or $750 filing fee was paid on the initial petition or the first extension of stay. • Does not apply to petitioners eligible for fee waivers – see below. NOTE: ACWIA fees cannot be paid by the beneficiary. See INA 212 (n)(2)(C)(vi)(II). Data entry rejects petitions if beneficiary pays ACWIA fees. USCIS should not deny or revoke the petition if it is discovered the beneficiary paid these fees. DOL can impose penalties and seek reimbursement to the alien for ALL fees, e.g., initial, first extension with same employer, change of employer, and ACWIA. (Rev. 01-27-2010)
26 or more employees	$1,500	
25 or less employees	$ 750	
Public Law 111-230	$2,000	Signed into law by President Obama on August 13, 2010. This fee is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, needed to file a petition for a Nonimmigrant Worker (Form-129), as well as any premium processing fees for H-1B petitions postmarked on or after August 14, 2010, and will remain in effect through September 30, 2014. This additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in the U.S. in H-1B or L nonimmigrant status. Petitioners meeting these criteria must submit the applicable fee with an H-1B, L-1A, or L-1B petition filed to: • grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of INA section 101(a)(15), this includes initial and new concurrent employment filings, or • obtain authorization for an alien having such status to change employers.
Premium Processing	$1,225	Premium Processing (PP) guarantees a decision (approval or denial) within 15 days of receipt. Issuance of Requests for Evidence and Intents to Deny (RFE's & ITD's) stop the PP clock.
Fee Waivers		
• Non-profit org, education, government research org		Must have proof: 501(c)(3), etc. See 8 C.F.R. 214 (h)(19)(iii)(B)
• Amended petitions		It is considered an extension if they ask for more time. Amended petitions

REQUIREMENTS		STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
		are only for the same validity period.
• USCIS error		(i.e. USCIS data-entered the beneficiary's name incorrectly)
• 2nd or subsequent extension		With the same employer. If the petitioner is a "new employer" – Fees start all over again. Does not apply to second or subsequent extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the $1,500 or $750 filing fee was paid on the initial petition or the first extension of stay.
Mandatory Fraud Fee	$ 500	H-1B Visa Reform Act of 2004. Applies to initial approval of H-1B or L nonimmigrant status or seeking approval to employ an H-1B or L nonimmigrant currently working for another U.S. employer.
Cap Exemptions		Make sure the beneficiary was previously counted against the CAP. Check to see whether the previous employer was Cap exempt.
Section 214(g)(5) of the Act indicates that, "The numerical limitations [Cap] contained in paragraph (1)(A) shall not apply to any H-1B non-immigrant alien who:		(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), or a related or affiliated nonprofit entity;
		(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization;....
Affiliations **ROUTE ALL AFFILIATIONS CASES TO: AD432*		For the purposes of determining affiliation USCIS uses 8 C.F.R. 214 (h)(19)(iii)(B) which states that an affiliated or related nonprofit entity is a non profit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education through one or more of the following:
		1. The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation; 2. operated by an institution of higher education; or 3. attached to an institution of higher education as a member, branch, cooperative, or subsidiary. *See* Aytes Memo of 06/06/2006 for guidance for the exemptions of the H1B Cap (H-1B, Legal Reference, Cap Exemption folder).
Controlled Technology or Technical Data		Any Form I-129, Petition for a Nonimmigrant Worker filed on behalf of an H-1B, H-1B1, L-1, or O-1A beneficiary on or after February 20, 2011, **MUST INCLUDE A RESPONSE TO PART 6 OF THE PETITION,** "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States."
Troubled Asset Relief Program (TARP) Employ American Workers Act (EAWA), Pub. L. 111-5, Div. A, Title XVI, § 1611 sunset on February 16, 2011.		Officers should continue to follow previously issued EAWA guidance if the H-1B petition indicates that the beneficiary will begin employment before February 17, 2011. If the H-1B petition requests a start date of February 17, 2011 or later, officers should not deny an H-1B petition for lack of a valid LCA at the time of filing if the denial ground is solely based on the fact that the petitioner responded affirmatively to question 1d on Part A (page 17) of the

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	H-1B Data Collection and Filing Fee Exemption Supplement but did not complete the H-1B dependent employer attestations on the LCA. This is regardless of the date the petition and/or LCA were filed. Additionally, petitioners requesting an employment start date of February 17, 2011 or later are not required to fill out question 1d on Part A (page 17) of the H-1B Data Collection and Filing Fee Exemption Supplement. Again, this is regardless of the date that the petition and/or LCA are filed. The officer should not issue an RFE requesting the petitioner to fill out this question if it is left blank. SCOPS will work to have this question removed in future versions of the form.
Signature	Petitioner must sign Part 6 of Form I-129. If prepared by someone other than petitioner, Part 7 must be signed by preparer.
G-28	Must be properly signed and appropriate category checked to be considered properly executed

Petitioner Requirements	
LCA - (DOL Form ETA-9035)	• Required with every petition. • Must be certified by DOL before filing the petition. • Must show all work locations. • Validity period for petition may not exceed the limits (dates) on the LCA. • The LCA is the governing document for purposes of approved validity periods. • Copies may be submitted for multiple beneficiaries but LCA must include a list of all previously approved petitions using the LCA.
	NOTE: Beware of LCA job descriptions for SOC (ONET/OES) occupation titles that are different than the job duties listed on the petition. RFE if there are clear differences. Example: The LCA shows a title with a job description as a Health Educator but the duties on the petition are those of a registered nurse and, coincidentally, the Beneficiary has a degree in nursing.
Employer	• Must have an Employer-employee relationship. • 8 CFR 214.2(h)(4)(ii) defines employer. • Evidence should establish employer's ability to hire, fire, supervise and control work of H-1B alien throughout the duration of the validity period requested. • right to control vs. actual control. *See* Memorandum from Donald Neufeld, Associate Director Service Center Operations, Citizenship and Immigration Services, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitioner, Including Third-Party Site Placements: Adjudicator's Field Manual Update AD10-24*, HQBCIS 70/6.2.8, AD 10-24 (January 08, 2010).
	From: Steele, Jenny B **Sent:** Wednesday, July 28, 2010 12:10 PM **To:** #CSC Division II;

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
Validity Periods for Employer-Employee Relationship	Cc: Gooselaw, Kurt G; Nguyen, Carolyn Q **Subject:** E-E Relationship and Validity Periods **Importance:** High This email supersedes any and all previous guidance on H-1B validity periods. As such the instruction below applies to all H-1B petitions including Cognizant. In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period. However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS has provided the following instruction for the below situations: • the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated); • an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and • an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched). Should you have any further questions or concerns regarding H-1B validity periods, please see your supervisor and/or ACD. Thanks.
Itinerary	8 CFR 214.(2)(h)(2)(i)(B) provides that an itinerary is required any time the petition requires services to be performed in more than one location. See Part D of the I-129, H-1B data collection supplement. If they claim offsite employment, they must have an itinerary.
Agents as petitioners	8 CFR 214.2(h)(2)(i)(F)
Itinerary	(1) Agent as employer – contract with beneficiary and itinerary required.
	(2) Agent filing for multiple employers - itinerary
Contracts	(3) cont'd. Contracts can be requested in questionable cases only. See employer-employee relationship memorandum listed in the "Employer" section above.
Fraud Prevention	Fraud is defined as a knowing and willful misrepresentation of a material fact.
Check all applicable databases	
Primary Fraud Identifiers from BFCA	Benefit Fraud & Compliance Analysis (BFCA) determined:

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
<$10 million gross annual income < 25 employees < 10 years since established	
Aberrant Filing Practices	...hundreds of H-1B filings in a short period of time – usually a ratio of 10 filings for every one employee (e.g., 10:1 ratio, 100 filings with only 10 employees). aka: Body Shops
Bona Fide Business	
Willful Violator	

Position Requirements	8 CFR 214.2(h)(4)(iii)(A)(1),(2),(3)&(4)
Degree – must be in a specific specialty	Check beneficiary's transcripts – there must be a nexus between the beneficiary's degree that qualifies him/her to perform the duties of the H-1B position.
Baccalaureate or higher:	
(1) Normally a minimum requirement	Authority: The DOL publication Occupational Outlook Handbook (OOH).
(2) Common to the industry or so complex	Copies of job announcements that show that the attainment of a baccalaureate or higher degree in a specific academic discipline is common place and is required as a minimum to enter into that specific occupational field by similar-sized companies.
(3) Employer normally requires the degree	The petitioner can show, through probative evidence, that in the past they have only hired individuals with a degree to perform the duties of the proffered position.
(4) Nature of the duties so specialized....	Petitioner must establish through probative evidence (trade journals, publications, recognized authorities, etc.) that the duties are so complex and specialized that only an individual with a degree in _____ would be able to perform the duties of the position.
Two positions, one petition	Normally, a petitioner files 1 petition for 1 position. However, it may be possible for a petitioner to file 1 petition for 2 positions. Example: A college professor will teach a chemistry course and a subsequent physics course within a particular validity period. If he has a degree in Chemical Physics, it may be okay to approve for both positions since he is qualified to teach both courses. However, clear it through your supervisor/ACD first.
Fraud Prevention	
No Bona Fide Job Offer	Accounting, Human Resources, Analysts, & Managers - business analysts, financial analysts, market research analysts, managers for advertising, marketing, promotions, public relations, and sales requested by marginal companies lacking the organizational complexity required to support such a position on a full-time basis for a three-year period may not qualify as bona fide job offers, (e.g., liquor stores, dry cleaners, gas stations, residential care facilities, convenience stores, donut shops, fast food restaurants, dental offices, 99 cent stores, parking lots, etc.). In such cases, if the petitioner is requesting an extension with the same employer – you may ask (with permission from your supervisor) for work product for the previous validity period to determine if it and the proffered position appear credible. Additionally you can "google" to see if the work product was plagiarized by the beneficiary.

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	Market Research Analysts: Since approximately 2009 the OOH indicates that there is no minimum requirement in a specific field of study for entry into a Market Research Analyst position. However, a Market Research Analyst may still qualify as a specialty occupation if the position meets one of the three remaining criteria for a specialty occupation listed above.
Position title does not match description	See RFE. Must be a significant difference between the duties performed under the title shown on the LCA and the duties described by the petitioner, e.g., a teacher vs. a nurse.

Beneficiary Requirements	8 CFR 214.2(h)(4)(iii)(C)(1), (2),(3), (4), & (5)	
Must have one of the following:		
1. U.S. baccalaureate or higher degree	as required by the specialty from an accredited college or university in the United States	
2. Foreign degree determined to be equivalent to a US baccalaureate or higher	as required by the specialty occupation from an accredited college or university in the United States	
3. Unrestricted State license to fully practice and be immediately engaged in the specialty occupation in the state of intended employment.	School teachers, architects, healthcare workers, civil engineers or any other professions.	
	Temporary License –	give validity to the end of license or one year, whichever is longer.
	Permanent License –	give requested time up to three years.
4. Equivalency	8 CFR 214(h)(iii)((D) Combination of Education, Training, and Experience	
1. Evaluation from official who has authority to grant college credit for training or experience at an accredited college that has a program for granting such credit.	If the college official is writing the evaluation on behalf of a private educational evaluation firm the evaluation will not meet this requirement. However, it may, possibly, be used as recognition of expertise from one of the two recognized authorities in the specialty occupation for the determination of equivalency.	
2. CLEP or PONSI recognized college-level credit programs.	This evidence has never been seen. Keep in mind that to qualify under CLEP or PONSI the beneficiary would have had to successfully obtained CLEP/PONSI for each specific academic discipline. These certifications are not accumulative.	
3. Evaluation of foreign education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.	Must have for all foreign degrees. They should have also submitted transcripts. The evaluation should not include experience or training for an equivalency. Foreign credentials evaluators evaluate foreign education – ONLY.	
4. Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons...who have achieved a certain level of competence in the specialty.	This evidence has never been seen except on First Preference, I-140 Immigrant Petitions for Aliens of Extraordinary Ability (E11). Examples include "The Royal Society"which is a fellowship of the most eminent scientists, engineers, and technologists from the UK and the commonwealth; and the IEEE (Institute of Electrical and Electronics Engineers) which have "Fellow" grade memberships which recognize unusual distinction in the profession and conferred only by invitation of the Board of Directors upon a person of outstanding and extraordinary qualifications and experience in IEEE-designated fields, and who has made important individual contributions to one or more of these fields.	

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
5. Determination by the Service.	
Baccalaureate: 3 years of specialized training or experience for every 1 year the alien lacks	It must be clearly demonstrated that the training and/or experience included the theoretical and practical application of specialized knowledge required by the specialty occupation that was gained while working with peers, supervisors, or subordinates who have a degree or equivalent in the specialty occupation.
Masters: baccalaureate with at least 5 years of experience in the specialty	And that the beneficiary has recognition of expertise from at least two recognized authorities in the specialty occupation.
Doctorate: No equivalency. Must have the doctorate degree or foreign degree equivalent if required	
Recognition of expertise by one of the following:	
1. Recognition of expertise from at least two recognized authorities in the specialty occupation.	8 CFR 214.2(h)(4)(c)(ii) defines *Recognized authority* as a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state: (1) The writer's qualifications as an expert; (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) How the conclusions were reached; and (4) The basis for the conclusions supported by copies or citations of any research material used.
2. Membership in a recognized foreign or US association or society in the specialty occupation	• Example: Electronics Engineer who is a member of the IEEE (Institute of Electrical and Electronics Engineers). • Membership in the IEEE is open to individuals who by education or experience give evidence of competence in an IEEE designated field of interest. • The designated fields are, in broad terms: Engineering, Computer Science and Information Technology, Physical Sciences, Biological and Medical Sciences, Mathematics, Technical Communications, Education, Management, Law, and Policy.
3. Published material by or about the alien in professional publications trade journals, books, or major newspapers	
4. Licensure or registration to practice the specialty occupation in a foreign country, or	
5. Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.	

Beneficiary's Status	
Untimely Filing	Under 214.1(c)(4) a petition may be filed untimely if:

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances; (ii) The alien has not otherwise violated his or her nonimmigrant status; (iii) The alien remains a bona fide nonimmigrant; and (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act. Case-by-case basis. Contact a Div I supervisor for the RFE.
Passport Pages	Must be valid at time of filing
COS	• Must be maintaining status in U.S. at time of filing and while petition is pending. • If they depart the U.S. while the petition is pending they have abandoned their request for COS and their status must be denied (Form I-541). • See SQ94 in IBIS.
J-1 subject to 212(e)	Beneficiary is not even eligible to apply for an H or L nonimmigrant visa unless they have the waiver (I-612 Approval Notice) in hand. *See* 212(e) of the Act; 248 of the Act; and 8 CFR 214.2. However, we do not hold them to this requirement. They can submit an I-612 at the time of filing the I-129. If there is none with the file we must RFE to see if they have been granted an I-612 waiver.
Conrad 30 Waiver –	Foreign Medical Graduates (FMG) serving in underserved areas in compliance with an I-612 waiver of 212(e) 2-year residence requirement. NOTE: • A J-1 FMG cannot change to any other nonimmigrant classification (with the exception of H-1B for the sole purpose of fulfilling the terms/conditions of his or her Conrad 30 waiver) unless/until he or she fulfills all the terms/conditions of his or her Conrad 30 waiver. • Consequently, the J-2 spouse cannot change to any other nonimmigrant classification (with the exception of H-4 status in re: the J-1 FMG's H-1B limited status) unless/until the J-1 FMG fulfills all the terms/conditions of his or her Conrad 30 waiver. • Make sure that H-4s requesting a COS to H-1B are not dependents of FMG with a Conrad waiver.
EOS	Must be maintaining status in U.S. at time of filing. See SQ94 in IBIS.
Six-Year Limitation of Stay in H and/or L status	*See* 8 C.F.R. 214.2(h)(13)(iii)
AC21 - Exemptions of the 6-year limitation	Latest Guidance: Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, Bureau of Citizenship and Immigration Services, *Supplemental Guidance Relating to Processing Forms I-140*

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications "Affected by the American Competitiveness in the Twenty-First Century Act of 2000(AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277. (May30, 2008).
Section 104	Section 104(c) of AC21 - Exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status when an H-1B nonimmigrant with approved I-140 petition is unable to adjust status (no I-485 or pending) due to limitation on visa availability by country. May be extended up to three (3) years
Section 106	The 21st Century DOJ Appropriations Act (November 02, 2002) amends § 106(a) of AC21 - Exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status. May only be extended up to one year and/or in conjunction with an extension up to the six-year limit.
Recaptured time	...can be any time outside the U.S including seasonal or intermittent employment, etc. *See* Adopted Decision 06-0001 - H-1B Recapture of Time Spent Outside the United States
Outside U.S. for 1 year	Remainder Option: Where an alien has been absent from the United States for longer than a year but has time remaining on his or her initial maximum period of admission, USCIS will currently allow the alien to choose between being re-admitted for the remainder of the six-year period or admitted as a "new" H-1B alien subject to the H-1B fiscal year numerical limitation. See Michael Aytes Memorandum, dated 12-05-2006, *Guidance on...Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent From the united States for Over One Year.*
Commuters, Seasonal, or Intermittent Employment	If a beneficiary of an H or L classification is in the U.S. for six months or less each year, grant them an additional extension up to 3 years without regard to 6 year H classification limitation. Commuters from Mexico or Canada are exempt AC-21
IBIS	
SQ11	Good for 180 days.
SQ94	SQ94/NIIS check is required as follows, per the most current memos (2002 & 2005): • All EOS Denials within 15 days • All COS Approvals & Denials within 15 days

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
NSEERS	Effective Date: April 28, 2011 -- DHS Notice withdrawing NSEERS country designation Over the past six years, the Department of Homeland Security (DHS) has implemented several new automated systems that capture arrival and exit information on nonimmigrant travelers to the United States, and DHS has determined that recapturing this data manually when a nonimmigrant is seeking admission to the United States is redundant and no longer provides any increase in security. DHS, therefore, has determined that it is no longer necessary to subject nationals from these countries to special registration procedures, and this notice deletes all currently designated countries from NSEERS compliance. Afghanistan Eritrea Kuwait Oman Sudan Algeria Indonesia Lebanon Pakistan Syria Bahrain Iran Libya Qatar Tunisia Bangladesh Iraq Morocco Saudi Arabia UAE Egypt Jordan North Korea Somalia Yemen See Federal Register, Vol. 76, No. 82 / 23830 / Thursday, April 28, 2011 - found in the O common, I-129, NSEERS, Reference Material, HQ Policy Memoranda folder.

Beneficiary's Dependents Requirements	
Relationship	Review passports, marriage certificates, and/or birth certificates to establish relationship.
Status	
Passport Pages	Must be valid at time of filing.
COS	Must be maintaining status in U.S. at time of filing and while petition is pending. See SQ94 in IBIS.
EOS	Must be maintaining status in U.S. at time of filing. See SQ94 in IBIS.
IBIS	
SQ11	Good for 180 days.
SQ94	Must be checked within 15 days of decision. If applicant departed, approve to end of current validity. If departed after the end of the current authorized validity period, deny and give to the departure date.

Lookouts, etc.	
Petitioners:	

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.

REQUIREMENTS	STATUTE, REGULATION, MEMORANDUMS, INFO, etc.
	See Policy Memorandum of April 28, 2011 on *Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation.*
Positions:	
Foreign Medical Graduates (FMG) who received waivers of 212(e) based on the Conrad Amendment to work as physicians in underserved areas	Route to: Michael Violett – Div I, AD432
Florida Hospital Nurses	Route to: Jenny Chong, SISO, Div I, AD503
Medical Residents in Maryland	The State doesn't issue a license. If you are going to limit the validity period to one year – get supervisory approval. Email Jenny Chong if you have any questions.

H-1B ADJUDICATION CHECK-LIST

(Rev. 03-28-13, D1)

Petitioner Requirements

- ❑ Check all applicable databases & systems (IBIS, ADIS, CLAIMS for prior filings, VIBE, SEVIS, Lookouts list).
- ❑ Same employer ❑ New employer ❑ New Filing
- ❑ Filing – Is it filed no more than six months prior to the start date or end of current validity period?
- ❑ Fees
  - ❑ Base Fee: $ 325
  - ❑ Employer Fees (ACWIA)
    - ❑ 26 or more employees $1,500
    - ❑ 25 or less employees $ 750
      - ❑ Fee Exempt
        - ❑ Higher Education, Non-profit research, government research, primary or secondary school
        - ❑ Amended petitions
        - ❑ USCIS error
        - ❑ 2nd or subsequent extension with same employer
  - ❑ Fraud Fee – mandatory for 1st filing with each employer $ 500
  - ❑ Public Law 111-230 Fee – mandatory for initial filing with each employer for employers with 50 or more employees of which 50% or more are in H or L nonimmigrant status $ 2000
- ❑ Cap Exempt? (Higher Education (or affiliated), Non Profit or Government Research, J-1 Conrad Physician with Conrad waiver)
- ❑ Signatures (Part 7 and both signatures on the H classification supplement)
- ❑ Release of controlled technology- Did they answer this question?
- ❑ G-28 – signed by petitioner and attorney. Beneficiary is not the affected party – cannot sign.
- ❑ LCA (DOL Form ETA-9035) – certified? Applies to the proffered position? Validity Period on LCA: From: _____ To: _____

Requested dates on Pet: From: _____ To: _____

- ❑ Employer or Agent ❑ Itinerary
- ❑ Employer-Employee Relationship (especially for third-party placement)
- ❑ Prior petition? Still valid? Previous Receipt Number: _____ Prior validity dates: _____

Position Requirements

- ❑ Degree - must be in the specific specialty required to perform the duties of the position
  - ❑ Baccalaureate or higher
    - ❑ Normally a minimum requirement..... Occupational Outlook Handbook
    - ❑ Common to the industry or so complex..... Job announcements
    - ❑ Employer normally requires the degree..... Employment History
    - ❑ Nature of the duties so specialized..... Complexity of duties
- ❑ License required?
- ❑ Physicians – Special Requirements (see RFE under Position Issues folder)

Beneficiary Requirements

- ❑ Must qualify
  - ❑ U.S. baccalaureate or higher degree in the specialty
  - ❑ Foreign degree determined to be equivalent to a U.S. baccalaureate or higher in the specialty
  - ❑ Unrestricted State License to fully practice and be immediately engaged in the specialty occupation in the State of intended employment ❑ temporary, ❑ permanent, ❑ working under licensed professional, e.g., architect or civil engineer

- ❑ Equivalency - Must have "recognition of expertise" in addition to one or more of the following:
  - ❑ Evaluation from an official who has authority to grant college level credit for training or experience – school has a program for such.
  - ❑ CLEP or PONSI recognized college-level programs.
  - ❑ Evaluation of foreign education by a reliable credentials evaluation service which specializes in such service.
  - ❑ Certification or Registration from a nationally-recognized professional association.
  - ❑ Determination by USCIS: ❑ Bachelor's: 3:1 ratio = yrs train/exp to 1 yr college. ❑ Master's: Bachelor's + 5 yrs train/exp.
  - ❑ Doctorate: Must have a doctorate degree or its foreign equivalent.
- ❑ EOS

  Beyond the "Six-Year Limit"
  - ❑ AC21
    - ❑ Section 104 - approved I-140 unable to adjust status due to unavailability of visa. Extended up to three (3) years
    - ❑ Section 106 – pending I-140 or Labor Cert for 365 days or more - extended up to one year
  - ❑ Recaptured Time

- ☐ Remained outside U.S. for one (1) year – cap available?
- ☐ Intermittent or Seasonal

☐ Status ☐ Current status: _____ Validity ends: _____ Date of 6-year limit: _____

- ☐ Timely filed petition?
- ☐ Passport Pages – must be valid at time of filing – continuing to maintain status
- ☐ Foreign Health Care Workers – Special Admissibility Requirements (see RFE currently under Position Issues folder)
- ☐ COS
  - ☐ J-1, subject to 212(e)? ☐ 212(e) waived - admissible? ☐ SEVIS

EOS – SAME EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner
- Licensure restrictions

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity date will **begin** one day after the current H-1B status expires and will **end** for three years or until 1) the beneficiary has reached the six year limit, or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension or 4) one year or the end date of the contract/work order stated by third party employer(s) whichever is longer.

CHANGE OF STATUS

Make note of:
- Beneficiary's current status
- Date current status expires
- Dates listed on LCA
- Dates requested by Petitioner
- Licensure restrictions

Questions to ask:
- Is the beneficiary currently in valid status and/or will the beneficiary be in valid status when the COS is to begin? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity dates will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will **end** for three years or until 1) the beneficiary has reached the six year limit or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension, or 4) the contract/work order is limited by third party employer(s).

Sustained Appeal Cases: the COS date of approval for appealed denial decisions sustained by the AAO is the date of adjudication. The date of adjudication has been determined to be the date the petition was denied. The date of denial is the effective date. – per Efren Hernandez, HQ.

EOS – DIFFERENT EMPLOYER

Make note of:
- Date current H-1B status expires
- Dates listed on LCA
- Dates requested by Petitioner
- Licensure restrictions

Questions to ask:
- Is the beneficiary in status? If no see *Note 1*
- Is the petitioner requesting dates beyond the beneficiary's six year limit? If yes see *Note 2*
- Is the petitioner requesting **recaptured time?** If so see *Note 3*
- Is the employment off-site? If so see *Note 4*
- Does the beneficiary possess a required license? *If so see Note 5*

Validity date will **begin** no earlier than the date of adjudication or will be valid at a date later than the date of adjudication if 1) the petitioner requests a later start date, or 2) the LCA is valid at a later start date, and will **end** for three years or until 1) the beneficiary has reached the six year limit or 2) the petitioner requests less than a three year extension or 3) the LCA is valid less than a full three year extension, or 4) the contract/work order is limited by third party employer(s).

Note 1: Beneficiary out of Status
If otherwise approvable, but the beneficiary's status expires before the extension or change of status is requested to or legally can begin (e.g. due to H-1B cap), the officer must issue a split decision, denying the extension or change of status while approving the nonimmigrant classification.

Note 2:Extension Beyond 6-Year Limit
Four circumstances exist which enable validity dates to range beyond the six year H-1B limit:
1) AC-21 issues (see below)
2) Itinerant/seasonal work*
3) Border crossers/border commuters*
4) Recaptured time (see note 3)

* itinerant/seasonal work and border crossers/commuters are relatively rare and will not be discussed here. See your supervisor and/or coach for more **information**.

AC-21 issues:
- *Is there evidence of an **unexpired** labor certification (LC) or employment-based immigrant petition that is or has been filed over 365 days?* If so, the adjudication can extend beyond the sixth year in **one** year increments. The LC has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by the DOL. Section 106 of AC21
- *Is there evidence of an approved I-140, but the visa is not available?* If so, the adjudicator can approve beyond the 6th year for up to **three** years. Section 104 of AC21

Note 3: Recaptured time
Days spent outside the United States during the validity period will not be counted toward the maximum period of stay; the petitioner must submit independent evidence documenting any and all periods of time spent outside the United States. *See Matter of IT Ascent and Aytes memo dated 10/21/2005.*

Note 4: The off-site employment:
Where the employment is at a third party work-site, and the provided contracts/work orders and/or itinerary

cover less time than requested or authorized by the LCA, only approve for the time period covered by these contracts/work orders and/or itinerary or one year whichever is longer.

Note 5: Required License:
If the temporary license is available and the beneficiary is allowed to perform the duties without a permanent license required by the occupation, then the petition may be approved for a period of 1 yr or for the period that the temporary license is valid, whichever is longer.

If the beneficiary is fully qualified but unable to obtain a full unrestricted license due to lack of SSN, valid immigrant document and/or physical presence in the US in the form of a letter from the State Board, then one year can be granted if otherwise approvable. The beneficiary must have the valid unrestricted license at the time the extension is filed.

U.S. Citizenship and Immigration Services

Form I-129

Petition for Non-Immigrant Worker

H-1B: Specialty Occupation Worker

Participant Guide

April 3, 2014

Creation Date: 04/01/2014

Notice to Students: The information below is provided to assist you with the processing of the Form I-129 Petition for Non-Immigrant Workers for an H-B Specialty Occupation Worker. If you have any questions or concerns regarding the content of this Participant Guide after you have attended the class, please speak to a supervisor or senior officer within your section for additional assistance.

Important Note: "This text has been compiled for TRAINING ONLY. It should NOT be used in place of official directives or publications. The text information is current according to the references listed. You should, however, remember that it is YOUR responsibility to keep up with the latest professional information available for your area of responsibility."

Overview

Objectives	Provide a basic overview of the H-1B nonimmigrant classification.
References	INA Sections 101, 212, 214 Title 8 CFR Parts 103, 214, 248, 274 HQ 70/6.2.8, AD 10-24: January 8, 2010 Memorandum Adjudicator's Field Manual (AFM) 11.1(c) Occupational Outlook Handbook – www.bls.gov/ooh
Agenda	Burden of Proof and Standard of Proof The Definition of an H-1B Nonimmigrant Worker Position and Beneficiary Requirements Petitioner Requirements Labor Condition Application Requirements (LCA)

Burden of Proof and Standard of Proof

What is the burden 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).

What is the standard of proof?

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence seems that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

How do we apply the preponderance standard?

The petitioner has satisfied the standard of proof if the submitted evidence leads USCIS to believe that the claim is "probably true" or "more likely than not."

"More likely than not" is generally considered as greater than 50%.

What is an H-1B Nonimmigrant Worker?

An alien who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability...

Divisions of the H-1B Classification

- H-1B (1B1): Specialty occupation workers
- H-1B2 (1B2): Department of Defense (DOD) cooperative research and development project or co-production project workers
- H-1B3 (1B3): Fashion models of distinguished merit and ability

What is an H-1B Nonimmigrant Worker?

How many can apply?

The total number of H-1Bs in a fiscal year is 65,000, known as the cap.

When can they apply?

Petitioners can file cap petitions for the next fiscal year beginning on April 1 of the current fiscal year.

Are there any exemptions to the cap?

- Masters Cap – First 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher
- Institutions of Higher Education
- Nonprofit entities that are related or affiliated with an institution of higher education
- Nonprofit research organizations or governmental research organizations

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Position Requirements

What is a specialty occupation?

A specialty occupation is defined under INA section 214(i)(1) as:

1) Theoretical and practical application of a body of highly specialized knowledge; and
2) The attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

How do we determine if a position is a specialty occupation?

Does the position meet one of the following four criteria?

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) a) The degree requirement is common to the industry in parallel positions among similar organizations or,
   b) in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

Position Requirements	3) The employer normally requires a degree or its equivalent for the positions; or 4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.
Beneficiary Qualifications	**How does a beneficiary qualify?** Does the beneficiary meet one of the following four criteria? 1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university; 2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university; 3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or 4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.
Petitioner Requirements	**Who can file a petition for a nonimmigrant worker?** A U.S. employer or an agent may file an H-1B petition for a nonimmigrant worker. A U.S. employer is defined as a person, firm, corporation contractor or other association or organization who: 1) Engages a person to work within the U.S. 2) Has an employer-employee relationship with respect to employees under this part; and 3) Has an IRS tax identification number.

Petitioner Requirements

An agent may also file an H-1B petition if the beneficiary is traditionally self-employed or uses agents to arrange short term employment on their behalf with numerous employers. An agent may also file an H-1B petition for a foreign employer who authorizes the agent to act on its behalf.

In both cases, a U.S. employer and an agent must demonstrate that the employer has a valid employer-employee relationship with the beneficiary and that it will continue to exist through the duration of the H-1B validity period.

What is an employer-employee relationship?

The U.S. employer (petitioner) may hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

Third Party Placement

Third party placement is the placement of a beneficiary that is not operated by the petitioner. However, an employer-employee relationship still needs to be established in these placements.

How do we determine if an employer-employee relationship exists in third party placement?

The petitioner has to establish that it has the right to control when, where, and how the beneficiary performs the job. Right to control is different from actual control. An employer may have the right to control the beneficiary's job-related duties but not exercise actual control over each function performed. To establish an employer-employee relationship, a petitioner has to establish the right to control.

Factors to consider in determining right to control

1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?
3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

Petitioner Requirements

4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
7) Does the petitioner claim the beneficiary for tax purposes?
8) Does the petitioner provide the beneficiary any type of employee benefits?
9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

Labor Condition Application (LCA)

What is an LCA?

A LCA is a Department of Labor Form ETA 9035. The LCA must be submitted with every I-129 petition for H-1B classification (except for H-1B2), and must be certified by the DOL prior to the filing of the I-129.

USDOL regulations at Title 20, Code of Federal Regulations ("20 C.F.R.")655.700(b):

> Procedure for obtaining an H-1B visa classification. Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:
>
> 1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA)....
> 2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I-129), together with the certified LCA, to INS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations....

Labor Condition Application (LCA)

What information is on the LCA?

The LCA will provide information on the employer, rate of pay, period of employment, occupation information, work location(s), number of alien workers sought, employer labor condition statements, and employer declaration..

Standard Metropolitan Statistical Area (SMSA)

An LCA is required for each SMSA where the beneficiary will be working. Additional work locations may be listed on an LCA. A petitioner may file multiple LCAs as needed to cover additional work locations.

LCA Requirements

The LCA must be certified by the DOL prior to the filing of the I-129 petition. Employment may only be authorized for the validity period of the LCA. If the LCA lists multiple beneficiaries, the petitioner must submit a list of all prior petitions using the LCA each time a new petition is submitted. An LCA is required for each SMSA where the beneficiary will be working.

U.S. Department of Justice
Immigration and Naturalization Service

CO 214h-C, CO 214L-C
CO 214R-C, CO 1803-C

425 I Street NW
Washington, DC 20536

May 19, 1993

MEMORANDUM FOR All District Directors
All Service Center Directors
Director, Services Center Operations

THROUGH: James A. Puleo
Acting Executive Associate Commissioner for Operations

FROM: Office of Adjudications

SUBJECT: Determining Educational Equivalencies in Petitions Involving Specialty Occupations

Section 124(i) (1) (B) of the INA states, among other things, that a specialty occupation requires the attainment of a bachelor's degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Service officers involved in the adjudication of H-1B petitions for aliens employed in specialty occupations are reminded that all petitions involving an alien who holds a foreign degree need not be accompanied by an evaluation performed by a credentials evaluation service. The regulation at 8 CFR 214.2(h) (4) (iii) (C) (2) merely requires that the beneficiary hold a foreign degree determined to be equivalent to a United States baccalaureate degree.

The determination that a foreign degree is equivalent to a United States degree can be made by a Service officer at the time the petition is adjudicated utilizing a number of factors other than an evaluation performed by a credentials evaluation service. For example, such factors as the alien's prior work experience, the past hiring practices of the petitioning entity, the reputation of the petitioning entity, and an examination of the official transcript of the alien's academic courses should be taken into consideration by the officer in determining whether the alien's foreign degree is equivalent to a United States degree. Obviously, in those situations

where the adjudicator is unable to render a decision in this area, an evaluation from a credentials evaluation service should be requested.

Once a determination has been made that a specific foreign degree is equivalent to a United States degree, that determination may be utilized in the adjudication of future petitions, provided of course, the factors in both petitions are substantially the same.

The instructions in this memorandum may also be utilized in the adjudication of employment-based petitions; L-1 specialized knowledge professional cases, and R-1 religious workers.

R Michael Miller
Acting Assistant Commissioner

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/6.2.8

425 I Street NW
Washington, DC 20536

March 28, 1997

MEMORANDUM FOR All District Directors
All Officers-in-Charge
All Service Center Directors

FROM: Michael L. Aytes
Assistant Commissioner
Office of Benefits

SUBJECT: Criteria for H-1B Petitions Involving Specialty Occupations

The purpose of this memorandum is to remind officers involved in the adjudication of H-1B petitions for specialty occupations of the criteria described in 8 CFR 214.2(h)(4)(iii). The regulation describes the four criteria, which a petitioner can meet to establish that an occupation is a specialty occupation.

This office has been advised that some officers are requiring H-1B petitioners to meet all four of the criteria described in the regulation in order to establish eligibility for H-1B classification. Service officers are reminded that the regulation requires that the position meet only one of the four criteria listed in order to be considered to be a specialty occupation.

If you have any questions or require additional information, please contact Adjudications Officer John W. Brown at [redacted]

(b)(6)

Michael L. Aytes
Assistant Commissioner

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Service Center Operations
Washington, DC 20529

U.S. Citizenship and Immigration Services

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director
Service Center Operations Directorate

DATE: APR 23 2014

SUBJECT: Validity of Arrival/Departure Checks for Fiscal Year (FY) 2015 H-1B Cap Cases

These operating instructions supplement the guidance provided in the July 25, 2013, memorandum, "Operational Guidance to Document Arrival/Departure Information for Applicants/Beneficiaries of Nonimmigrant Petitions and Applications.

The July 25, 2013, memorandum states that USCIS shall review Arrival/Departure information for all applicants/beneficiaries in an appropriately designated DHS system, such as the Arrival Departure Information System (ADIS), no more than 15 days prior to rendering a final decision on an application or petition for a change of nonimmigrant status.

Effective immediately, ADIS checks completed in April 2014, for a FY2015 H-1B cap case, are valid until May 15, 2014. This extension will maximize efficiency and mitigate the impact of having to re-run ADIS checks on H-1B cap petitions.

This guidance applies to, and is binding on, all USCIS Service Center employees and contractors unless specifically exempt. Questions regarding this guidance should be directed to the Service Center Operations Directorate through appropriate channels.

Chong, Jenny

From: Baltaretu, Cristina G
Sent: Friday, January 10, 2014 4:17 PM
To: Nicholson, Roya Z; Matthews, Steven D; Murillo, Gustavo; Cartwright, Charity R; Culhane, Dennis J; Luu, Ken W; Vitug, Ella C
Cc: Chong, Jenny
Subject: FW: E-E Relationship and Validity Periods
Attachments: Employer-Employee Memo010810.pdf

Sups,

As we and the seniors have discussed during previous H1B trainings - including the Preponderance Training, Preponderance Practicums, and this month's H1B Roundtables can you kindly remind officers that Bobbie's email guidance was not meant to limit validity periods to less than three years in cases where there is no end/termination date in the contract or end-client letter?

The final adjudicative decision should be based on the totality and evidence provided with each case.

Thanks,
Cristina

From: Johnson, Bobbie L
Sent: Wednesday, July 28, 2010 8:28 AM
To: Perkins, Robert M; Gooselaw, Kurt G; Nguyen, Carolyn Q
Cc: Velarde, Barbara Q; Kramar, John; Renaud, Daniel M; Hazuda, Mark J; Sweeney, Shelly A
Subject: E-E Relationship and Validity Periods
Importance: High

VSC and CSC:

We have discussed the issue of validity periods with OCC and SCOPS management. OCC and SCOPS agree that we should treat all petitioners equally. We should not have any special guidance or practice specific to any particular company. As such this instruction applies to all H-1B petitions (including Cognizant).

In general, the adjudicator does not need to issue an RFE if the petition initially contains evidence of an employer-employee relationship but the evidence does not cover the full period of time requested on the petition. The petition's validity should be limited to the time period of qualifying employment established by the evidence. Per previous instruction, if evidence is submitted for less than a year, the petition should be given a one-year validity period.

However, there may still be instances in which the adjudicator determines that an RFE for evidence of the employer-employee relationship for the full validity period is necessary. In addition, SCOPS would like to provide the following instruction for the below situations:

- the full validity period requested will be provided if the contract/end-client letter indicates that there is an automatic renewal clause (depending on the totality of the circumstances in the petition, an RFE may be issued if the contract/end-client letter is outdated);
- an RFE should be issued if it is evident that the end/termination date was clearly redacted from the contract/end-client letter; and
- an RFE may be issued if there is no end/termination date in the contract or end-client letter (this should be on a case-by-case basis if we can articulate a reason to believe that the beneficiary will be benched).

On a separate note, we do not think that the Service Centers should be put in the position of having to set up meetings with individual attorneys or companies on questions regarding Agency policy. If you receive inquiries from individual firms

and/or companies requesting such a meeting on validity periods or any other issues regarding the employer-employee relationship, please direct them to SCOPS and notify us of the interested party(ies).

Please let us know if you have any questions. Thanks.

Bobbie

Bobbie L. Johnson
Branch Chief
Business Employment Services Team 2
Service Center Operations, USCIS
[redacted]

(b)(6)

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQPRD70/23.12
AD06-24

Interoffice Memorandum

May 2, 2006

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER

FROM: Michael Aytes /s/
Acting Associate Director
Domestic Operations

SUBJECT: *AFM* Update: Chapter 31: H-1B Cap Exemption for Aliens Holding a Master's or Higher Degree from a U.S. Institution. (AD06-24).

This memorandum revises Chapter 31.3 of the *Adjudicator's Field Manual* (*AFM*). Chapter 31 pertains to the adjudication of H-1B petitions. This update will be included in the next INSERTS release. Accordingly, the *AFM* is revised as follows:

1. Section 31.3(g) in Chapter 31 of the *Adjudicator's Field Manual* is amended to include the following new paragraph at AFM 31.3(g)(9) to read as follows:

31.3 H-1B Classification and Documentary Requirements

* * * * *

(g) Adjudicative Issues.

* * *

(10) H-1B Cap Exemption for Aliens Holding A U.S. Master's or Higher Degree.

On December 8, 2004, the President signed the Omnibus Appropriations Act (OAA) for Fiscal Year 2005, Public Law 108-447, 118 Stat. 2809. Among the provisions of OAA is the H-1B Visa Reform Act of 2004. The H-1B Visa Reform Act of 2004 amends section 214(g)(5) of the INA by adding an additional exemption to the H-1B cap. New section 214(g)(5)(C) provides that aliens who have earned a masters' or higher degree from a

United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) are exempt from the H-1B visa cap (up to a maximum of 20,000 per year). Once the 20,000 cap is reached, any employer seeking an alien who possesses a masters' or higher degree will be subject to the 65,000 annual limit for H-1B nonimmigrants unless the alien is eligible for another statutory or regulatory exemption..

When reviewing a petition involving a potential 20,000 cap case, adjudicators should first determine if there is another basis to exempt the alien beneficiary from the 65,000 H-1B cap. For example, if the alien is being petitioned for by an entity described in section 214(g)(5)(A) or (B) of the INA, he or she may be exempt from the annual 65,000 cap, as these provisions do not contain a numerical limit. Similarly, if the employer is simply amending the H-1B petition, seeking an alien for concurrent employment, or is changing employment for an alien who is already in H-1B status, the petition may be approved as a cap-exempt case. Adjudicators should always apply all exemptions that do not contain numerical limitations first before applying the "masters or higher" 20,000 exemption.

(1) U.S. Masters Degree.

In determining whether a U.S. issued degree is a master's degree, adjudicators should consider more than the simple nomenclature of a degree. The fact that a degree is or is not titled as a masters degree is not by itself dispositive. A degree may be titled as "Doctor of ___" but in fact not be a graduate degree at all. For example, in the field of Chiropractic, the entry-level degree is "Doctor of Chiropractic" and a bachelors degree in any field is not required prior to obtaining that degree. On the other hand, attorneys typically hold a "juris doctor" degree, and medical doctors hold a similar "doctor of medicine" degree. Prior to earning either the J.D. or M.D. degree, the holder must first earn at least a bachelors degree in some field. Accordingly, while neither degree is likely equivalent to a Ph.D., a J.D. or M.D. degree would be considered to be equivalent to, if not higher than, a masters degree.

Thus, adjudicators should consider the place that the claimed "masters" degree holds on the academic hierarchy of degrees. Specifically, in order to qualify as a masters degree so as to meet the cap exemption requirement, the degree must be one for which a bachelors degree in any field is required in order to obtain the "masters" degree. This ensures that the "masters" degree is a degree that is at least one level higher than a bachelor's degree, which is the essential component of a "masters or higher" degree.

(2) Qualifying Institution

In addition to meeting the above standard, the claimed masters degree must be issued

from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. That section provides as follows:

> For purposes of this chapter, other than subchapter IV and part C of subchapter I of chapter 34 of Title 42, the term "institution of higher education" means an educational institution in any State that--
>
> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
> (2) is legally authorized within such State to provide a program of education beyond secondary education;
> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
> (4) is a public or other nonprofit institution; and
> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

In order to obtain the H-1B cap exemption for a U.S. Masters' degree or higher, both # 1 (qualifying "masters" degree) and # 2 (qualifying U.S. institution) must be met.

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

AD XX-XX [INSERT SIGNATURE DATE]	Chapter 31.3	Adds guidance relating to the H-1B cap exemption for aliens holding master's or higher degrees from a U.S. institution of higher learning.

VALIDITY PERIODS

- If no license is required by the State (or District of Columbia) the validity period may be one, two, or three years, as appropriate, depending on the exemption stipulated (or not stipulated) by each State during the residency program.

  Example: If no State license is required for:
  - The first year of residency – give them 1 year;
  - The first four years of residency – give them 3 years; or
  - The duration of the residency program (or, conversely, if no time limitations are clearly stipulated) – give them 3 years.

- If the petitioner submits a temporary license, approve the petition for one year or for the period that the temporary license is valid, which ever is longer.

- If a permanent license is provided, the petition may be approved for a period of 3 years.

NEW YORK MEDICAL RESIDENTS: If you adjudicate H1B medical residents from New York, it is okay to grant them periods of up to 3 years. NY does not require a license for the medical residents. Although the NY medical resident may not have a license, HQ has instructed us to grant them up to 3 years since there is no license requirement for medical residents in New York. (Rev. 01-19-07)

Chong, Jenny

From: Speidel, Pam B
Sent: Tuesday, February 04, 2014 10:27 AM
To: Chong, Jenny; Phan, Lethuy; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Cc: Violett, Michael D; Powell, Trevor
Subject: RE: sample validity case
Attachments: VD Ex Instructor Guide.doc; VD Ex.doc; 2008-05-30, HQMemo, Neufeld--AC21.pdf; 2006-12-05, HQMemo, Aytes--PeriodsOfAdm H4&L2 decoupled.pdf

Hello Everyone!

Attached are the validity dates scenarios that we are planning to use for the tomorrow roundtable. Please review and let me know if you have any comments or suggestions. I am also attaching the Policy Memos for your reference.

I am hoping that I did cover all issues as previously discussed in the meeting. I am starting to confuse with so many dates.☺

Thank you,

Pam

From: Speidel, Pam B
Sent: Friday, January 31, 2014 11:05 AM
To: Chong, Jenny; Phan, Lethuy; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Subject: RE: sample validity case

I am working on writing up the validity dates exercises so we can use for the roundtable.

From: Chong, Jenny
Sent: Friday, January 31, 2014 10:59 AM
To: Phan, Lethuy; Speidel, Pam B; Trinh, Nhut M; Itpick, Gwendolyn L; Hutchens, Rebecca L; Aguilar, Lorri L; Parrish, William F
Subject: sample validity case

Hi.

Here is one sample validity scenario we could use to ask the officers:

A change of employer/extension filed on 09/21/2013
The beneficiary's current status expires on 09/29/2013

Start date of the requested validity period from 10/01/2013 to 09/30/2015
Submitted LCA is certified from 10/01/2013 to 09/30/2015

If the petition is otherwise approvable, what would be the correct validity period to grant if we were to adjudicate the case today, 1/31/2014.

Thanks.

(b)(6)

Jenny Chong | Supervisory Immigration Services Officer| Dept. of Homeland Security| USCIS | Laguna Niguel, CA 92677|

☎: [redacted] 🖷: 949.389.8027 | ✉: jenny.chong@dhs.gov

Validity Dates Exercises

Adjudication Date: 01/31/2014

EOS-Same Employer **No 6 –Year Limit Issues**

1) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 12/15/13 to 09/30/16
H-1B Status Expires: 09/30/2015
Amended/Change in previously approved petition filed on: 12/20/13
Validity Period: _____

2) **LCA:** 06/01/13 to 05/30/16
Petition Dates: 06/30/13 to 05/30/16
H-1B Status Expires: 10/30/13
Amended/Change in previously approved petition filed on: 06/30/13
Validity Period: _____

3) **LCA:** 09/20/13 to 09/30/16
Petition Dates: ASAP to 09/30/16
H-1B Status Expires: 09/10/13
I-94 Expires: 09/20/13
Petition Filed on: 09/01/13
Validity Period: _____

4) **LCA:** 09/01/13 to 09/30/16
Petition Dates: 09/01/13 to 09/30/16
H-1B Status Expires: 09/10/13
Date of Last Arrival on I-94: 01/30/12
I-94 Expires: 06/30/12
Prior I-797 Issued on: 08/30/11
Petition Filed on: 08/30/13
Validity Period: _____

EOS -- Change of Employer

5) **LCA:** 10/01/13 to 09/30/15
Petition Dates: 10/01/13 to 09/30/15
H-1B Status Expires: 09/29/13
Petition Filed on: 09/21/13
Validity Period: _____

COS

6) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 10/01/13 to 09/30/16
Period of Time in H1B status: 10/01/07 to 09/30/11 (5 years)
Period of Time outside the U.S: 08/01/11 to 08/31/11 (30 days)
H-4 Status Expires: 04/20/15
Petition Filed on: 04/20/13
Validity Period: _____

Adjudication Date: 01/31/2014 6-Year Limitation Issues

EOS -- Change of Employer

7)	**LCA:**	**06/01/13 to 09/30/14**
	Petition Dates:	**10/1/13 to 09/30/14**
	H-1B Status Expires:	**06/29/13**
	H-1B Status Start Date:	**06/30/07**
	Petition Filed on:	**05/30/13**
	ETA Filed on:	**07/05/12**
	Validity Period:	_____
8)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**10/01/13 to 09/30/16**
	H-1B Status Expires:	**09/30/13**
	H-1B Status Start Date:	**10/01/07**
	Petition Filed on:	**08/31/13**
	I-140 Revoked on (auto-revocation):	**10/15/13**
	I-485 Filed on:	**10/01/12**
	Validity Period:	_____

Note: The new job in the same or similar occupational classification as the job for which the prior I-140 petition was filed was offered to the beneficiary.

9)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**3 years**
	H-1B Status Expires:	**09/30/13**
	Petition Filed on:	**07/03/13**
	I-140 Priority Date:	**09/08/08**
	Visa is available on:	**01/31/14**
	Validity Period:	_____

Validity Dates Exercises

Adjudication Date: 01/31/2014

EOS-Same Employer **No 6 –Year Limit Issues**

1) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 12/15/13 to 09/30/16
H-1B Status Expires: 09/30/2015
Amended/Change in previously approved petition filed on: 12/20/13
Validity Period: 01/31/14-09/30/16

2) **LCA:** 06/01/13 to 05/30/16
Petition Dates: 06/30/13 to 05/30/16
H-1B Status Expires: 10/30/13
Amended/Change in previously approved petition filed on: 06/30/13
Validity Period: 10/31/13-05/30/16

3) **LCA:** 09/20/13 to 09/30/16
Petition Dates: ASAP to 09/30/16
H-1B Status Expires: 09/10/13
I-94 Expires: 09/20/13
Petition Filed on: 09/01/13
Validity Period: 09/11/13-09/10/16 (Back Dating??)

4) **LCA:** 09/01/13 to 09/30/16
Petition Dates: 09/01/13 to 09/30/16
H-1B Status Expires: 09/10/13
Date of Last Arrival on I-94: 01/30/12
I-94 Expires: 06/30/12
Prior I-797 Issued on: 08/30/11
Petition Filed on: 08/30/13
Validity Period: 01/31/14-09/30/16 (Late Filing, Split Decision??)

EOS -- Change of Employer

5) **LCA:** 10/01/13 to 09/30/15
Petition Dates: 10/01/13 to 09/30/15
H-1B Status Expires: 09/29/13
Petition Filed on: 09/21/13
Validity Period: 01/31/14-09/30/15 (Late Filing, Split Decision)

COS

6) **LCA:** 10/01/13 to 09/30/16
Petition Dates: 10/01/13 to 09/30/16
Period of Time in H1B status: 10/01/07 to 09/30/11 (5 years)
Period of Time outside the U.S: 08/01/11 to 08/31/11 (30 days)
H-4 Status Expires: 04/20/15
Petition Filed on: 04/20/13
Validity Period: 01/31/14-01/30/15 (New 6-year rule)

Adjudication Date: 01/31/2014 6-Year Limitation Issues

EOS -- Change of Employer

7)	**LCA:**	**06/01/13 to 09/30/14**
	Petition Dates:	**10/1/13 to 09/30/14**
	H-1B Status Expires:	**06/29/13**
	H-1B Status Start Date:	**06/30/07**
	Petition Filed on:	**05/30/13**
	ETA Filed on:	**07/05/12**
	Validity Period: 01/31/14-09/30/14	**(AC21-106)**
8)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**10/01/13 to 09/30/16**
	H-1B Status Expires:	**09/30/13**
	H-1B Status Start Date:	**10/01/07**
	Petition Filed on:	**08/31/13**
	I-140 Revoked on (auto-revocation):	**10/15/13**
	I-485 Filed on:	**10/01/12**
	Validity Period: 01/31/14-01/30/15	**(Grant 1 yr or 3 yrs?)**

Note: The new job in the same or similar occupational classification as the job for which the prior I-140 petition was filed was offered to the beneficiary.

9)	**LCA:**	**10/01/13 to 09/30/16**
	Petition Dates:	**3 years**
	H-1B Status Expires:	**09/30/13**
	Petition Filed on:	**07/03/13**
	I-140 Priority Date:	**09/08/08**
	Visa is available on:	**01/31/14**

Validity Period: 01/31/14-09/30/16 (AC21-104, Visa is not available at the time of filing)

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

If you are requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the U.S. Citizenship and Immigration Services (USCIS) containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

H-1B Specialty Occupation

Specialty Occupation means an occupation which requires the theoretical and practical application of a body of highly specialized knowledge and which requires the attainment of a baccalaureate or higher degree or its equivalent, in a specific specialty, as a minimum, for entry into the occupation in the United States.

Provide the following to establish that the present petition meets the criteria for H-1B petitions involving a specialty occupation:

EVIDENCE PERTAINING TO EQUIVALENCE TO COMPLETION OF A COLLEGE DEGREE

RECOGNITION OF EXPERTISE: The petitioner must show that the beneficiary has equivalency AND recognition of expertise. If the petitioner has provided no equivalency evaluations or has provided inadequate evaluations, then the following information should be requested. Generally speaking, this section will read best if it is sent in its complete state. The more text that is cut from this section the less coherent it will be. Read your final RFE carefully to insure that it is clear.

Definition - Equivalency: Equivalence to completion of a United States baccalaureate or higher degree means achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty. The following additional requested information is to assist you to establish that the beneficiary has the equivalent of a United States baccalaureate degree and recognition of expertise in the specialty occupation:

Evaluation of Foreign Education: The evidence indicates that the beneficiary has completed either several courses or a full course of study in a particular subject abroad. Provide the following to establish the level and type of education the beneficiary has obtained abroad and its educational equivalent in the United States:

- Foreign Educational Credentials Evaluation: Submit an advisory evaluation of the beneficiary's foreign educational credentials by a reliable credentials evaluation service that specializes in evaluating foreign educational credentials. This evaluation must address the beneficiary's educational achievements as to equivalent education in the United States including the field of study. An acceptable evaluation should consider formal post-secondary education only and not practical experience. It should also provide a detailed description of the material evaluated rather than conclusions. Further, it should provide a brief description of the qualifications and experience of the evaluator. Additionally, you must include all the documentation provided by the beneficiary for the evaluation and must cite any reference material used by the evaluator.

Evaluation of Training & Experience: You are attempting to establish that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, **and** that the beneficiary **has recognition of expertise** in the specialty through progressively responsible positions directly related to the specialty.

OPTIONAL PARAGRAPH - If not applicable, delete: You have provided an evaluation of the beneficiary's foreign educational credentials from a foreign credentials evaluator who claims that the beneficiary has the equivalent of a baccalaureate level of education or higher based on education, training and/or experience. However, this evaluation is insufficient because regulations limit the scope of foreign credential evaluators to evaluating only foreign education. Evaluation of training and/or experience requires the submission of other documents from other sources such as college officials, professional associations, former employers, or recognized experts.

Therefore, provide at least one of the following to establish the level and type of training and/or experience the beneficiary has obtained and its educational equivalent in the United States:

- Evaluation of Training and/or Experience by a College Official: Submit an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty of [insert specialty occupation]. The evaluation must be from an accredited college or university that has a program for granting such credit in the field of study based on an individual's training and/or work experience.

  NOTE:

A private educational credentials evaluation service may not evaluate an alien's work experience or training; because regulations limit the scope of educational credential evaluators to evaluating only foreign education.

Professors writing evaluations as consultants, may, in the alternative, be considered as recognized authorities if they can establish their qualifications as experts; provide specific instances where past opinions have been accepted as authoritative and by whom; show how conclusions were reached; and show the basis for the conclusions with copies or citations of any research material used.

The evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. Resumes or Curriculum Vitae alone are usually insufficient to satisfy this requirement.

Also, provide a letter from the **Registrar** of the institution (on the institution's letterhead) to establish that the particular evaluating official is authorized to grant college-level credit on behalf of their institution, and that the evaluator holds a bachelor's degree in the field of study he or she is evaluating. Further, provide written verification or other documents or records to clearly substantiate that the evaluator is actually employed by the claimed college or university. Additionally, include evidence that the institution is accredited. [NOTE TO ADJUDICATOR: If school is in SEVIS, it does not necessary mean that the institution is accredited]

Provide copies of pertinent pages from the college or university catalog to show that it has a program for granting college-level credit based on training and/or experience. Merely stating in a letter that the school has such a program is insufficient. The program must be sufficiently substantiated. Further, CLEP and PONSI equivalency exams or special credit programs do not satisfy this requirement because the regulation requires that the beneficiary produce the results of such exams or programs in order for them to qualify. Also, training or experience derived from internship programs may not satisfy this requirement unless you can establish that the experience or training claimed was gained through enrollment in the particular college or university's internship program.

Moreover, provide evidence to show the total amount of college credit the Registrar or evaluator may grant for training or experience as part of the program. The evaluator may provide copies of the evaluation made by a school official, preferably the Registrar, which shows how the alien met the college or university's program requirements and how much possible college credit the alien may be granted for his or her training and experience.

- Equivalency Examinations: Submit the results of recognized college level equivalency examinations or special credit programs, such as the College Level

Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

- Certification by a Professional Association: Submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Evidence for Recognition of Expertise: Submit the following to certify and substantiate that the beneficiary has recognition of expertise through progressively responsible experience that is directly related to the specialty and that the training or experience is equivalent to a degree in the specialty:

- Documentation to Certify Recognition of Expertise: Submit affidavits or declarations (made under penalty of perjury) certifying as to the beneficiary's training and/or experience in the specialty occupation, and that the beneficiary has recognition and expertise in the specialty through progressively responsible positions directly related to the specialty.

  The certification should specifically describe the beneficiary's recognition and ability in factual terms. Merely stating that the beneficiary has recognition of expertise is insufficient. The documentation must state specific facts about the significance of what the beneficiary actually performed that gave him the recognition of expertise. Further, they must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

  Present or former employers: The affidavits or declarations should be on the present or former employer's company letterhead with the dates of employment, and should describe, in detail, the duties the beneficiary performed, and show that the alien's experience was gained while working with peers, supervisors or subordinates who have a baccalaureate degree or higher or its equivalent. Also, evidence of the nature and size of the former employers' businesses should be included.

  Recognized authorities: The affidavits or declarations should be from at least two recognized authorities certifying the beneficiary's training and/or experience in the specialty occupation, and that the beneficiary has recognition and expertise in the specialty through progressively responsible positions directly related to the specialty.

  NOTE: If the beneficiary's has achievements that can be determined to be significant contributions to the field of the specialty occupation, only one recognized authority may need to submit an affidavit or declaration. However, merely stating the beneficiary's achievements are significant without providing supporting

documentation to show the scope of the achievement will, generally, be insufficient to meet this requirement.

A recognized authority means a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested. Such opinion must state: the writer's qualifications as an expert; the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; how the conclusions were reached; and the basis for the conclusions supported by copies or citations of any research material used.

- Documentation to Substantiate Recognition of Expertise: To substantiate that the beneficiary has recognition of expertise in the specialty, through progressively responsible positions directly related to the specialty, provide copies of all the material evaluated including copies of personnel records, performance evaluations, pay records; or copies of any other documents that reflect promotion or achievement of progressively responsible positions directly related to the specialty. Clearly show how the affiant arrived at his or her determination.

USCIS Determination of Equivalency: If you prefer, USCIS is authorized to make a determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience. However, it must be clearly demonstrated that the areas of training and/or experience are related to the specialty and the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the beneficiary lacks. For equivalence to an advanced (or Masters) degree, the beneficiary must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the beneficiary must hold a Doctorate degree or its foreign equivalent.

USCIS has determined that the beneficiary has, at best, accumulated approximately [insert number of equivalent years determined: ___] years of education in the specialty or related field. As such, the beneficiary needs, at least, [insert number of equivalent years needed: ___] additional years of experience in the field.

OPTIONAL: Documentation from prior employers fails to show the progressive responsibility, nature, and description of the duties; who mentored or guided the employee; their educational background; how duties and experience related to the theoretical knowledge needed in the field beyond that of the practical. Thus the first three criteria listed below have not been met. Further, documents relating to the fourth criteria shown below, have not been submitted.

Therefore, provide additional evidence such as copies of affidavits from present or former employers; copies of personnel records, performance evaluations, pay records; or copies of any other documents that reflect promotion or achievement of progressively responsible positions directly related to the specialty that clearly demonstrate that the beneficiary's training and/or work experience included:

1. the theoretical and practical application of specialized knowledge required by the specialty occupation; and

2. that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and

3. progressively responsible work experience; and

4. that the beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

   (a) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; or

   (b) Membership in a recognized foreign or United States association or society in the specialty occupation; or

   (c) Published material by or about the beneficiary in professional publications, trade journals, books, or major newspapers; or

   (d) Licensure or registration to practice the specialty occupation in a foreign country; or

   (e) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. [NOTE: *Merely stating the beneficiary's work is significant or highly significant and such general terms do not meet this requirement. The evidence must clearly substantiate the significance of the beneficiary's achievements.*]

   Recognized authority: A recognized authority means a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested. Such opinion must state: the writer's qualifications as an expert; the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; how the conclusions were reached; and the basis for the conclusions supported by copies or citations of any research material used.

Completion of the I-129 H-1B Approval Checklist

This is a guide to help determine the appropriate response for each checklist question (YES, NO, or NA) on the I-129 H-1B APPROVAL QUALITY ASSURANCE REVIEW CHECKLIST. Whenever possible, a relevant citation is given from the Immigration and Nationality Act (INA) and/or Title 8, Code of Federal Regulations (8 CFR); also, page number(s) from the I-129 National SOP (SOP), Adjudicator's Field Manual (AFM) or National Background Identity and Security Checks Operating Procedures (NaBISCOP) Handbook is given that contains information about the checklist question. Last, information on policy is given if a question is not clearly defined in these resources.

When answering the questions on the I-129 H1B APPROVAL QUALITY ASSURANCE REVIEW CHECKLIST, keep in mind that the underlying consideration is: "*Was this element of the adjudication addressed properly?*", "*Was the security item performed according to policy and procedure?*", or "*Was this aspect of the process handled correctly?*" The checklist questions dealing with evidentiary, statutory, and regulatory requirements need not be answered literally for the consolidation of data.

If during the Review, a deficiency(ies) is found, it must be articulated in the itemized Comments section at the bottom of the CHECKLIST. The narrative comments written by the Reviewer must be factual and concise; value judgments such as inadequate or insufficient must be avoided; and the comments cannot be derogatory or inflammatory against the Quality Assurance customers. The best, well-written comments do not require the presence of the reviewed file to determine the accuracy of the deficiency(ies).

Proper Filing

1. Was filing properly signed?

See 8 CFR 103.2(a)(1), 8 CFR 103.2(a)(2), 8 CFR 103.2(a)(6), 8 CFR 103.2(a)(7)(i)

Signature. An applicant or petitioner [or requestor] must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner [or requestor], or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

All forms of signature are acceptable, including an "X" or a thumbprint.

A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, the beneficiary may sign the petition as a legal representative of the petitioner if he or she is an officer of the corporation. [See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980)] A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, the beneficiary may sign the petition as a legal representative of the petitioner if he or she is an officer of the corporation. [See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980)]

The response should be either Yes or No; N/A is not an acceptable response to this question.

2. Were correct fee(s) received?

See 8 CFR 103.2(a)(1), 8 CFR 103.2(a)(7)(i), 8 CFR 103.7(b)(1)(i)

Every benefit request or other document submitted to the Department of Homeland Security (DHS) must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. Each benefit request or other document must be filed with fee(s) as required by regulation. Benefit requests which require a person to submit biometric information must also be filed with the biometric service fee in 8 CFR 103.7(b)(1), for each individual who is required to provide biometrics. Filing fees and biometric service fees are non-refundable and, except as otherwise provided in this chapter I, must be paid when the benefit request is filed.

A benefit request which is not signed and submitted with the correct fee(s) will be rejected. A benefit request that is not executed may be rejected. Except as provided in 8 CFR parts 204, 245, or 245a, a benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format. The receipt date shall be recorded upon receipt by USCIS.

To determine if the correct fee has been received, look for the date stamp on the right side of the petition and review in CLAIMS.

See INA 214(c)(9)(A), INA 214(c)(12)(A)-(C), ESABSA Public Law 111-230

The current base fee for the I-129 is $325 (as of 5/2/11).
The current ACWIA fee is $1,500 for petitioners with more than 25 full-time equivalent employees, and $750 for petitioners who employ a total of no more than 25 full-time equivalent employees.
The current, one-time, Fraud Prevention and Detection fee is $500.
The current ESABSA (Public Law 111-230) fee is $2000, if applicable.

The ACWIA fee is not required if the petitioner is exempt from this fee requirement.

The fee is not required in the following instances:

- The petitioner is an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit research organization or a governmental research organization, as defined in 8 CFR 214.2(h)(19)(iii)(C)
- The second or subsequent request for an extension of stay filed by the same petitioner for the same beneficiary
- An amended petition that does not contain any request for extension of stay
- The petition is filed to correct a USCIS error
- The petitioner is a primary or secondary education institution [private or public]
- The petitioner is a nonprofit entity that engages in an established curriculum-related clinical training of students recognized at such an institution

<u>Additional Fee for Certain H-1B and L-1 Petitions</u>

On August 13, 2010, President Obama signed into law, with immediate effect, Public Law 111-230, which contains provisions to increase certain H-1B and L-1 petition fees.

Public Law 111-230 requires the submission of an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1 petitions postmarked on or after August 14, 2010, and will remain in effect through September 30, 2014. This fee is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, needed to file a petition for a Nonimmigrant Worker (Form-129), as well as any premium processing fees.

This additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in the U.S. in H-1B or L (including L-1A, L-1B and L-2) nonimmigrant status. Petitioners meeting these criteria must submit the applicable fee with an H-1B, L-1A or L-1B petition filed:

- Initially to grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of INA section 101(a)(15), or
- To obtain authorization for an alien having such status to change employers.

The response should be either Yes or No; N/A is not an acceptable response to this question.

Eligibility and Evidence

3. **Was filing filed or approved earlier than 6 months before the date of actual need for the beneficiary's services?**

   See 8 CFR 214.2(h)(9)(i)(B)

   The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training.

   The response should be either Yes or No.

4. **Was filing submitted by an appropriate petitioner?**

   See 8 CFR 214.2(h)(2)(i), 8 CFR 214.2(h)(2)(i)(F), (4)(ii)

   The following entities may file for an H-1B nonimmigrant:

   A United States Employer: A person, firm, corporation, contractor, or other association or organization in the United States, which:

   - Permits a person to work in the United States;
   - Has an IRS tax identification number; and
   - Has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of an employee.

   An Agent: A United States individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

   An alien may be employed by more than one employer (petitioner) at any given time. This is called concurrent employment. However, a separate petition must be approved for each employer. Also, part-time employment is allowed.
   The response should be either Yes or No.

5. **If seeking to file as a United States employer, was a valid employer-employee relationship established?**

See 8 CFR 214.2(h)(2)(i); (4)(ii); Donald Neufeld memo dated 01/08/2010, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

As an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation, the petitioner is required to establish by a preponderance of the evidence that a valid employer-employee relationship will exist between the petitioner and the beneficiary throughout the duration of the requested H-1B validity period.

Right to Control:

The petitioner must demonstrate that the petitioner has the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary. Evidence establishing the right to control is defined as follows:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employer, and the names and addresses of the establishment venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and the beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (with whom the petitioner has entered into a business agreement for which the beneficiary will be utilized) that establishes that while the beneficiary is placed at the third-party work site, the petitioner will continue to have the right to control the beneficiary;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of the position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of the petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the petitioner's regular business, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisory chain.

Maintenance of Initial Employer-Employee Relationship:

The petitioner must submit evidence to document that the petitioner and the beneficiary maintained the employer-employee relationship throughout the H-1B approval period. Evidence establishing maintenance of employer-employee relationship throughout the H-1B approval period is defined as follows:

- Copies of the beneficiary's pay records (leave and earnings statements, pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or W-2 forms, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of work schedules from prior years;
- Copies of the petitioner's state quarterly wage reports for the last four quarters that contain the name, social security numbers (last four digits only), and number of weeks worked by the beneficiary;
- Copies of the beneficiary's two or three most recently filed federal individual tax returns with all required schedules and statements, as appropriate;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews promotional materials, designs, blueprints, newspaper articles, website text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire and dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

The response should be either Yes or No.

6. **If claiming "in-house" work, was there evidence to demonstrate if the in-house project exists?**

The evidence submitted must establish that a job offer based on an actual position or the prospective employment is legitimate (e.g., employment is not speculative in nature (consulting position)).

Note: Requests for contracts and/or other types of documentation should be made only in those cases where the officer can articulate a specific need for such documentation.

The response should be N/A if the petitioner is not claiming "in-house" work.

7. **Did position offered meet specialty occupation requirements?**

See 8 CFR 214.2(h)(4)(iii)(A)

When dealing with "Extensions of Stay", keep in mind the re-adjudication memo, Addendum 29 in the SOP.

Specialty Occupation:

For H-1B petitions involving a "specialty occupation," 8 CFR 214.2(h)(4)(iii)(A) requires that the position meet one of the following criteria:

- A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

It is not sufficient to simply establish that a bachelor's degree or higher degree is a minimum for entry into the occupation; the position must require a degree in a specific specialty. [INA Section 214(i)(1)]

Job Description:

The petitioner must provide a detailed description of the job duties to be performed. A Request for Evidence (RFE) can be issued asking for a description in non-technical terminology. Consider all of the information provided by the petitioner in making a decision as to whether or not the position qualifies as a specialty occupation. Keep in mind that it is the duties of the job rather than the title of the job that determine the legitimacy of a specialty occupation.

See SOP dated 09/30/2004 pgs. 5-25 – 5-26

Resources for Determining Specialty Occupation: Occupational Outlook Handbook (OOH) and Occupational Information Network (O-Net).

See SOP dated 09/30/2004 pg. 5-26

Classification in a Specialty Occupation for Nurses. The H-1A nurse program ended on September 1, 1995; however, nurses can be considered under the H-1B classification; see SOP Pg. 5-162 through 5-165. Most nursing positions are not professional and do not require a person with a four-year degree in the specialty occupation. To qualify for H-1B classification, the institution and/or the duties of the position must be exceptional. One must be satisfied that the position requires a four-year degree.

The response should be either Yes or No.

8. Were education/experience requirements met?

See 8 CFR 214.2(h)(4)(iii)(C), (D)

Beneficiary Qualifications:

In order for an individual to qualify to perform services in a specialty occupation, the alien must:

- Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

- Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The response should be either Yes or No.

9. Were state licensure requirements met?

See 8 CFR 214.2(h)(4)(v)

If the occupation requires a state or local license for an individual to fully perform that occupation, an alien seeking H-1B classification in that occupation must have the license prior to approval of the petition. [8 CFR 214.2(h)(4)(v)(A)]

Some states do not issue licenses until the worker is present. In these cases, accept a statement from the state licensing authority stating that a license will be issued to the beneficiary immediately upon arrival in the United States; however, approve these petitions for one year only.

[HQ Memo entitled, Temporary Licensure for H-1B Nonimmigrants, 5/4/1992]
States may allow an individual to fully practice the licensed occupation under the supervision of licensed senior or supervisory personnel in that occupation. If the nature of the duties and the level at which they are performed demonstrate that the alien under the supervision could fully perform the duties of the occupation, H classification may be granted. [8 CFR 214.2(h)(4)(v)(C)]

Physicians to be employed by the Department of Veterans' Affairs (VA) are not required to have a license from the state in which they will work. They may have a license from any state.

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of one-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the Social Security Administration (SSA). Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. At the time an extension petition is filed by the alien, the ISO should determine that the required license was obtained. If it has not been obtained at that time, the petition should be denied.

Emergency certifications for teachers vary from locality to locality and must be considered on a case by case basis.

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted. Where licensure is required in an occupation, approve the petition for one year or for the period that the temporary license is valid, whichever is longer. [8 CFR 214.2(h)(4)(v)(B) and (E)]

See SOP dated 09/30/2004 pg. 5-169

Health Care Worker Certification. As of July 26, 2004, health care workers in the following fields are required to submit evidence of health care worker certification when filing for change of status or extension of stay:

- Registered nurses
- Occupational therapists
- Speech language pathologists and audiologists
- Medical technologists

- Physician's assistants

The response should be N/A if the beneficiary does not require licensure.

10. If requested, was eligibility for a new CAP number verified?

See INA 214(g)(7), 8 CFR 214.2(h)(13)(iii)

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) . . . of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) . . . of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

When the beneficiary has already spent six years in the United States as an H-1B nonimmigrant, he or she may not seek extension, change status, or be readmitted to the United States as an H nonimmigrant for a new six-year admission period unless the beneficiary has first lived one year abroad.

The response should be N/A if a new CAP number was not requested.

11. If applicable, was one of the H-1B cap exemptions met?

See INA 214(g)(5)(A)-(C), 214(g)(7), 214(l)(2)(A)

See also the H-1B Data Collection and Filling Fee Exemption Supplement

This section of law refers to the numerical limitations not applied to nonimmigrant aliens employed or who have received an offer of employment at an institution of higher education; or aliens employed or who have received an offer of employment at a nonprofit research organization or a governmental research organization; or aliens who have earned a master's or higher degree from a United States institution of higher education.

See Michael Aytes dated 12/05/2006; Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.

H-1B "Remainder" Option (CAP exemption)

When the beneficiary who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.

See Michael Aytes dated 01/29/2007, Public Law 109-477 – Two-Year Extension of Conrad State 30 Program
Conrad Doctors – Not subject to H-1B Cap even if they change employers or occupations

Pub. L. 106-313 American Competitiveness in the Twenty-first Century Act of 2000, 106th Congress, October 17, 2000, 114 Stat. 1251, [S. 2045]

SEC. 114. EXCLUSION OF CERTAIN "J" NONIMMIGRANTS FROM NUMERICAL LIMITATIONS APPLICABLE TO "H-1B" NONIMMMIGRANTS.

The numerical limitations contained in section 102 of this title shall not apply to any nonimmigrant alien granted a waiver that is subject to the limitation contained in paragraph (1)(B) of the first section 214(l) of the Immigration and Nationality Act (relating to restrictions on waivers).

J-1 physicians who are the beneficiaries of a Conrad 20 waiver of the two-year home residence requirement who change status to H-1B may be granted such a change without regard to the cap, and are not counted toward the cap.

The response should be either Yes or No.

12. Was there evidence to support eligibility for AC21 or recaptured time?

See Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update As 05-21), Neufeld Memo dated 05/30/2008 (HQ 70/6.2, AFM Update AD 08-06), 8 CFR 214.2(h)(13)(iii)(A), 8 CFR 214.2(h)(13)(i)(B), 8 CFR 214.2(h)(13)(iii)(B), 8 CFR 214.2(h)(13)(v)

214.2(h)(13)(i)(B)
When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15) (H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

214.2(h)(13)(iii)(A)
Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling. An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

214.2(h)(13)(iii)(B)
Alien involved in a DOD research and development or coproduction project. An H-1B alien involved in a DOD research and development or coproduction project who has spent 10 years in the United States under section 101(a)(15) (H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act to perform services involving a DOD research and development project or coproduction project. A new petition or change of status under section 101(a)(15) (H) or (L) of the Act may not be approved for such an alien unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

214.2(h)(13)(v)
Exceptions to Time Limits:
1) Time limitations do not apply to aliens who did not reside continually in the United States and whose employment in the U.S. was seasonal or intermittent or was for an aggregate of six months or less per year. The limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-

time employment. To qualify for this exception, the petitioner and alien must provide clear and convincing evidence. Such evidence shall consist of documents such as arrival and departure records, copies of tax returns, and records of employment abroad.

2) AC21 §106 permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the six-year maximum period, when:
   (a) The H-1B nonimmigrant is the beneficiary of an application for labor certification or an employment based immigrant petition or an application for adjustment of status; and
   (b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an employment based immigrant, or 365 days or more have passed since the filing of the employment based immigrant petition.

The Attorney General is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made on the H-1B nonimmigrant's lawful permanent residence.

3) AC21 §104(c) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant is eligible for this benefit even if he or she has exhausted the maximum six-year period of authorized stay for H-1B nonimmigrants under 8 U.S.C. §1184(g)(4), INA §214(g)(4). The statute states that the beneficiary must:
   (a) Have a petition filed on his or her behalf for a preference status under INA § 203(b)(1), (2), or (3) (an employment based ("EB") petition); and,
   (b) Be eligible to be granted that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B nonimmigrant status until a decision is made on the nonimmigrant's application for adjustment of status.

Recapture of Time:
Time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay in the United States, if the time spent outside of the United States did not interrupt the alien's employment in the United States. Periods of time spent outside of the United States which are considered to be a normal part of a work year (e.g., vacations, holidays, and weekends) do not interrupt the alien's employment in the United States. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States.

Examples of periods of time spent outside of the United States which interrupt an alien's employment in the United States (e.g., do not count against the time limit) include, but are not limited to: maternity leave, extended medical leave, and long-term details to an employment location outside of the United States.

[HQ Policy Memo Limitations in Admissions, March 9, 1994 James A Puleo memo signed by Lawrence J. Weinig, Acting Associate Commissioner]

The response should be N/A if the petitioner did not request dates beyond the beneficiary's six year limit or did not request recaptured time.

Labor Condition Application (LCA)

13. **Prior to filing, was there a LCA certified that was related to the occupation covering the dates and place of employment?**

    See INA 212(n)(1), 8 CFR 103.2(b)(1) and 214.2(h)(1)(ii)(B)

    Review the start of employment date. If the petition is filed more than 6 months prior to the start of employment, the petition can be denied.

    Review the Form ETA 9035 LCA to ensure it meets the following criteria:

    The LCA:
    - Was signed by Department of Labor (DOL),
    - Included DOL certified starting and ending dates,
    - Included a LCA case number,
    - Was filed by appropriate petitioner,
    - Was filed for all locations specified on the petition, and was filed for the position specified on the petition.

    The petition must contain the required, certified LCA at the time of filing. If a valid LCA was not certified prior to filing, the petition should be denied.

    The response should be either Yes or No.

14. **If filing indicated work would be performed in multiple locations, were all work locations covered by the LCA?**

    See INA 212(n)

    The petitioner is required to submit one or more LCA's for all locations where the beneficiary will work.

    The response should be either Yes or No.

15. **Were Standard Occupational Classification (SCO) code and occupational title on LCA consistent with the job duties on the H1B filing?**

    See 8 CFR 214.2(h)(4)(i)(B)(1)

    Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

    The response should be either Yes or No.

16. **Was a detailed list submitted of all USCIS file numbers for beneficiaries who have been approved using the LCA if LCA indicates more than one H1B nonimmigrant being certified for employment?**

    See 8 CFR 214.2(h)(4)(i)(B)(3)
    If all of the beneficiaries covered by an H-1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the labor condition application using photocopies of the same application.

Each petition must refer by file number to all previously approved petitions for that labor condition application.

The response should be either Yes or No.

Change of Status (COS)/Extension of Status (EOS)

17. At time of filing for EOS, was beneficiary physically present in the United States?

See 8 CFR 214.2(h)(15)

The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.... When the total period of stay in an H classification has been reached, no further extensions may be granted.

When the beneficiary is not physically present at the time of filing the I-129 petition, the requested extension of stay may not be approved. However, the petition filed on behalf of the beneficiary may be approved on its merits but the request for extension of stay will be denied. (Split decision)

See also SOP dated 09/30/2004 pg. 5-82

If the petitioner wishes that USCIS notify a consulate or port of entry of the beneficiary's status change or extension of stay, he/she/it must provide a second copy of the I-129. The requested change of status or extension of stay should be indicated on the I-129, and the consulate to be notified indicated on the I-824 or cover letter.

The response should be N/A if the petitioner is not requesting EOS.

18. At time of filing, was valid nonimmigrant status maintained?

See 8 CFR 214.1(c)(4), 8 CFR 248.1(b)

If the petition was not timely filed but excusable for one of the reasons listed in 8 CFR 214.1(c)(4) or 8 CFR 248.1, the petition may continue to be processed. Look at the evidence provided to determine if the reason for the gap is excusable.

Ensure that the alien has maintained valid non-immigrant status by applying the following status violation questions:

- Is the alien still employed, receiving training or performing other duties that are required by current status? (If not, he/she is in violation)
- Has the alien accepted unauthorized employment? (If so, he/she is in violation)

The fact that an H or L non-immigrant has filed an application for Adjustment of Status does not disqualify him/her from eligibility for COS/EOS [Dual Intent is allowed; refer to the I-129H-1B National SOP, see Addenda 17 and 31]

See also Thomas Cook's USCIS Memorandum dated 06/18/2001, Travel After Filing a Request for a Change of Nonimmigrant Status

If the beneficiary departed the U.S. during the pendency of the request for a change of status, the request for a change of nonimmigrant status is considered to be abandoned and should have

been denied pursuant to 8 CFR 248.3(g). However, the petition filed on behalf of the beneficiary may be approved on its merits but the request for change of status will be denied. (Split decision)

The response should be either Yes or No.

J1/J2

19. Have 212(e) requirements been met or waived?

See INA 214(l)(1)

A foreign medical graduate beneficiary who receives a waiver under Conrad 30, P.L. 103-416 must fulfill the 3-year employment contract as an H-1B nonimmigrant with the healthcare facility AND in the specified Department of Health and Human Services (HHS)-designated shortage area named in the waiver application. The alien may not apply for any other nonimmigrant classification until that requirement is fulfilled, and failure to do so will result in the alien again becoming subject to the 2-year residency requirement of 212(e).

In order to grant a change of status for a J-1 under Conrad 30, a State Workforce Agency letter concurrent with the Department of State (DOS) recommendation and a CLAIMS generated I-612 approval notice are required.

"Conrad 30" was expanded by Public Law 108-441, to include State as well as Federal Agencies to petition for certain J-1 medical graduates. It is applicable to petitions filed on or after December 9, 2004.

The response should be N/A if the beneficiary is not a J classification.

20. If J1 or J2 subject to 212(e) under PL 94-484, was beneficiary eligible for COS as J1 foreign medical graduate (FMG) or dependent of J1 FMG?

See INA 248(a)(2), 8 CFR 248.2(a)(3), INA 214(l)(2)(A)

Any alien admitted as a nonimmigrant under section **101(a)(15)(J)** of the Act, or who acquired such status after admission in order to receive graduate medical education or training, whether or not the alien was subject to, received a waiver of, or fulfilled the two-year foreign residence requirement of section **212(e)** of the Act is not eligible to change their nonimmigrant status. This restriction shall not apply when the alien is a foreign medical graduate who was granted a waiver under **section 212(e)(iii)** of the Act pursuant to a request made by a State Department of Public Health (or its equivalent) under **Pub. L. 103-416**, and the alien complies with the terms and conditions imposed on the waiver under section **214(k)** of the Act and the implementing regulations at **§** 212.7(c)(9) of this chapter. A foreign medical graduate who was granted a waiver under **Pub. L. 103-416** and who does not fulfill the requisite 3-year employment contract or otherwise comply with the terms and conditions imposed on the waiver is ineligible to apply for change of status to any other nonimmigrant classification...

A J-2 dependent of a J-1 FMG cannot COS to any other nonimmigrant classification except H-4 until the principal fulfills the 3-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1.

FMGs who were granted waivers of the 2-year foreign requirement under either the State or Federal programs are allowed to change status from J-1 to H-1B. The FMG, however, must be otherwise eligible to apply for a change of nonimmigrant status under section 248 of the Act. This includes the requirement for timely filing of the change of status application. The statutory ineligibility for change of status under § 248 continues to apply to FMGs who obtain a § 212(e)

waiver based on exceptional hardship or persecution (e.g., under § 212(e) itself, rather than § 214(l)).

The response should be N/A if the beneficiary was not subject to 212(e) under PL 94-484.

Physician/Health Care

21. If applicable, was there evidence of health care worker certification from the CGFNS, FCCPT or NBCOT?

See INA 212(a)(5)(C)

Any alien who seeks to enter the United States for the purpose of performing labor as a health care worker, other than a physician, is excludable unless the alien presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), or a certificate from an equivalent independent credentialing organization (such as the Foreign Credentialing Commission on Physical Therapy (FCCPT) and the National Board for Certification in Occupational Therapy (NBCOT)). The certificate verifies the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for entry into the United States and are comparable with that required for an American health-care worker. The certificate also shows that the alien has the level of competence in oral and written English to be appropriate for health care work of the same kind in which the alien will be engaged.

The response should be N/A if the beneficiary will be a physician.

22. If a physician performing direct patient care, did he/she have a license, authorization from state of employment, or evidence that neither a license or authorization is needed?

See 8 CFR 214.2(h)(4)(viii)(A)(1)

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted. Where licensure is required in an occupation, approve the petition for one year or for the period that the temporary license is valid, whichever is longer.

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

23. If a physician performing direct patient care, did he/she pass all the steps in the USMLE test or receive education in the United States?

See 8 CFR 214.2(h)(4)(viii)(B)(2)

The beneficiary must have passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or be a graduate of a United States medical school; ...

By notice published on September 16, 1992, at 57 FR 42755, if the physician is required to pass the FLEX, or the NBME, or the USMLE, he or she must have done one of the following:

a) Passed components 1 and 2 of the Federation Licensing Examination (FLEX); or
b) Passed Parts I, II and III of the National Board of Medical Examiners (NBME); or
c) Passed Steps 1, 2 and 3 of the United States Medical Licensing Examinations (USMLE)

These criteria cannot be combined. To meet H-1B requirements, the physician must have passed all parts of the exams specified by a), b), or c) above. For example, passing Part 1 of the NBME and Steps 2 and 3 of the USMLE would not make a physician eligible for H-1B status.

The Licentiate of the Medical Council of Canada (LMCC), the Canadian medical licensing procedure, is not equivalent to the FLEX.

Foreign medical school graduates who are of national or international renown are exempt from restrictions on direct patient care listed above. They would, however, require licensure and a LCA. [8 CFR 214.2(h)(4)(viii)(C)]

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

24. If a physician performing direct patient care, did he/she possess an ECFMG certificate or receive education in the United States or Canada?

See 8 CFR 214.2(h)(4)(viii)(B)(2)

The beneficiary must also:

- Have competence in oral and written English as evidenced by a certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG); or
- Be a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Graduates of Canadian medical schools are considered competent in oral and written English. Therefore, they are not required to take the ECFMG exam. [Memo, from the Commissioner, INS, March 29, 1977]

The response should be N/A if the beneficiary will not be a physician performing direct patient care.

All Categories

25. At time of filing, was passport valid?

See INA 212(a)(7)(B)(i)(I), 8 CFR 214.1(a)(3)

Every nonimmigrant alien who applies for...an extension of stay in, the United States, must establish that he or she is admissible to the United States.... The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

Ensure that the beneficiary maintained passport validity as required by INA 212(a)(7)(B)(i)(I) and 8 CFR 214.1(a)(3)(i) and was valid at the time of filing of the instant extension of nonimmigrant status **or** change of status. The failure to maintain the validity of one's passport constitutes a failure to maintain nonimmigrant status.

The response should be either Yes or No.

26. Were full English translations included for all required documents written in a foreign language?

See 8 CFR 103.2(b)(3)

Any document containing foreign language submitted to USCIS should be accompanied by a full English language translation. In addition, there must be a certification from the translator

indicating that the translation is complete and accurate and attesting to his or her competence as a translator.

Note: Sometimes the keeper of a record will issue an "extract" version of the document. This often happens in countries where the complete document is lengthy and filled with extraneous information. Such official extracts are acceptable, but only if they contain all the information necessary to make a decision on a case. For example, an official extract of a birth certificate which fully identifies the child's parents may be used in support of an application or petition; one which only lists the child's name and date and place of birth may not. Furthermore, only extracts prepared by an authorized official (the "keeper of record") are acceptable. According to the AFM, a summary of a document prepared by a translator is unacceptable. However, for QA purposes, a summary of a document prepared by a translator will be sufficient.

Refer to the Foreign Affairs Manuel (FAM) for information regarding the acceptability of extracts for various countries.

Lack of acceptable translations for documents not required for the adjudication of the application or petition should not be regarded as an error.

The response should be Yes (if translations were included), No (if translations were required, but not included), or N/A (if no translations were required).

27. Were all other decisional requirements met?

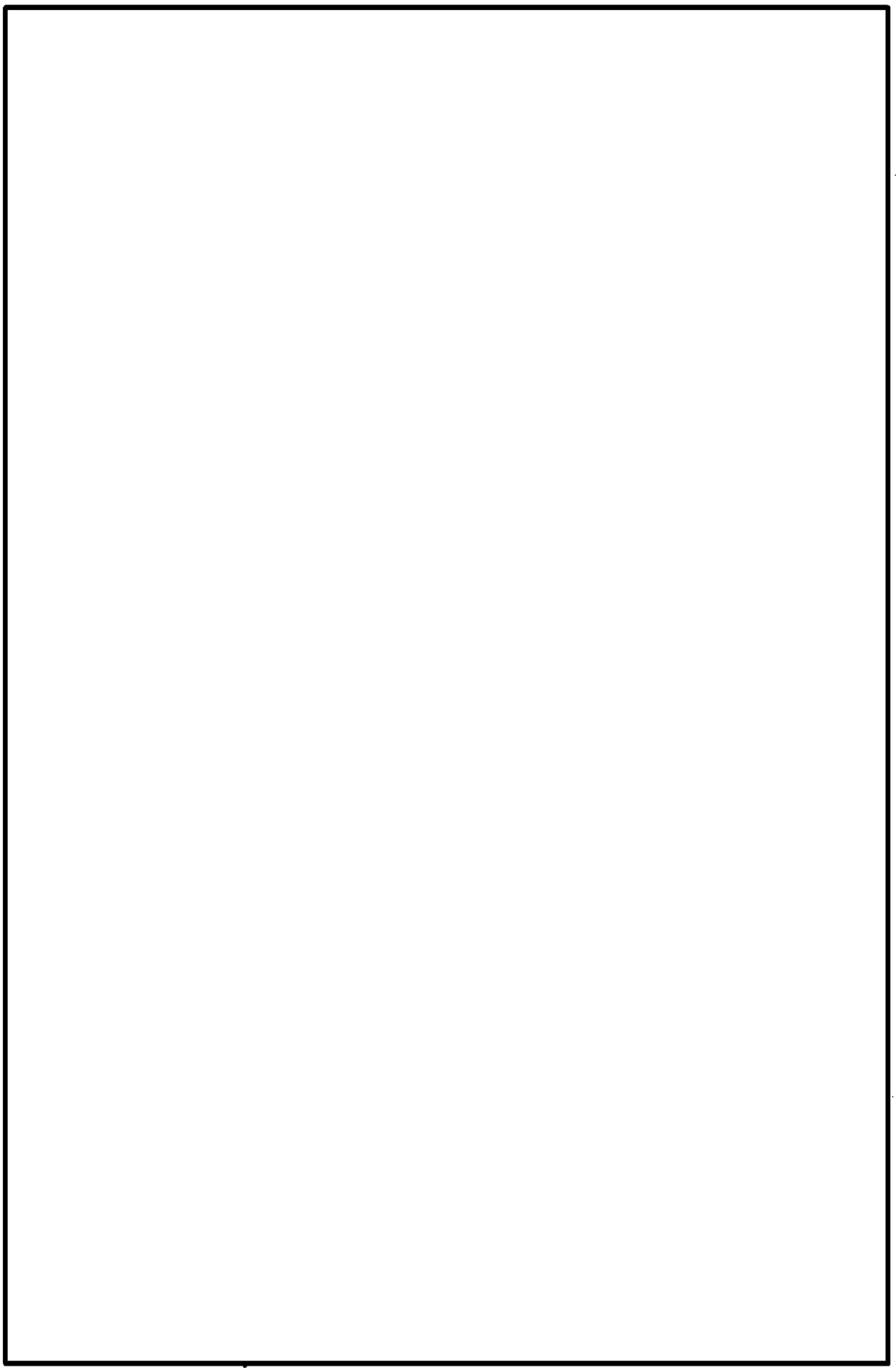
This checklist question will suffice for an identified error that was not covered with the decisional questions 1 through 26. Errors should not arbitrarily be entered under this question. This question is only used when the error identified is not suitable for any other question in this section.

The response should be either Yes or No; N/A is not an acceptable response to this question.

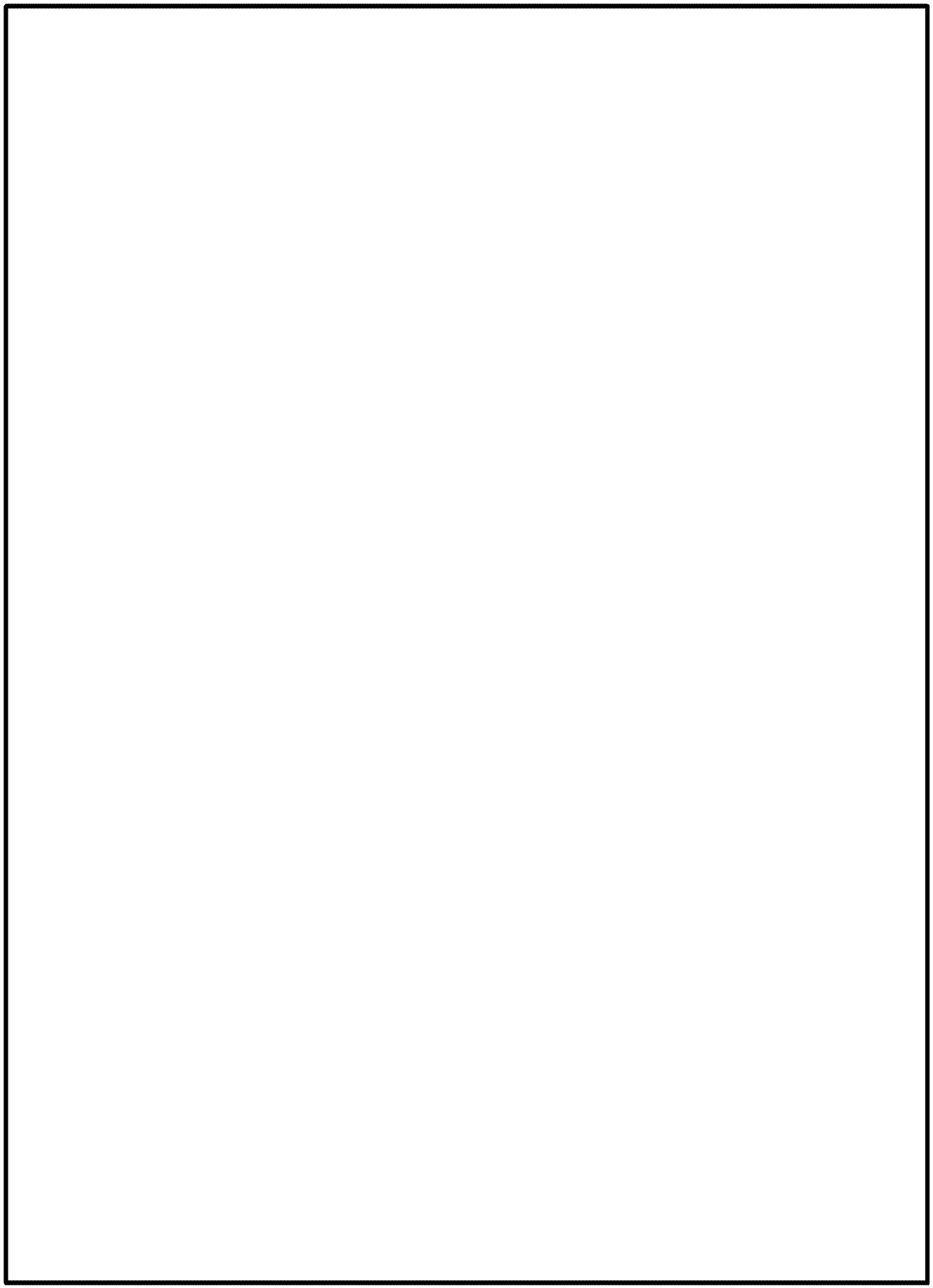
Security Checks

(b)(7)(e)

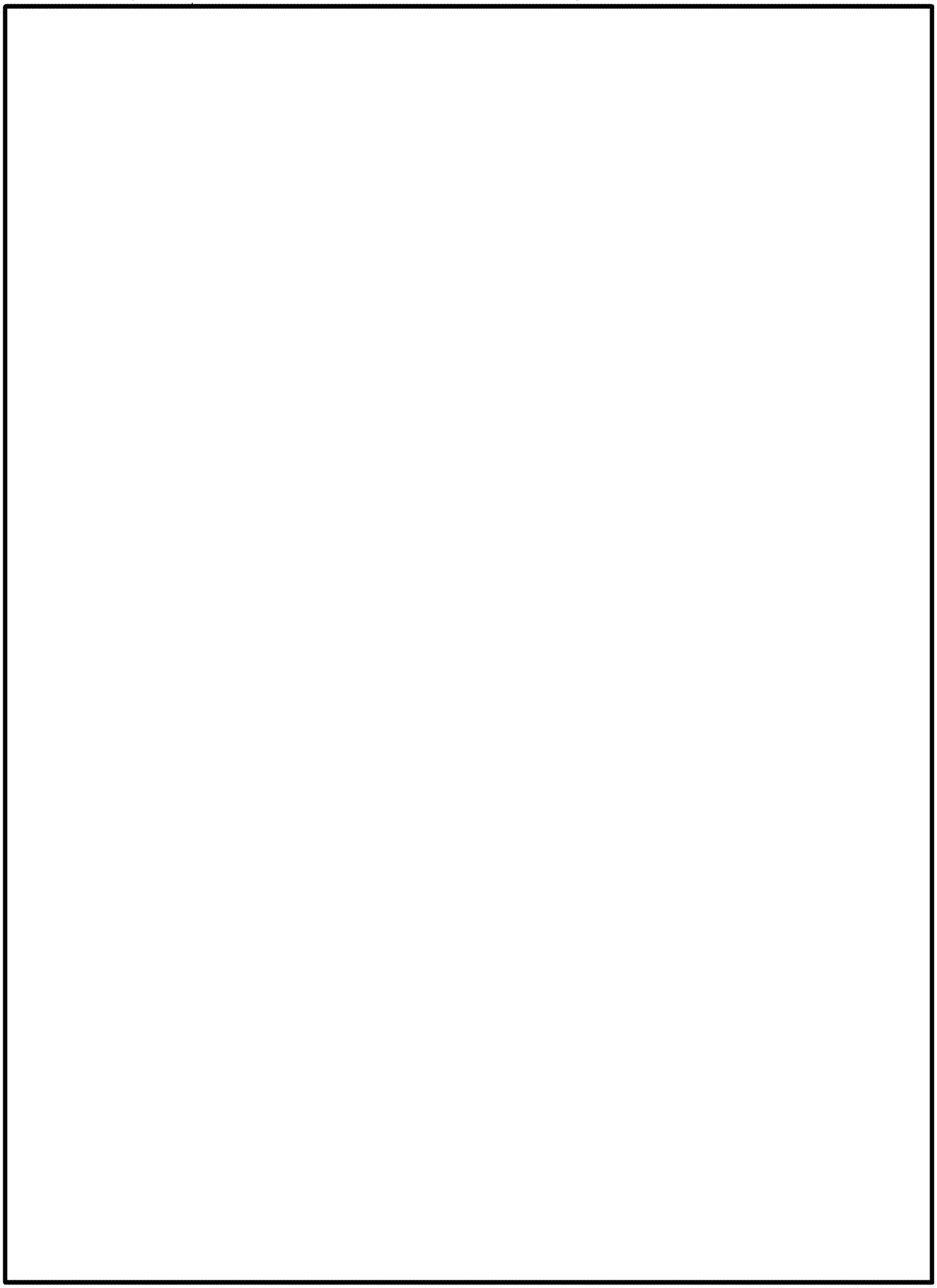
(b)(7)(e)



(b)(7)(e)



(b)(7)(e)



(b)(7)(e)

VIBE Checks

(b)(7)(e)

(b)(7)(e)

System Checks (Non-Security)

37. Were all system check requirements met? (e.g., SQ94, AR11, ADIS, SEVIS, US-VISIT, CASEBOOK, etc.)

See William R. Yates memo dated 04/05/2005, Revised Enhanced Processing Instructions and Johnny N. Williams memo dated 03/18/2002, Enhanced Processing Instructions; NaBISCOP modified 02/11/2011

The file must contain evidence of system check(s) if the check was required for a final decision on the case.

An Arrival Departure Information System (ADIS) check must have been done for EOS denials prior to the denial stamp date. The date of final decision is the denial stamp date, NOT the CLAIMS Denial Notice Ordered Date. An ADIS check must have been done for COS denials no more than 15 days prior to the date of final decision. The file must include either a copy of the ADIS printout or a notation indicating the date of the check and that there is no record of the applicant in ADIS system. The response to this question must be YES even if there is an untimely ADIS check in file that was completed for one, or more, of the applicants on the I-129 if it is an EOS Denial. On the other hand, if it is a COS Denial, this question must be marked NO if there is an untimely ADIS check done.

The file may contain an ADIS printout, which shows that no record was found (blank ADIS printout). However, a second check of ADIS may turn up correct ADIS information. This discrepancy is not an error on the officer's part.

ADIS	ADIS check is required as follows, per the most recent interim guidance (March 28, 2013): • All EOS Denials within 15 days • All COS Approvals & Denials within 15 days

AR11 printouts are not required to be placed in the file by the officer. If an address change has been made, the QA reviewer must check AR11 to verify the address change.

The response should be either Yes or No; N/A is not an acceptable response to this question.

38. Does ADIS check indicate that beneficiary is still in the United States?

8 CFR 214.1, 8 CFR 248.1, HQ Office of Programs memo dated 06/18/2001, Travel After Filing a Request for Change of Nonimmigrant Status

An alien beneficiary(ies) must be physically present in the United States at the time of filing the petition for an extension of stay or a change of status. If the alien(s) leaves the United States for business or personal reasons while an extension request is pending, the petitioner may request the Director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. On the other hand, if the alien(s) leaves the United States for business or personal reasons while a change of status request is pending, the petition may be approved on its merits, but the request for a change of status must be denied due to abandonment.

The response should be N/A if no ADIS check was required.

Endorsements and Notice

39. Are endorsements on filing correct?

See SOP pg. 5-70

Officers must sign an official signature card when they are issued their decision stamp. This is the signature they must use when signing their decision stamp. Refer to 12/26/2002 memo titled: Use of Adjudications Officer's Full Name/Signature on Official Immigration Document. Since QA reviewers do not have access to the signature cards, the decision stamp is properly endorsed if it is signed with the proper date.

Note: Effective with July 1st cases, the decision stamp should be in regular black ink. Any forms stamped with the retired red security ink after the implementation date should be marked as an error. Refer to memo from Gilbert C. Schmelzinger, Chief Security Officer, "Transition to New USCIS Security Ink," dated 04/04/ 2014.

The following endorsements must be present:

- Class
  - "H1B1" for specialty occupations
  - "H1B1" for Trade Agreement with Chile or Singapore
- # of Workers = 1
- Classification Approved block checked
- Occupational Code: refer to the OC list
- If the petition approval is for consulate, POE, or POI notification, the designation must be circled and the location written
- If the petition approval is for an extension in H1B status, the Extension Granted block must be checked

- If the petition approval is for a change of status to H1B, the COS/Extension Granted block must be checked
- The Action Block must be stamped with the decision stamp and endorsed with the officer's signature
- Other endorsements, such as those involved with a Split Decision, should be annotated on the front of the petition (most generally in the Remarks block)

Any other issues related to endorsements not listed should be addressed under this question.

The response should be either Yes or No; N/A is not an acceptable response to this question.

40. Is information in CLAIMS/GUI correct?

Please note that for National QA purposes, all biographical information in CLAIMS must be correct for completions regardless of whether it is for an approval or denial. This information may include the petitioner, beneficiary or applicant's name, address, A-number, Date of Birth, gender, Class of Admission, Country of Birth, validity dates/period, etc.

The following CLAIMS information must be correct and, if applicable, must match the information on the filing and in the CIS 9101 screen (add for forms producing a document):

- Petitioner's and Beneficiary's name
- Petitioner's address
- Beneficiary's Date of Birth, Country of Birth, and I-94 number
- The approval screen information:
  - validity dates
  - classification must be entered as 1B1
  - paragraph text selection must be correct
- Fee – the fee must be correct. New ACWIA fee as of December 8, 2004 is:
  - $1,500 for employers with 26 or more employees
  - $750 for employers with no more than 25 employees

The fee is not required in the following instances:

- The petitioner is an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)
- The petitioner is a nonprofit research organization or a governmental research organization, as defined in 8 CFR 214.2(h)(19)(iii)(C)
- The second or subsequent request for an extension of stay filed by the same petitioner for the same beneficiary
- An amended petition that does not contain any request for extension of stay
- The petition is filed to correct a USCIS error
- The petitioner is a primary or secondary education institution [private or public]
- The petitioner is a nonprofit entity that engages in an established curriculum-related clinical training of students recognized at such an institution

- G-28 information (Attorney name and address)
- The "... Notice Ordered" and "...Notice Sent" updates are properly completed

NSC Policy: Officers are not required to change the address on the form to match CLAIMS in the event of a post-filing address change. (Added or omitted depending on form type).

If a valid G-28 is in the file but the information is not in CLAIMS/GUI, OR if there is G-28 information in CLAIMS/GUI but there is no G-28 in the file or the G-28 is not valid (e.g., not signed by the petitioner and/or representative), the error should be counted under this question.

Any other issues related to CLAIMS/GUI not listed should be addressed under this question.

Note: If a correction to the filing name and/or date of birth was not changed in CLAIMS, count the error under question 41; do not count the same error again under this question.

The response should be either Yes or No; N/A is not an acceptable response to this question.

41. Was decision updated in appropriate system within 3 (for approvals) or 5 (for denials) business days of stamp date?

See 12/15/2010 Donald Neufeld memo re: Updating Decisions in USCIS Systems

Approvals must be updated in the appropriate system within 3 business days of the decision stamp date.

Denials must be updated in the appropriate system within 5 business days of the decision stamp date.

The response should be either Yes or No; N/A is not an acceptable response to this question.

42. If a correction to the filing name and/or date of birth was required, was it changed on the form and/or system? *(If applicable, answer question 29; if N/A, answer N/A to question 29)*

See 9/13/2005 HQ memo Naming Conventions; Use of Full Legal Name on All USCIS Issued Documents; AFM 51.4

If a change is made to the name or date of birth on the filing, it must be changed in CLAIMS/GUI or other appropriate system(s). No changes to the name are required other than to correct errors for forms that do not produce a document (e.g. typos, first and last names reversed). If applicable, the name and/or date of birth changes must also be reflected in the Central Index System (CIS).

The response should be N/A if no changes were required.

43. Are validity dates correct?

See INA 214(g)(4), Donald Neufeld memo dated 05/30/2008 'Revisions Adjudicator's Field Manual (AFM)'

See also SOP pgs. 5-63 thru 5-65, 5-71 -- 5-79

The validity start date must be:

- The date of adjudication if there is a change of employer; or
- One day after the validity end date for the previously approved period of H-1B employment if the petition was filed for continued employment with the same employer

The validity end date must be the:

- The end date listed on the petition, the end date listed on the LCA, or 3 years from the start date whichever is earliest; or
- One year from the start date if the petition was filed for employment after 6 years. CSC accepts petitions filed for a 7th year extension if it is filed no more than 180 days prior to the alien reaching 6 years in H-1B status. The petition can be approved for time up to the 6th year limit and an addition year (7th) year, as long as the total extension time

does not exceed 3 years and the ending date does not exceed the end date listed on the petition and/or LCA.

If the beneficiary has, for example, 5 months left before reaching the 6th year limit, and is also eligible for a 7th year H-1B extension, CSC will grant an extension request for 1 year and 5 months. A 7th year extension may be granted if a LCA or I-140 petition was filed 365 days prior. If the LCA has been approved and the I-140 petition has not yet been filed, then the LCA must still be valid.

Time Limits:

Non-immigrant specialty occupation employees and fashion models are limited to 6 years in combined H and L status and no petition can be approved for more than 3 years at a time. Aliens employed under the Department of Defense (DOD) specialty are limited to 10 years in combined H and L status and no petition can be approved for more than 5 years at a time ("H and L status" includes H-2, H-3, H-4, L-1 and L-2).

Exceptions to Time Limits:

1) Time limitations do not apply to aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. The limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and alien must provide clear and convincing evidence. Such evidence shall consist of documents such as arrival and departure records, copies of tax returns, and records of employment abroad.
2) The 21st Century Department of Justice (DOJ) Appropriations Act amends §106(a) of AC21 to permit H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6 year maximum period when:
   (a) 365 days or more have passed since the filing of any application for labor certification; Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
   (b) 365 days or more have passed since the filing of an EB immigrant petition.

   The Attorney General is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made on the H-1B nonimmigrant's lawful permanent residence. Officers are not to send RFE's requesting that an I-140 and/or an I-485 be filed.
3) AC21 § 104(c) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant is eligible for this benefit even if he or she has exhausted the maximum six-year period of authorized stay for H-1B nonimmigrants under 8 U.S.C. § 1184(g)(4), INA §214(g)(4). The statute states that the beneficiary must:
   - have a petition filed on his or her behalf for a preference status under INA § 203(b)(1), (2), or (3); and
   - be eligible to be granted that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B nonimmigrant status until a decision is made on the nonimmigrant's application for adjustment of status.

See also Donald Neufeld memo dated 05/30/2008 'Revisions to Adjudicator's Field Manual (AFM).' This memo has recently changed portions of the above information, particularly if an employment immigrant petition has been filed, approved, or has not been filed.

Recaptured Time:

Due to the settlement in the court case Ramirez v Polous (CV 02-2811 ER) (USDC-C.D.CA Oct 7, 2002), H-1B aliens can recapture their vacation time outside of U.S. as long as they can provide evidence. CSC is the only Service Center that is bound by this decision.

The beneficiary is entitled to recapture any time spent outside the United States. In most cases, the attorney or petitioner will submit a statement detailing the dates when the beneficiary was outside the United States. The statement must be supported with documentation, such as copies of the beneficiary's passport showing entry and exit stamps. ADIS can also be checked to confirm dates of exit and reentry.

The new validity date for approved EOS cases should be calculated from the end date of the prior I-797 approval notice because the date shown on the I-94 includes a ten day grace period which is not authorized for employment.

The response should be either Yes or No; N/A is not an acceptable response to this question.

44. Is the classification correct?

Depending on the classification requested, the class entered in CLAIMS 3 and annotated on the petition will be "1B1."

The response should be either Yes or No; N/A is not an acceptable response to this question.

45. Is file in proper ROP order?

See Records Policy Manual (RPM)

ROP order for an I-129 approved/denied on initial submission or after RFE/ITD from top to bottom is as follows:

	Left-hand Side	**Right-hand Side**
Top	G-28	Resolution Memorandum (if applicable)
	Petition	ROIT
	Initial evidence • Cover letter • Other supporting documentation • Envelope (or part of) showing address and postmark	Miscellaneous screen prints, checklists, or correspondence
Bottom	RFE/ITD Notice and response	Unacceptable G-28

The right-hand side of the file should be in reverse chronological order; unless the TECS Memo and/or ROIT documents have been refreshed then they should be moved to the top of the file.

Additional material may be added to the file, particularly on the right-hand side, post-adjudication. This may include processing worksheets, returned notices or correspondence. This should not be recorded as a ROP error unless the material is placed on the wrong side of the file.

TSC Policy:
The Record of Proceeding (ROP), from top to bottom, for TECS:

If a resolution is received on a case that is staying in its file jacket, place the TECS and Non-TECS resolution documents on the non-record side of the file as follows:

1. Resolution Memo
2. ROIT
3. TECS Manifest print-out
4. Non-TECS Referral Sheet

Note: Regardless if the petition is approved or denied, evidence received in response to a request for evidence must never be incorporated into the original submission of evidence. All envelopes must be kept at the back of each petition/correspondence packet with which they were received.

CSC Policy (March 2014):
The contractor will clamp the duplicate copy of the I-129 for KCC to the non-record side of the file.

The response should be either Yes or No; N/A is not an acceptable response to this question.

46. Were all other non-decisional requirements met?

This checklist question will suffice for an identified error that was not covered with the Processing questions 37 through 45. Errors should not arbitrarily be entered under this question. This question is only used when the error identified is not suitable for any other question in this section.

The response should be either Yes or No; N/A is not an acceptable response to this question.

QA Results

47. Decisional – D

The response must be Pass if the answer to questions 1 – 27 was Yes or N/A.

The response must be Reject if any answer to questions 1 – 27 was No.

48. Security Checks – S

(b)(7)(e)

49. VIBE – V

50. Non-Decisional – ND

The response must be Pass if the answer to questions 37 – 46 was Yes or N/A.

The response must be Reject if any answer to questions 37 – 46 was No.

Form I-129 H-1B Adjudication

January 2011

Agenda Training Matters

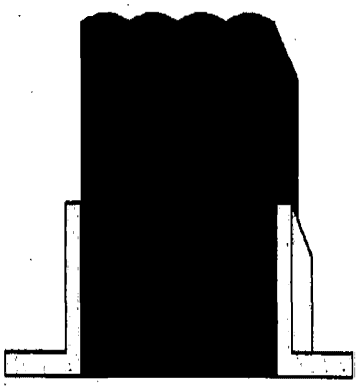
- Introduction
- Fees
- The Cap
- The Definition of an H-1B Nonimmigrant Worker
- Petitioner Requirements
- Beneficiary Requirements

Agenda Training Matters

- Labor Condition Application
- Four Categories of 6-Year Exceptions
- Things to Know
- Summary

Sources of Information for H-1B Adjudication

- Immigration and Nationality Act
  - Sections 101, 212, 214
- Title 8 Code of Federal Regulations
  - Parts 103, 214, 248
- Free-standing Acts & Legislation
  - AC21
- Adopted Decisions
- Memos, policies



Fees

The base fee for the Form I-129

=

$325

Fees

The fee for premium processing of Form I-129

=

$1,225

Fees

P.L. 111-230 effective 8/13/2010 contains provisions to increase certain H-1B and L-1 petition fees.

- $2,000.00 for H-1B
- $2,250.00 for L

The additional fee applies to a petitioner who employs 50 or more employees in the U.S. with more than 50% of its employees in H-1b or L status.

- Applies to initial and new concurrent H & L filings, or
- To obtain authorization for an alien having such status to change employers.

Fees

The H-1B Visa Reform Act of 2004, enacted on December 8, 2004, imposes two additional fees to the I-129 for H-1B classification:

1. Reinstitutes and increases the fees originally imposed by the American Competitiveness And Workforce Improvement Act of 1998 (ACWIA)

Fees

- This fee is used for scholarships for low- income students and job training for U.S. workers.

- U. S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay an additional

$1,500.00

Fees

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay an additional

$750.00

Exceptions

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)
- Nonprofit organizations or entities related to or affiliated with institutions of higher education
- Nonprofit research organizations or governmental research organizations
- Primary or secondary educational institutions, private or public

Exceptions

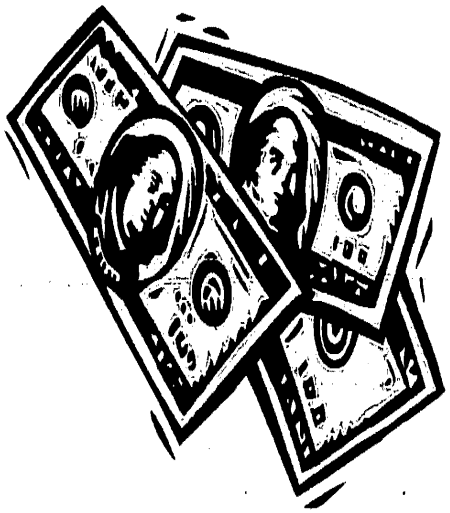
- Amended I-129 petition
- I-129 petition filed for the purpose of correcting a USCIS error
- Second or subsequent extension by the same employer for the same employee

Fees

❷ Creates a new Fraud Prevention and Detection fee of **$500.00**

This fee is for the initial approval of an H-1B (or L) employee by a U.S. employer.

There are no exceptions to the Fraud Prevention and Detection Fee.



The 'Cap' & Numerical Limitations

The total number of temporary workers who were issued initial visas or otherwise provided nonimmigrant status for H-1B classification in fiscal year 2009 was 65,000. The same amount is applicable to fiscal year 2011.

This amount only applies to the principal alien and not to the spouse and children of the alien.

Numerical Limitations

- Of the available 65,000 visas,
  - 1,400 visas are designated for nationals of Chile under the U.S.-Chile Free Trade Agreement, and
  - 5,400 visas are designated for nationals of Singapore under the U.S.-Singapore Free Trade Agreement.
- Reduces the overall visa amount to 58,200 for H-1B classification.

Numerical Limitation Exceptions Masters CAP

- Beneficiaries that have earned a master's or higher degree from a U.S. institution of higher education will be in a Masters CAP until the number of visas exceeds 20,000

- This is a separate CAP from the general CAP of 65,000.

- This CAP is completed before the general CAP. Any surplus over the 20,000 is then added to the general CAP

Numerical Limitations

- In fiscal year 2008 and 2009 the numerical cap was reached immediately. A lottery was conducted to determine which petitions would be accepted for filing.
- Petitions not selected in the lottery were rejected.
- Duplicate petitions (same petitioner and beneficiary) were denied.
- In 2010, a lottery was not needed. The CAP was reached on 12/21/09

The 'Cap' & Numerical Limitations

- Petitioners may not file a petition more than six months prior to employing the alien.

- The first date to file for the fiscal year which starts October 1 is April 1 of that year.

Numerical Limitation Exceptions – Petitioners not subject to the CAP INA 214(g)(5)(A) and (B)

8 CFR 214.2(h)(19)(iii)(B) – 2 Prongs

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a), or related or affiliated nonprofit entity

- Nonprofit research organizations or governmental research organizations

Petitioners as CAP Exempt entities

UNIVERSITY	Gov. Research Org.	Non-Profit Research Org.
Beneficiary	Beneficiary	Beneficiary

- These entities are CAP exempt – no affiliation needed
- The beneficiary can work offsite as long as the employer-employee relationship is maintained
- Let's define these three entities

Institutions of Higher Education defined by the Higher Education Act of 1965

- Defined as those that admit students holding a high school diploma (or equivalent)
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree
- Qualify as a public or nonprofit institution.
- In other words, a college/university

What is a Research Organization?

A nonprofit research organization or government research organization is one that is primarily engaged in basic research and/or applied research

Non-Profit/Government Research

Basic Research defined:

- Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind.

- Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest.

Non-Profit/Government Research

Applied research defined:

- Research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met.
- Investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.
- It may include research and investigation in the sciences, social sciences, or humanities.

Suggested Evidence For verification of a Research Organization

- Organization Document submitted to IRS – 501(c)(3) (along with the 1023 – NP doc application for exemption status)
- 990 non-profit tax return
- Any documentation showing their primary research mission, such as charitable, religious, educational or scientific purpose.
- Internet references of the petitioner on Secretary of State and Attorney General websites that show public charitable orgs.

Institution of Higher Education OR

A related or affiliated nonprofit entity

In certain instances, nonprofit petitioners that are not themselves a qualifying institution also can claim a CAP exemption through an affiliation or connection with a CAP exempt institution

Institution of Higher Education Affiliations

"or related or affiliated nonprofit entity":

When determining an affiliation, USCIS uses 8 C.F.R. 214.2 (h)(19)(iii)(B) which states:

that an affiliated or related nonprofit entity is a non profit entity that is connected or associated with an institution of higher education through one or more of the following three prongs

"...affiliated nonprofit entity" 3 prongs

Prong 1 - The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation;

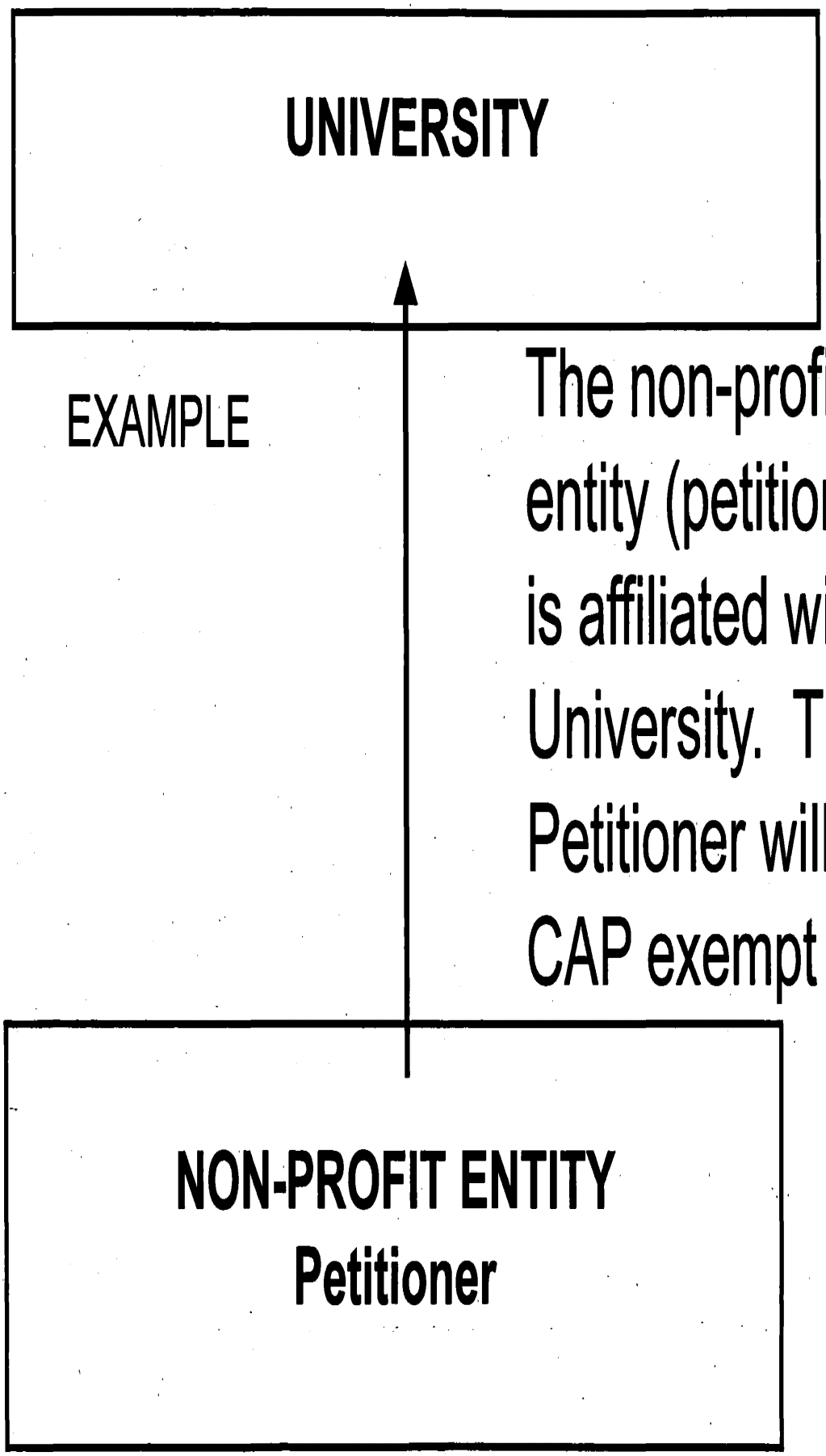
Prong 2 - Operated by an institution of higher education or;

Prong 3 - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

Cooperative

A business organization owned and operated by a group of individuals for their mutual benefit.

A group persons united voluntarily to meet their common economic goals, through a jointly owned and democratically controlled enterprise


UNIVERSITY
EXAMPLE
The non-profit entity (petitioner) is affiliated with a University. The Petitioner will be CAP exempt
NON-PROFIT ENTITY
Petitioner

Beneficiary Employed "at" a CAP Exempt Employer

Sections 214(g)(5)(A) and (B) of the Act (Section 103 of AC21) exempt an alien from the H-1B cap if the alien is employed (or has received an offer of employment) "**at**"

- *an institution of higher education,
- *a related or affiliated nonprofit entity,
- *a nonprofit research organization, or
- *a governmental research organization

*hereinafter referred to as a "qualifying institution

Third Party Petitioner

- The petitioner itself is not CAP exempt
- The beneficiary is not working exclusively at the petitioner's site, but rather is working "AT" a CAP exempt entity (qualifying institution).
- This type of petitioner is known as a **Third Party Petitioner**

Third Party Petitioners

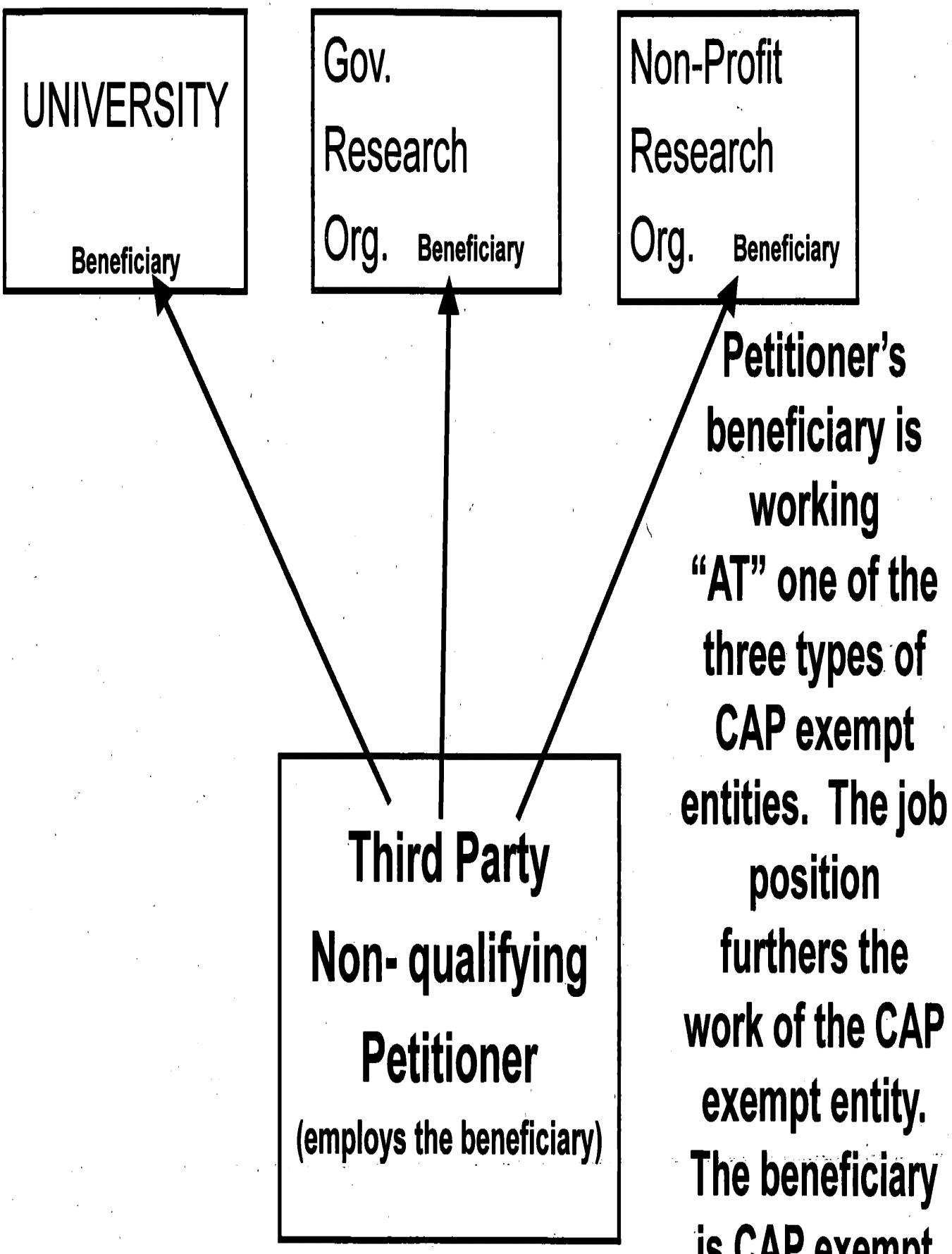
The 06/06/2006 Aytes H-1B Cap exemption memo provides guidance on a third party entity claiming exemption based on employment or an offer of employment "**AT**":

- An institution of higher education or a related or affiliated non-profit entity,
- A nonprofit research organization, or
- A governmental research organization

Third Party Petitioners

The petitioner will employ and pay the beneficiary, but the beneficiary will work at the site of the cap exempt entity. Four conditions to satisfy that the beneficiary will be CAP exempt:

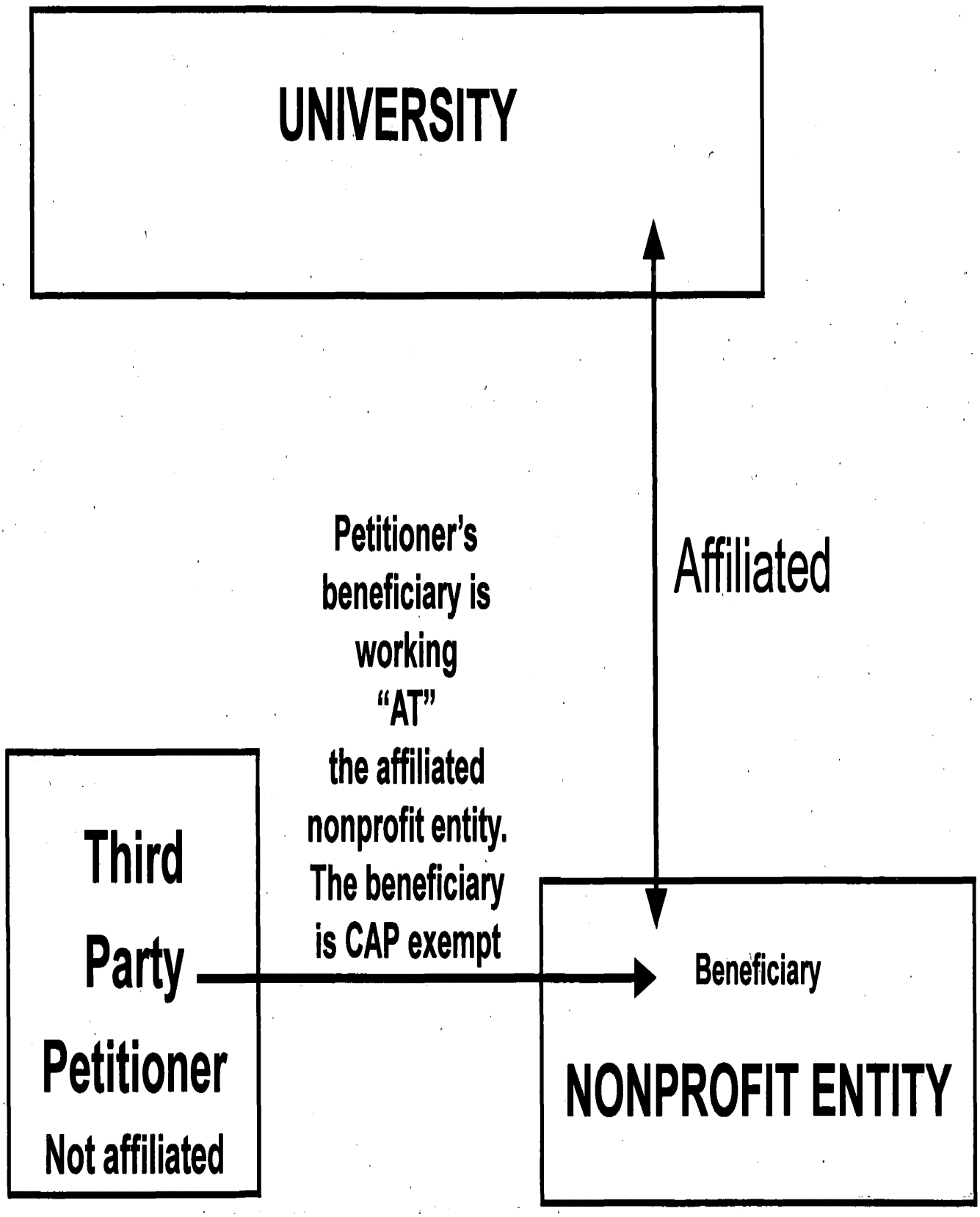
- The beneficiary must be working "at" a qualifying institution at least part of the time
- The job position "at" a qualifying institution must directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution and
- The position and beneficiary must qualify as an H1B.
- The third party petitioner must retain an employer - employee relationship (right of control)


UNIVERSITY
Beneficiary
Gov. Research Org. Beneficiary
Non-Profit Research Org. Beneficiary
Third Party Non- qualifying Petitioner
(employs the beneficiary)
Petitioner's beneficiary is working "AT" one of the three types of CAP exempt entities. The job position furthers the work of the CAP exempt entity. The beneficiary is CAP exempt

Works "AT" a non-profit affiliated entity

- The third Party petitioner's beneficiary can work "AT" a non-profit affiliated CAP exempt entity

- The petitioner must prove the beneficiary will be working at an entity that qualifies as a non-profit affiliated entity



The nonprofit entity is a member, branch, subsidiary, or cooperative of the university. It is CAP exempt

Third Party Affiliation Exemptions Summary...

- The nexus (connection) - The petitioner must demonstrate and document how the beneficiary's duties are directly and predominantly related to and in the furtherance of, the normal, primary, or essential purpose, mission, objective or function of a university or its non-profit affiliate, or a non-profit research organization or a governmental research organization

- Note that the exemption is created by the beneficiary being "**AT**" the qualifying entity's location.

Aytes Memo – 6/6/2006

- The Aytes Memo is the current guide to follow when adjudicating affiliation petitions.

  EXCEPT: The examples that say the bene must be working at least 51% of the time at the qualifying institution. This is no longer a requirement

- A new memo is coming from HQ in the near future.

AAO Decision – Garland ISD

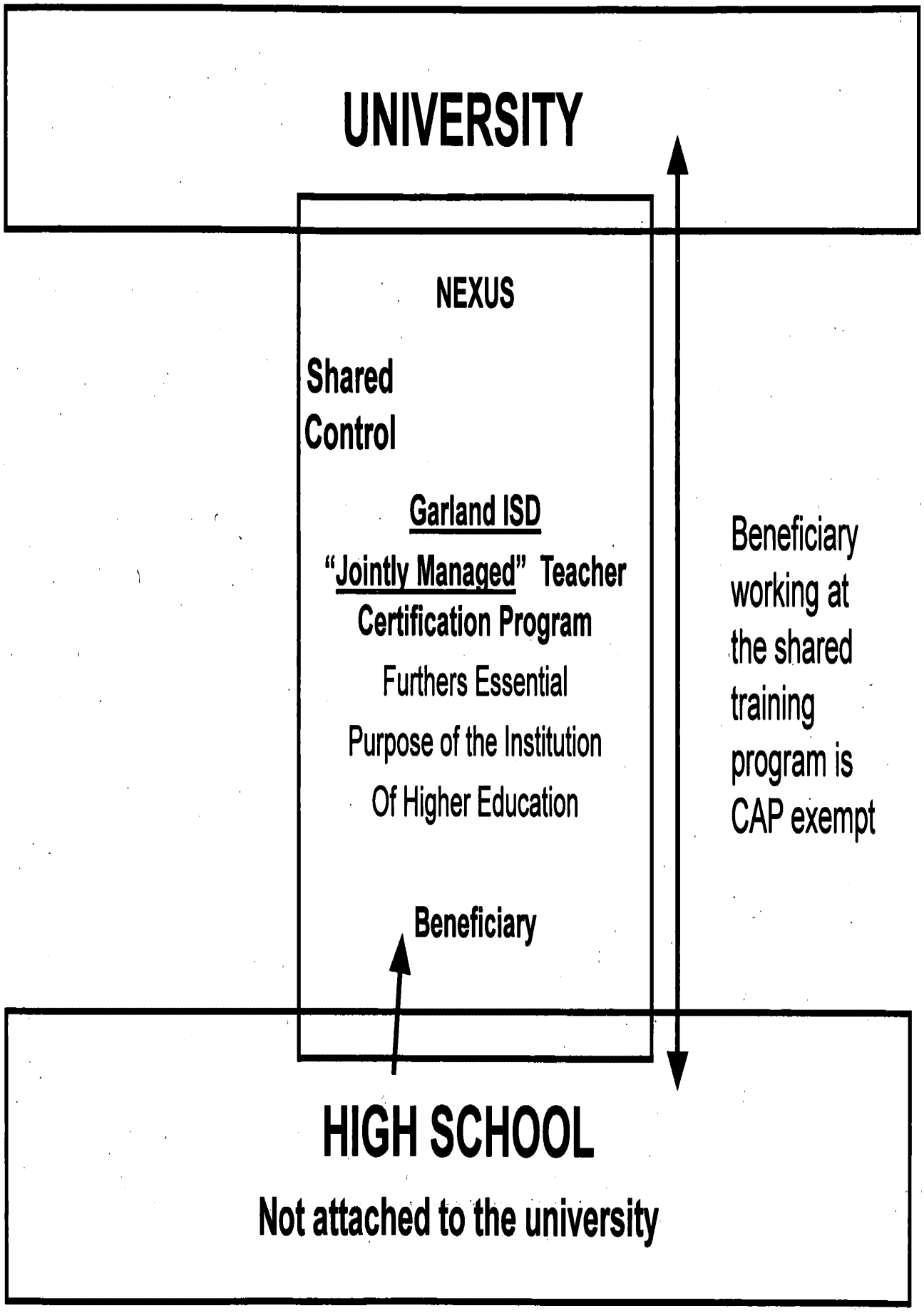
- AAO - Garland Independent School District decision. Public school districts can be affiliated with a institution of higher learning (non precedent decision)

- An affiliation contract must provide for a training/teaching program where the control is shared by the school district and the university or college

AAO's Decision

- AAO ruled that the "Teacher Trak" program that was jointly managed by both entities made Garland ISD attached to Richland U. but only in regards to the Teacher Trak program.

- Thus, only teachers enrolled in the jointly managed Teacher Training programs would be CAP exempt!


UNIVERSITY
NEXUS
Shared
Control
Garland ISD
"Jointly Managed" Teacher
Certification Program
Furthers Essential
Purpose of the Institution
Of Higher Education
Beneficiary
Beneficiary
working at
the shared
training
program is
CAP exempt
HIGH SCHOOL
Not attached to the university

Teacher Training Affiliation Programs Disqualified

- USCIS has negated the AAO Garland ISD Decision on teacher training affiliations
- Teacher Training programs will no longer qualify as an affiliated program.
- Any school who wants to qualify for a CAP exemption must do so by qualifying in one of the other types of CAP exemptions previously discussed.

Teacher Training Affiliations – Initial Filings vs. Extensions

Because thousands of Teacher Training Affiliation H1Bs were approved:

- We will NOT deny any of these petitions that are extension/same employer filings
- We will deny initial and extension/change of employer filings
- Make sure these filings do not qualify under any of the other CAP exemption conditions.

J-1 CAP Exemptions

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 exemption applies only to medical doctors who have received a CONRAD 20/30 waiver under INA 214(l)
- Must work at a hospital designated to be in a needy area.
- This will be covered in detail in the physicians section.

Aliens not subject to the CAP

- Extension validity request within the 6 years.
- Change of employer from one CAP exempt employer to another CAP exempt employer.
- Has reached the 6 year limit but exempt the limit, eligible for recaptured time or AC 21 sec. 104 or 106.
- Prior H1B status continuance.
- Concurrent filing when at least one is CAP exempt.

Concurrent Filing – Two Employers

- An H1B alien can be employed by two separate petitioners at the same time. A separate petition must be filed by each employer

- Concurrent employment may only be granted to an alien seeking employment in the same nonimmigrant classification. For example, an H1B alien may not seek concurrent employment as an H1B1 (HSC), H1B2, H1B3, or vice-versa

H1B Numerical Limitation Exceptions

- The beneficiary was previously counted against the cap once within the last six years and has not reached the maximum allowable time.

- The six years is the total time in H1B status, not calendar years.

LCA General Requirements

- Also called Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA*.
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.

•(Except H-1B2 petitions for Department of Defense workers)

LCA Contents

- Employers information
- Required Rate of pay
- Period of employment and occupation information
- Information related to work location
- Employer Labor condition statements
- Public disclosure information
- Declaration of employer
- Contact Information
- Number of alien workers sought

LCA

An LCA is also required for each Standard Metropolitan Statistical Area (SMSA):

- This is an area designated by DOL that requires an LCA
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.
- Could be more than one work location on an LCA.

LCA

The idea behind the LCA is to protect U.S. workers' wages and working conditions from imported foreign labor. The employer promises that:

- (1) it won't pay the H-1B employee a below-market wage;
- (2) it will notify its workers of the H-1B employment;
- (3) it won't subject the H-1B employee to sub-standard working conditions;
- (4) it won't hire the H-1B employee to break a strike or otherwise help the employer during a labor dispute; and
- (5) it will keep detailed records of its compliance.

LCA

- Validity dates - employment is only authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.

- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one employee

- Because only one alien can be on an H1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.

- Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted

LCA

- Check validity dates of the LCA
- The petition and LCA must agree on the specific occupation that the beneficiary will be employed
- Both must agree on the actual location where beneficiary will be working
- The LCA must list the location of the aliens work site(s)
- If beneficiary is to work at multiple sites all sites must be listed on the LCA

LCA

- Before filing an I-129 H-1B petition, the petitioner must obtain a Labor Condition Application (LCA)

- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.

- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Filing the H-1B Petition

An I-129 H-1B Petition can be filed up to 6 months before the requested start date of employment.

What is an H-1B Nonimmigrant Worker?

What is an H-1B Nonimmigrant Worker?

According to 101(a)(15)(H)(i)(b) of the Act –

an alien who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) of the Act

The H-1 Classification

- **H-1B** Specialty occupation workers
- **H-1B1** Specialty occupation workers under Free Trade Agreements between Chile and Singapore (Vermont Service Center)
- **H-1B2** Department of Defense cooperative research and development project or co-production project
- **H-1B3** Fashion models
- **H-1C** Registered nurses (Vermont Service Center)
- **E-3** Australian E Visa Professional Trade (Vermont Service Center)

Profession

Section 101(a)(32) of the INA defines a profession as:

The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians surgeons and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Specialty Occupation

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and

2) which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Two Questions

1. Does the position require a degree?

2. Does the beneficiary have the degree required by the specialty ?

OOH

Department of Labor's Occupational Outlook Handbook located at:

http://www.bls.gov/oco

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Occupational Outlook Handbook, 2010-11 Edition

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Occupational Outlook Handbook (OOH), 2010-11 Edition

For hundreds of different types of jobs—such as teacher, lawyer, and nurse—the *Occupational Outlook Handbook* tells you:

- the training and education needed
- earnings
- expected job prospects
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CAREER ARTICLES FROM THE OOQ

EMPLOYMENT PROJECTIONS

Announcement

Earnings data for two occupations, *airline pilots, copilots, and flight engineers* and *flight attendants*, which appear in many places within the **Career Guide to Industries** and **Occupational Outlook Handbook**, are being removed from the BLS website because these data were incorrect as initially published. These data will be replaced when corrected data become available.

Ways to use the *Occupational Outlook Handbook* site:

1. To find out about a specific occupation or topic, use the Search box that is on every page—enter your search term in the box.
2. To find out about many occupations, browse through listings using the Occupations links that are on the left side of each page.
3. For a listing of all occupations in alphabetical order, select a letter:

   » A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

About the *Handbook*: *The Occupational Outlook Handbook* is a nationally recognized source of career information, designed to provide valuable assistance to individuals making decisions about their future work lives. The *Handbook* is revised every two years.

Manufacturers' agents *see:* Sales engineers

- Manufacturers' representatives *see:* Sales representatives, wholesale and manufacturing
- Manufacturing opticians *see:* Medical, dental, and ophthalmic laboratory technicians
- Map editors *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Mapping technicians *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Marble setters *see:* Carpet, floor, and tile installers and finishers
- Margin clerks *see:* Brokerage clerks
- Marine biologists *see:* Biological scientists
- Marine Corps *see:* Job opportunities in the Armed Forces
- Marine electronics technician *see:* Radio and telecommunications equipment installers and repairers
- Marine equipment mechanics *see:* Small engine mechanics
- Marine oilers *see:* Water transportation occupations
- Marine or hydrographic surveyors *see:* Surveyors, cartographers and photogrammetrists, and surveying and mapping technicians
- Mariners *see:* Water transportation occupations
- Marines *see:* Job opportunities in the Armed Forces
- Market and survey researchers
- Market research analysts *see:* Market and survey researchers
- Market research managers *see:* Advertising, marketing, promotions, public relations, and sales managers
- Marketing coordinators *see:* Public relations specialists
- Marketing managers *see:* Advertising, marketing, promotions, public relations, and sales managers
- Marketing research analysts *see:* Market and survey researchers
- Marketing specialists *see:* Public relations specialists
- Marking and identification printing machine operators *see:* Printing machine operators
- Marriage and family therapists *see:* Counselors
- Marshals *see:* Correctional officers
- Marshals and deputy marshals, U.S. *see:* Police and detectives

Occupational Outlook Handbook, 2010-11 Edition

Market and Survey Researchers

Significant Points

Training, Other Qualifications, and Advancement

About this section

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable toward obtaining a full-time position in the field, because much of the work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

Other qualifications. Market and survey researchers spend a lot of time performing precise data analysis, so being detail-oriented is critical. Patience and persistence are also necessary qualities because these workers devote long hours to independent study and problem solving. At the same time, they must work well with others as market and survey researchers sometimes oversee the interviewing of individuals. Communication skills are important, too, because the wording of surveys is critical, and researchers must be able to present their findings both orally and in writing.

Position Requirements

The petitioner must meet one of the following four criteria:

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3) The employer normally requires a degree or its equivalent for the positions; or
4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets one of the following four criteria:

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Copy of baccalaureate degree
- Should be for a course of study in the specialty that relates to the occupation
- Transcripts

Beneficiary Qualifications

2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Foreign degree and/or transcripts accompanied by a translation
- Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a **United States** bachelor's degree.
- RFE for educational evaluation if unable to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications

2) Foreign Degree Con't;

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.
- The four-year degrees from India can usually be considered equivalent to a U.S. bachelor's degree, but not always.
- Be careful not to penalize a beneficiary who earns a four-year degree in three years.

Beneficiary Qualifications

3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure are specialty occupations:

  pilots, cosmetologists, flight instructors, barbers, taxi drivers

Beneficiary Qualifications

4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience

- The evidence must show that the applicable work experience is that of a position requiring a baccalaureate degree.

Degree Equivalence

(Equivalence to completion of a college degree)

- The beneficiary's education, specialized training, and/or progressively responsible experience may be recognized as equivalent to a baccalaureate degree

- If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

Degree Equivalence

1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should show the following:

Credentials Evaluation Service - Foreign Degree Equivalence Only

- Consider formal education only, not practical experience;
- State if the collegiate training was post-secondary education (i.e., whether the applicant completed the U.S. equivalent of high school before entering college);
- Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and
- Briefly state the qualifications and experience of the evaluator providing the opinion.
- Remember, this evaluation service was hired by the petitioner.

Rating the Evaluation Service

Do your rating first:

- Look at transcripts and credentials to get a feel for whether a beneficiary qualifies for the position **before** looking at the credentials evaluation.

- If the evaluation is reasonably close to your evaluation, particularly if the evaluator's methodology makes sense, you can give the evaluation a higher degree of credibility.

Degree Equivalence

4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

Degree Equivalence

- A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty,
- That the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.
- For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

Degree Equivalence

- For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

- If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation

- That the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation;

Degree Equivalence

and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

Degree Equivalence

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Degree Equivalence

- Bachelor's Degree – Combination of education, specialized training and/or work experience ("three for one rule")

- Master's Degree - the alien must have **a** baccalaureate degree followed by at least five years of experience in the specialty.

- Ph.D. - If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent (no substitutions for a Ph.D.)

The Final Determination

- Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty,

- and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Degree Requirements

- Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field
- A nursing degree is called a Bachelors of Nursing but is not generally considered to be equivalent to a 4 year Bachelors Degree.
- In certain instances, specialty nurse positions may qualify as H1B.
- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree
- Speech Language Pathologists & Audiologists require a Masters degree

Licensing Requirements

If the occupation (not the duties) requires a license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for either permanent license, except for administrative reasons, e.g. need Social Security # or need DHS permission to be employed
- Does not include taking licensing tests or exams unless the beneficiary has a temporary or provisional license which allows the beneficiary to fully perform the duties with or without supervision

Identifying Licenses

- Temporary or provisional licenses normally are titled as such and may have requirements stated on the license that need to be completed before a permanent license can be issued.

- However, a few permanent licenses may also list requirements to be completed for a extension of the license and they normally do not have the word "permanent" in the title.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- Where licensure is required in an occupation, approve the petition for **one year** or for the period that the temporary license is valid, whichever is longer

Permanent Licenses

- A petition can be approved up to three years for beneficiary's who have permanent licenses

- Remember, although they are permanent licenses, they will still have an expiration date and may have renewal requirements listed.

- Expiration dates on Permanent licenses have no bearing on validity dates given. Approval can be up to three years

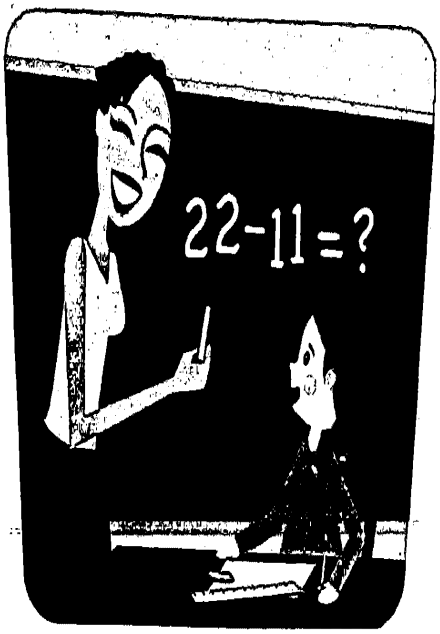
Teachers

- Public school teachers require teaching credentials
  - Unified School Districts
- Private schools do not require a teaching credential
  - Parochial Schools
- Special Education Teachers
  - Require a special certification

Teachers

- Must be teaching in the area that the credential is issued

- If issued an emergency credential, only grant for an increment of one-year



Certified Health Care Workers

- Certification is not to be confused with licensing.
- Licenses required by certain occupations are issued by the state.
- Certifications required by certain health occupations are also issued by the state.
- Don't confuse the title Teaching Certificate (credential) which is actually a license.

Uncertified Health-Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in of the affected health care occupations

Uncertified Health-Care Workers

Unless properly documented, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified healthcare workers:

1. Nursing
2. Physical Therapy
3. Occupational Therapy
4. Speech Language Pathology & Audiology
5. Medical Technology
6. Medical Technician
7. Physician's Assistant

Uncertified Health-Care Workers

- In this category nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Uncertified Health-Care Workers

At this time, only three entities are approved by the USCIS to certify non-immigrants for 212(a)(5)(C):

- Nurses - Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all 7 positions
- Physical Therapists - Foreign Credentialing Commission on Physical Therapy (FCCPT) – for PTs only
- Occupational Therapists - National Board for Certification in Occupational Therapy (NBCOT) – For OTs only

Evidence That the Position Qualifies as a "Specialty Occupation."

- A degree in the specific specialty
- Licensure, if applicable (e.g. Elementary and Secondary Public School Teachers)
- USMLE, or equivalent, and ECFMG, for foreign physicians
- Certification, if applicable, of Healthcare Workers

The job position will determine how many of the four requirements will be applicable for each petition

Umbrella License

- Some occupations allow an individual to work under the license of the employer

- For example, an architect may be able to work without a personal license if the company he works for has a license.

Determining State Licensure Requirements

- There are 50 states all with licensing requirements that vary
- How do you determine the requirements for each case?
- The burden of proof is on the petitioner to provide the requirements for their state and evidence that the beneficiary has satisfied them

Specific Occupations – How many of the four requirements will be applicable to each occupation?

- Teachers
- Healthcare workers
- Physicians
- Analysts
- Accountants
- Managers
- Computer related positions
- All others

Nurses

- Most nursing positions are not professional and do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be exceptional.
- You need to be satisfied that the position requires a four-year degree.
- Don't be fooled by a degree entitled "Bachelor of Nursing Degree". Despite the title, they are normally not equivalent to a 4 year U.S. degree

Nurses

In contrast to most general RN positions, certain specialized nursing occupations are likely to require a 4 year bachelor's or higher degree in the specific specialty, and accordingly, be H-1B equivalent:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM).

Specialized Nursing Occupations

- **Clinical Nurse Specialists (CNS):** Acute Care, Adult, Critical Care, Gerontological, Family, Hospice and Palliative Care, Neonatal, Pediatric, Psychiatric and Mental Health-Adult, Psychiatric and Mental Health-Child, and Women's Health

- **Nurse Practitioner (NP):** Acute Care, Adult, Family, Gerontological; Pediatric, Psychiatric & Mental Health, Neonatal, and Women's Health.

- **Certified Registered Nurse Anesthetist (CRNA)**; and

- **Certified Nurse-Midwife (CNM).**

*Note: Nursing positions not qualified for H-1B classification may qualify for H-1C classification under Section 2 of Public Law 106-95 (Adjudicated at Vermont Service Center).

Specialized Nursing Occupations

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Specialized Nursing Occupations

- The petitioner may be able to show that the H-1B petition is approvable by demonstrating that the individual nurse position requires a higher degree of knowledge and skill than a typical RN or staff nurse position

  Example: The employer demonstrates, through affidavits from independent experts or other means, that the nature of the position's duties are sufficiently specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent). As always, each petition must be adjudicated on a case-by-case basis (taking into account the totality of the requirements for the position).

Physicians

Beneficiary's requirements

1) Has a license or other authorization required by the state of intended employment to practice medicine, *_*or is exempt by law*_ therefrom, if the physician will perform direct patient care and the state requires the license or authorization, and

2) Has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

*Note:

The wording "or is exempt by law" was used to accommodate physicians coming to the U.S. to work at Veterans Administration (VA) hospitals. By law, physicians at VA hospitals are not required to have a license from the state of employment. They do however, need a license to practice medicine from some state.

Physicians

Petitioner requirements – No license required

The petitioner must establish that the alien physician:

1) Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research.

Physicians

Petitioner requirements – license required

1) If the physician will be employed by a for-profit organization in any capacity, then the petitioner must establish that the beneficiary complies with requirements of an alien physician performing direct patient care.

2) The alien has passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a United States medical school; and

Physicians – Foreign Medical Graduates (FMGs)

(i) FMG has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(ii) Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians FMGs- Exceptions

- Graduates of Canadian medical schools are exempt the ECFMG requirements.

- Canadian medical schools are very similar to U.S. medical school

- Foreign medical school graduates who are of national or international renown are exempt from restrictions on direct patient care listed above. They would, however, require licensure and LCA.

Distinguished Physician of National or International Renown

A physician who is a graduate of a medical school in a foreign state and who is of national or international renown in the field of medicine is exempt from all the petitioner's requirements. [8 CFR 214.2(h)(4)(viii)(C)]

Also exempt from:

- Passing the FLEX or equivalent
- Being competent in English

Physicians FMGs- Exceptions cont'd

- The burden of proof is on the petitioner to prove the FMG's license for that state is distinguished and does not require ECFMG
- Examples of distinguished notations on such licenses:

  Conceded Eminence

  Distinguished Professor
- Even with such terms on a license, the petitioner should explain the term for that state.

Physicians FMGs- Exceptions cont'd

- Remember:

  There are certain states that have licensure exemptions for international medical graduate physicians through recognition of eminence in medical education or medical practice, but these are extremely rare and in most cases tied to a specific medical faculty position or hospital appointment

Physicians

- Physician with a permanent license. Can be approved for up to three years

- Physician with a temporary or provisional license, approve for up to one year or the expiration of the temporary license, whichever is greater.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.
- Medical Residents have temporary licenses
- Exceptions: New York and Connecticut do not issue temporary licenses to their Medical Residents. They can be approved for up to three years.
- Evidence of no licensing requirement is needed for hospitals in other states.

214(l) Doctors

- Relates to J nonimmigrants attempting to change status to H-1B

- Aliens who have received J nonimmigrant classification in order to receive graduate medical education or training are subject to the two-year foreign residence requirement of 212(e) of the INA

214(l) Doctors

- According to section 248(2) of the INA, this alien cannot change status to an H nonimmigrant even with a waiver of the two-year residency requirement

- However, there is an exception, Conrad 30, P.L. 103-416 relates to section 214(l) of the INA (refer to CAP exempt section)

214(l) Doctors

A change of status from J to H-1B is allowed if the beneficiary receives a waiver and is requested by either a federal or state agency based on the following Public Law sections:

- Pub.L. 103-416 (by a State Department or Public Health) or
- Pub.L. 104-208 (by an interested U.S. Government Agency)

J-1 COS to H1B Physician

- Must provide the Conrad authorization document from the state where the hospital is located.
- Cannot file for a COS or EOS/ change of employer until the 3 year CONRAD agreement is completed.
- If hardship is claimed by the J-1's hospital the J-1 can relocate to another CONRAD hospital.

214(I) Doctors

In order to grant a change of status for a J1 under Conrad 30, the petitioner must submit:

- a State Workforce Agency letter concurrent with the Department of State recommendation and
- a CLAIMS generated I-612 approval notice is required

214(l) Doctors

- The beneficiary must fulfill a three year employment commitment in an HHS designated shortage area, VA facility or in medical research or training

- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled

- Once the CONRAD beneficiary fulfills the three year commitment, he will remain CAP exempt upon extension/change of employer.

214(l) Doctors

- If the commitment is not fulfilled, the beneficiary will again be subject to the two-year residence requirement

- When approving any J nonimmigrant changing status under this program, the adjudicating officer must attach the section 214(l) addendum to the I-797 approval notice.

- This addendum is required to prevent claims that a Foreign Medical Graduate did not know the obligations that accompany a waiver under this section

Analysts

- Look closely at the duties for a Market Research Analyst or business analyst
- Marketing managers and Personnel managers do not require degrees per the OOH
- Industrial production managers do not require degrees per the OOH

Managerial Positions

Managerial positions in advertising or public relations are not normally considered specialty occupations, because no requirement of a baccalaureate degree in a specialized area for employment is required.

Accountants

- It is the complexity of the business - not the complexity of the duties - that may show if the beneficiary qualifies

- Analyze the nature, size and income of the business

- Profit by itself may not be enough evidence. 2 Million dollars in sales does not show anything on its face.

Accountants

- **Size:** Generally companies with less than 15-20 employees would have a difficult time justifying an accounting position. The fewer employees, the less need for a full-time accountant.

- **Transactions**: A piano store that sells 11 pianos a month would have less need for an accountant than an independently owned (non-franchised) auto parts store that conducts thousands of transactions a month with both the public and local auto body and repair shops

Accountants

- **Nature of the business:** A non-profit organization with a more complex financial structure in terms of accounting for grants, taxes, etc., would, more likely, require the services of an accountant rather than a franchise business in which the accounting is normally included in the agreement

- An alien can qualify as an accountant by establishing required accounting duties and still do book keeping duties, as well.

Accountant vs. Book Keeper - Questions

- What are the duties of a book keeper? Pay records? Time sheets? Pay bills?
- What are the duties of an accountant? Analyze finances? Prepare taxes? Project expenditures?
- Are they the same?
- Does the business really need an accountant?
- Look at the totality of the evidence.

Who needs an Accountant?

- A 7-11 store?
- A dry cleaners?
- A Carl's Jr. Restaurant?
- Carl's Jr. Headquarters?

Computer Engineers

What are the duties?

- Writing software programs? Maintain mainframe efficiency? Input data with a keyboard?

Watch for job titles:

- Engineer
- Computer Analyst
- Civil Engineer

General Degrees

A degree in the general area of Business Administration may be insufficient unless the petitioner can show that the beneficiary's academic course work gained him or her the knowledge that was a realistic prerequisite for the position

Example: A Business Administration Degree with a major in accounting would likely qualify the beneficiary as an accountant, but may not qualify him as an architect.

H-1B1 Singapore and Chile Professionals

These are done at VSC, however, we get a few misfiled petitions. For each year's CAP:

- 1,400 visas are designated for Chile
- 5,400 visas are designated for Singapore (See Numerical Limits previous slides)
- The Singapore and Chile CAPS have never filled.

H-1B1 Singapore - Chile EOS – Filed on an I-129

- H-1B1s from Chile and Singapore may be admitted initially for a maximum of one-year, and they may extend their H-1B1 stay an indefinite number of times, in one-year increments, as long as they continue to demonstrate that they do not intend to remain or work in the United States permanently. Note that, unlike the H-1B statute, there is no "dual intent" provision for H-1B1s.

EOS from H-1B1 to H-1B – Subject to the General CAP

- An H-1B1 can EOS with a change of conditions of employment to H1B

- However, because the H1B1 has obtained a CAP number from the separate H-1B1 CAP visa limit, they must qualify for a number in the H1B general CAP, to EOS to H1B.

- Singapore- Chile H1B1s are adjudicated at the Vermont Service Center, but if you receive a misfiled H1B1, see you supervisor

H-1B2 Department of Defense Research Project

- Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties.

- The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met.

- ***Note:** Petitioner is **not** required to provide a Form ETA-9035 (LCA).

H-1B2 Department of Defense Research Project

- Verify that the petition is accompanied by a verification letter from DOD project manager. This letter must state that the alien will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD. Details about the specific project are not required.

H-1B2 Department of Defense Research Project

The petitioner must also:

- Provide a general description of the alien's duties and indicate the actual dates of the alien's employment on the project.

- Submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

H-1B2 Department of Defense Research Project

- Verify that the petition is accompanied by evidence that the beneficiary has a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing the services.

- Because of the sensitivity of these types of petitions, it is prudent to consult with your supervisor before taking an adverse action with these cases.

- A maximum of 100 aliens can be employed on a DOD research program at any time. Before you approve the petition, contact Headquarters Adjudications through your Supervisor.

H-1B3 Models

- H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. The alien must come to the United States to perform services that require a fashion model of prominence, and he or she must demonstrate such prominence.

- The Bachelors degree requirements are not applicable to models

- An LCA is required

H-1B3 Models - Requirements

- **Prominence** means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling

H-1B3 Models - Requirements

Verify that the beneficiary is qualified for the position. To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field of modeling you must have evidence of two of the following:

- Has achieved national or international recognition for outstanding achievements evidenced by critical reviews or other published material by or about the alien in major newspapers, trade journals or magazines;

H-1B3 Models - Requirements

- Has performed and will perform services as a fashion model for employers that have a distinguished reputation;

- Has received recognition for significant achievements from organizations, critics, or other recognized experts in the field of fashion modeling. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements;

- Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

H-1B3 Models - Petitioner

- If the petitioner is the employer (not an agent), it can provide copies of any written contracts with the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed.

- If the petitioner is an agent, he/she must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment.

- The agent can provide a copy of a written agreement between himself and the beneficiary, or a summary of the oral agreement as evidence.

H-1B3 Models - Petitioner

- The petitioner should establish that the services to be performed involve an event, production or activity which have a distinguished reputation OR

- the services to be performed are for an organization or establishment that has a distinguished reputation, or a record of employing prominent persons

The Petitioner

Qualifying Petitioner – A U.S. Employer

A U.S. Employer is:

a person, firm, corporation, contractor, or other association or organization in the U.S., which: permits a person to work in the U.S.; has an IRS tax identification number; and has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee. [8 CFR 214.2(h)(4)(ii)]

Qualifying Petitioner – A U.S. Agent

- A U.S. individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

  [8 CFR 214.2(h)(2)(i)(F)]

Qualifying Petitioner

Keep in mind:

- Unlike immigrant petitions, the ability to pay the beneficiary does not apply to H-1B nonimmigrant petitions; however, there must be a bona fide qualifying H-1B specialty occupation position for the validity period specified on the petition and LCA

- For EOS petitions with same employer, the evidence (e.g. beneficiaries pay statements, W-2s, etc...) should establish that the petitioner complied with the terms and conditions of employment as was stated and signed for on the initial H-1B petition.

Qualifying Petitioner

- An alien may be employed by more than one employer (petitioner) at any given time.
- This is called concurrent employment.
- However, a separate petition must be approved for each employer. Also, part-time employment is permitted.

Employee/Employer Relationship - Who is the Employer ?

Is the Petitioner a staffing firm or agent?

- If the petitioner is an agent, he must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment (H-1B3). [8 CF214.2(h)(4)(vii)(A)(2)]
- If the petitioner is an agent, has he/she provided a copy of written agreement between himself and the beneficiary, or a summary of the oral agreement? (control, pay, hire, fire)

What are the actual duties of the position?

Contractors/Agents

A petitioner as the employer of an alien

- Employment contractor/employment agency petitioners
- The petitioner must establish that it has the "right of control" over the beneficiary.
- The third party client can exercise "actual control" at their worksite

Right of Control

- An Employer must establish that it has the right of control over when, where, and how the beneficiary performs the job.
- The petitioner must show in the totality of evidence that it has the right to control the beneficiary's employment
- The nature of the petitioner's business and the beneficiary's position are factors.

Right of Control vs. Actual Control

- Right of Control: having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee.

- Actual Control: Physically supervising the employee. The employee will be physically at the site of actual control.

Third Party Employment.

- The third party client company will have the petitioner's beneficiary on site and will exert actual control by supervising him.

- The petitioner will still have the right of control to hire, pay, fire, supervise, or otherwise control the work of that employee.

Issues of Right of Control vs. Actual Control

- The ability to supervise the beneficiary
- The manner in which to supervise the beneficiary
- The right to control the work of the beneficiary on a day-to-day basis (if such control is required)
- The source of the instrumentalities and tools needed to perform the job
- The ability to hire, pay, and fire the beneficiary

Issues of Right of Control (con't)

- The ability to evaluate the work product of the beneficiary (i.e. progress/performance reviews)
- To claim the beneficiary for tax purposes
- To provide employee benefits
- The beneficiary's use of the petitioner's proprietary information to perform the duties of employment

Issues of Right of Control (con't)

- Whether the beneficiary produces an end-product linked to the petitioner's business

- The ability to control the manner and means in which the beneficiary's work product is accomplished

Petitioner as the Employer

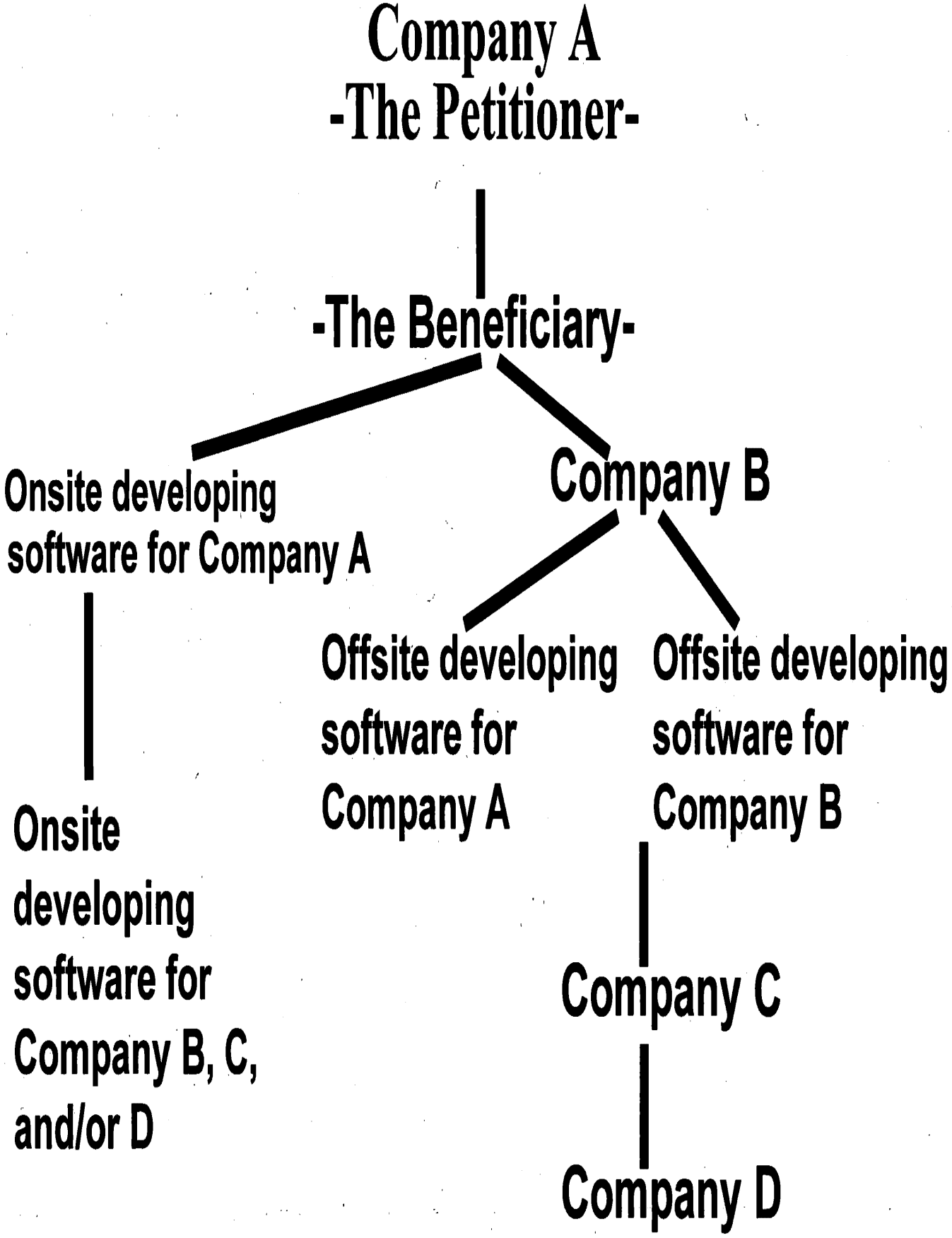
- The petitioner must prove there is an employer/employee relationship with the beneficiary

- In order to do so, the petitioner would have to prove it has the right to control the beneficiary.

Staffing Agency vs. Job Shop

- Staffing agency: by contractual agreement charges a fee to a third party client company for the services of their employee. The right of control stays with the staffing agency

- Job Shop: merely charges a fee and finds a position for their client at a third party company. The client company hires and pays the employee. The job shop does not have the right of control.


Company A
-The Petitioner-
-The Beneficiary-
Onsite developing software for Company A
Company B
Offsite developing software for Company A
Offsite developing software for Company B
Onsite developing software for Company B, C, and/or D
Company C
Company D

Contractors/Agents Assertions vs. Documentation

- An itinerary is a listing of places of proposed employment
- Remember, an itinerary by itself is merely an assertion by the petitioner
- Contracts, statement of work, state wage reports are documentation
- The burden is on the petitioner to show right of control.
- Labor Condition Application must be valid for all employment locations

Contractors/Agents – IT Consulting

- There is a lot of opportunity for abuse with third party client filers.

- Use the 10/25/10 criteria as a guide. Most of the abuse is with these petitioners:

  1. In business less than 10 years
  2. Has less than 25 employees
  3. Is worth less than 10 million dollars (Less than 1 million, very high abuse rate)

* **Note** - Consider the totality of the evidence

Dependent Employers

- A dependent employer is determined by the number of H-1B nonimmigrant's employed as a proportion of the total number of full-time equivalent employees employed in the U.S.

- See H-1B Data Collection and Filing Fee Exemption Supplement, Part A

- See LCA, part F-1, and instructions to LCA on page 5

- See Memo dated April 5, 2006, titled 'Organizations Ineligible for Approval of Immigrant and Nonimmigrant Petitions Under Section 212(n)(2)(c)(ii) of the Act'

TARP Dependent Employer

- H-1B petitioners who receive funds under the Troubled Asset Relief Program (TARP) must comply with the "H-1B dependent employer" provisions regarding recruitment of U.S. workers

- If the petitioner indicates on the petition it has received TARP funding, then the ISO must ensure that the petitioner has indicated they are H-1B dependent on the LCA

- If they did receive TARP but did not indicate on the LCA that they are H1B dependent, the LCA is invalid. The petition will be denied.

TARP

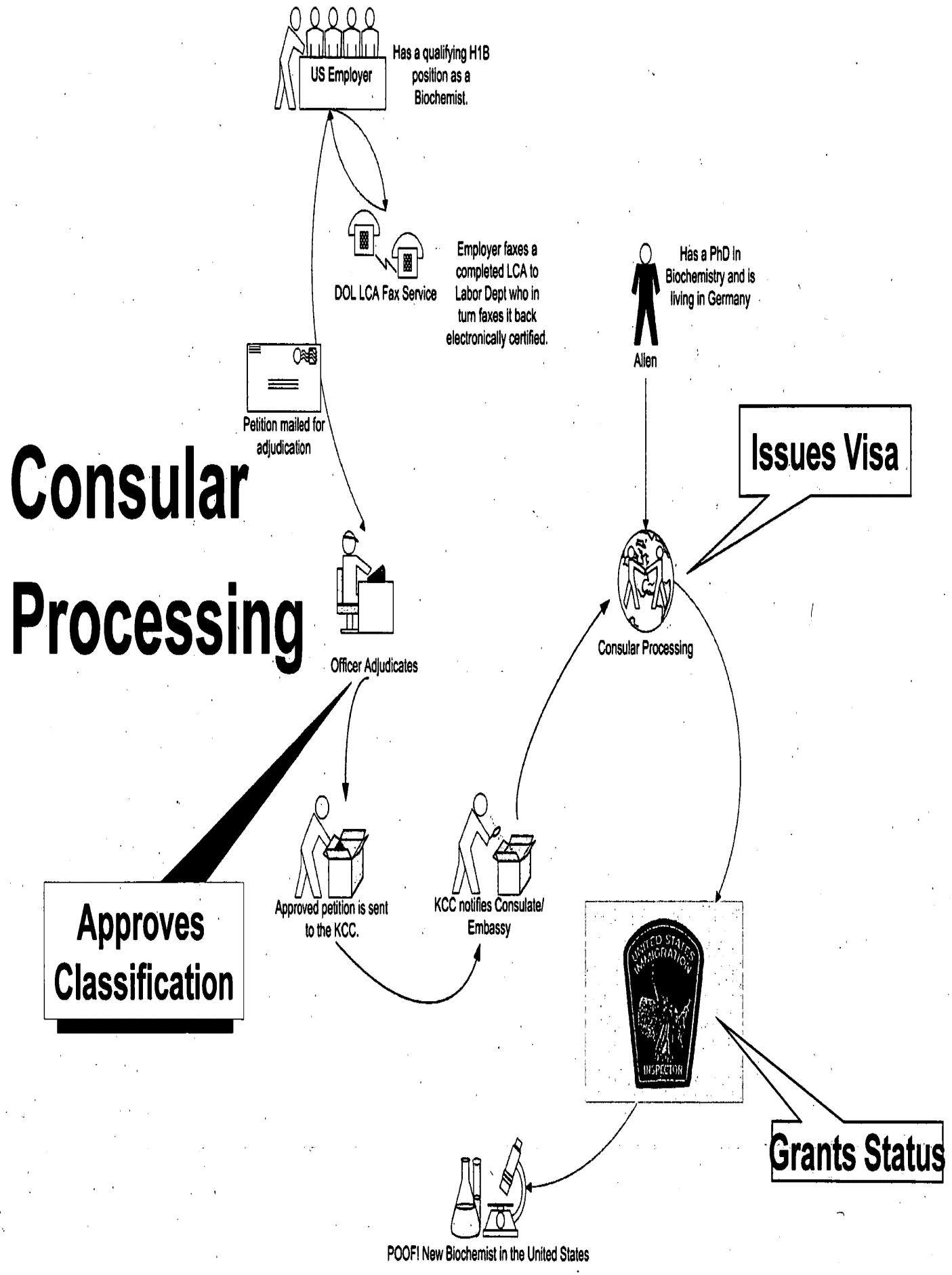
- If they did not indicate on the petition whether they received TARP funds of not, RFE for an answer.

- If they provide evidence that they have paid back the TARP funds then they do not have to indicate on the LCA that they are a dependent employer

The Petition and Visa Process

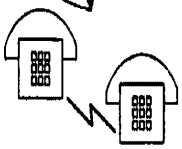
- Depending on whether the alien is abroad or physically present in the U.S., the petitioner may request that notice of an approved H-1B petition be sent to a U.S. consulate abroad so that the alien may apply for an H-1B visa, or that the alien's status be changed or extended in the U.S.

- It is critical to remember that eligibility for the H-1B classification is a separate analysis from whether the beneficiary is eligible for or has maintained valid H-1B status.


US Employer
Has a qualifying H1B position as a Biochemist.
DOL LCA Fax Service
Employer faxes a completed LCA to Labor Dept who in turn faxes it back electronically certified.
Has a PhD in Biochemistry and is living in Germany
Alien
Petition mailed for adjudication
Consular Processing
Issues Visa
Officer Adjudicates
Consular Processing
Approves Classification
Approved petition is sent to the KCC.
KCC notifies Consulate/ Embassy
Grants Status
POOF! New Biochemist in the United States

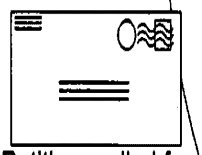
Change of Status

Has a qualifying H1B position as a Biochemist.



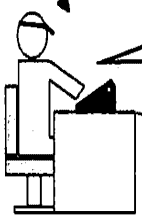
DOL LCA Fax Service

Employer faxes a completed LCA to Labor Dept who in turn faxes it back electronically certified.

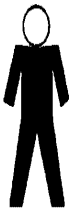


Petition mailed for adjudication

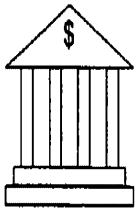
Officer approves the nonimmigrant classification and the change to H1B status



Officer adjudicates

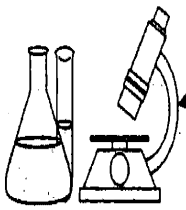


Alien



Harvard University

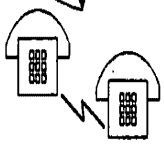
Just graduated with a PhD in Biochemistry.



POOF! New Biochemist in the United States

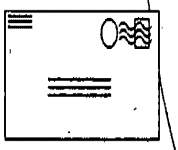
Extension of Status

Has a qualifying H1B position as a Biochemist.

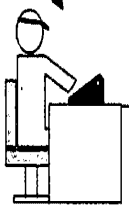


DOL LCA Fax Service

Employer faxes a completed LCA to Labor Dept who in turn faxes it back electronically certified.



Petition mailed for adjudication

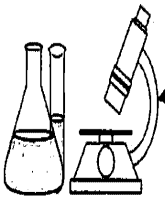


Officer adjudicates

Officer approves the nonimmigrant classification and extends the beneficiary's H-1B status

Approval notice with new I-94 attached

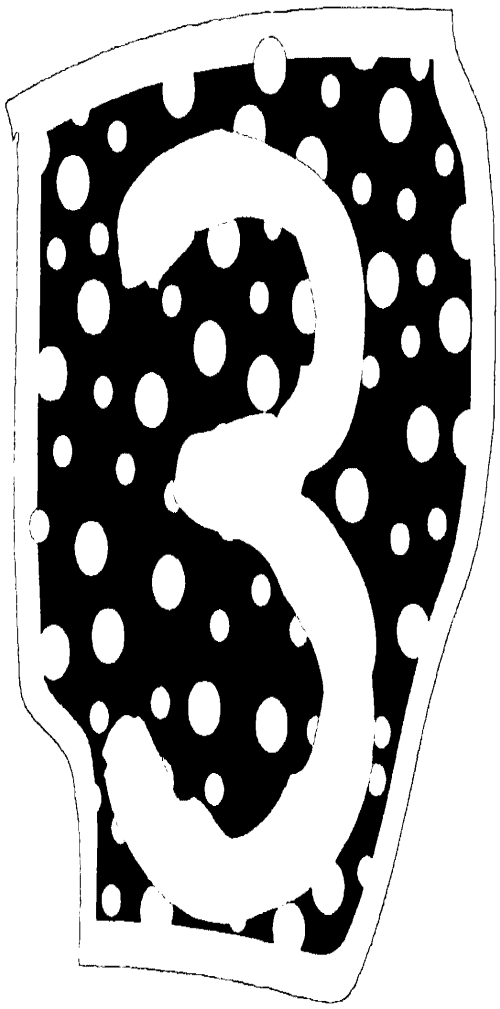
Alien



Biochemist extended with same or new employer in the United States

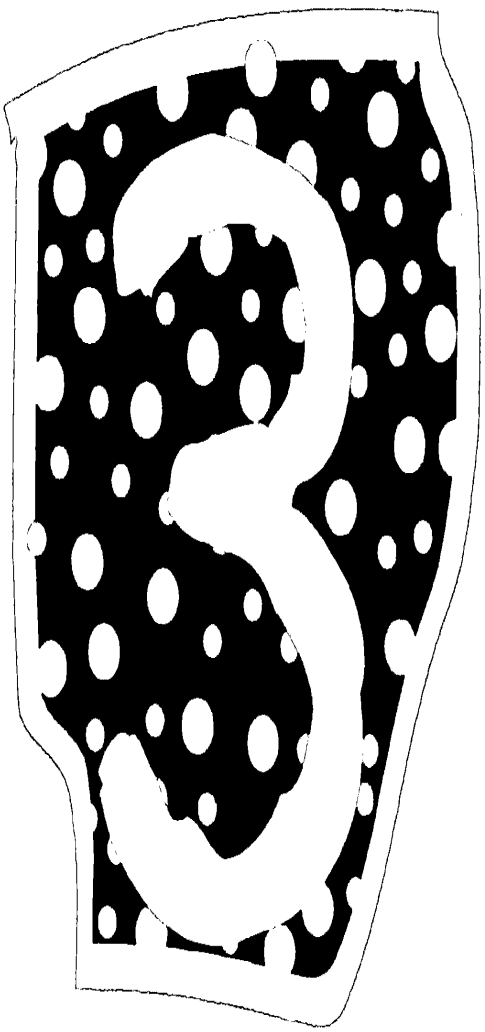
Initial Period of Stay

Specialty Occupations **up to 3 years**



Extension of Stay

Specialty Occupations **up to 3 years**



Requirements for Extension of Stay (EOS)

- Alien must be in the U.S. at the time of filing the petition
- Passport must be valid at the time of filing
- Alien does not have to be physically in the U.S. while the EOS is pending
- Departure is not treated as abandonment
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if the late filing was beyond the control of the alien

Validity Period for EOS

- EOS approved (same employer)
  - authorized from the date of expiration
  - backdate the validity date to the day after the beneficiary's status expires to eliminate gaps
- EOS approved (new employer)
  - valid from date of adjudication unless it's a future date

Validity Dates

- Determining the "To" validity date for EOS/COS approval

- National SOP page 5-70

RFE & Denials on EOS Petitions

- See Memo dated April 23, 2004, titled 'The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity'

- "Material Error"

- "Substantial Change in Circumstances"

- "New Material Information"

RFE & Denials on EOS Petitions

The Deputy Director will review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

Advance Parole

- An alien in H1B status can request advance parole upon leaving the U.S.
- Upon returning to the U.S. the alien will be paroled in.
- The petitioner can then file an I-129 requesting the alien be admitted as an H-1B.

Adjudicating Advance Parole

- If the previous granted H1B status is still valid at the time the petition is filed for an alien requesting admittance as an H1B, adjudicate as any normal EOS filing

- If the previous status has expired at the time of filing, adjudicate as any normal file that will be approved as a split decision

EOS – Split Decisions

- Remember if an alien in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H1B petition and the adjudication of the COS or EOS request

- If they are not in status when filing an EOS or COS and we approve the H1B petition, we will deny the EOS or COS. This is called a split decision.

Requirements for Change of Status (COS)

- Alien must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if the delay was beyond the petitioner/benes' control

Requirements for Change of Status (COS) – Split Decision

Follow the same procedures as for an EOS split decision covered on a previous slide

Change of Status (COS)

Classifications that cannot change to H1-B status, among others:

- M-1 student - 8 CFR 248.1(d)
- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)

F-1 COS

- Interim Rule 4/8/08 – Extends the period of OPT time from 12 months to 29 months for F-1 students who have completed a STEM degree

- STEM: science, technology, engineering or mathematics

- Employment must be with a U.S. employer enrolled in the E-verify program

Consulate Notification

- If the alien beneficiary is not in the U.S. then we will not have to consider any change or extension of status.

- If we approve the H1B petition we will send the approval notice to the consulate (through KCC) in the alien's foreign country.

Limitation on Stay

Specialty Occupations **maximum of 6 years**

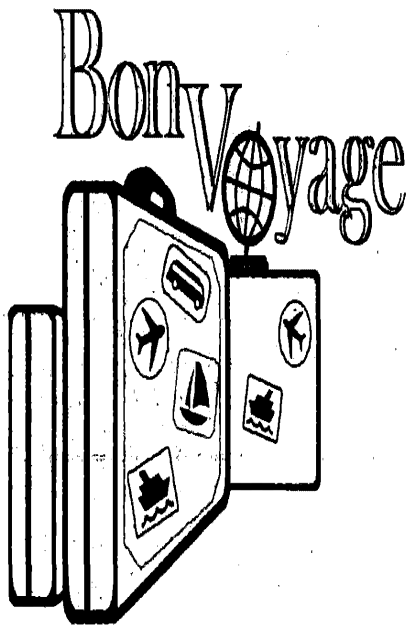
Limitation on Stay

- Limitations on the duration of time spent in H-1B status refer only to the principal alien worker and do not apply to the spouse and children

- Time spent as an H-4 dependent does not count against the maximum allowable period of stay

Split Decision

- Approve the classification
- Deny extension of stay (EOS) or change of status (COS)
- Beneficiary must depart the U.S. and apply for H-1B visa to enter



E-Verify Program

- E-Verify is a Web-based system that electronically verifies the employment eligibility of newly hired employees.

- E-Verify is a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA). U.S. Citizenship and Immigration Services (USCIS) oversees the program.

VIBE Program

- VIBE Description: VIBE is a program to verify the viability and current level of business operations by petitioners. VIBE will use open source data from an independent information provider (IIP), Dunn and Bradstreet, to validate and verify the information submitted by petitioners. Results will be included in each petition.

- Deployment of this system is scheduled for February of 2011.

- ALL I-129 files will be subject to VIBE verification.

Four Categories of 6-Year Exceptions

Seasonal or Intermittent Employment

- The 6-year limitation shall not apply to H-1B aliens who did not reside continually in the U.S. and whose employment was seasonal or intermittent or was for an aggregate of six months or less per year.

- The 6-year limitation shall not apply to H-1B aliens who reside abroad and regularly commute to the U.S. to engage in part-time employment.

Seasonal or Intermittent Employment

- To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for such an exception.

- Such proof could consist of evidence such as arrival and departure records, copies of tax returns of the petitioner, and records of employment abroad.

❷Recaptured Time

- See the Adopted Decision, Matter of IT, Ascent (September 2, 2005)

- The 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when the alien is lawfully admitted and physically present in the U.S.

- The petitioner must submit supporting documentary evidence to meet its burden of proof.

AC21

Overview of AC21 Statute

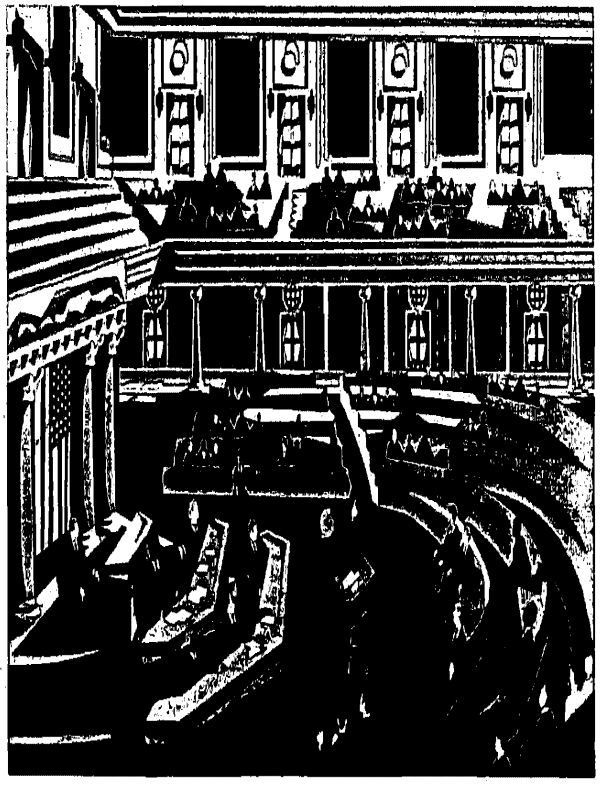
The American Competitiveness in the Twenty-First Century Act ("AC21"), Public Law 106-313, was signed into law on October 17, 2000. The law significantly changed the H-1B program as well as the employment based immigration program. The law very clearly has two major purposes and themes.

AC21 cont...

First, Congress was concerned with making U.S. immigration laws responsive to the needs of U.S. companies involved in the hiring of foreign nationals. Second, Congress was concerned with [Immigration and Naturalization Service] delays in adjudicating petitions, which create hardships to U.S. businesses and foreign nationals alike.

AC21 Congressional Intent

A Senate Report accompanied the AC21 legislation. *See* S. Rep. No. 106-260 (April 11, 2000). It is in that Senate Report that much of the legislative history of AC21 is found:



Congressional Intent cont...

Congress sought ways to retain highly skilled foreign workers since they believed U.S. employers and the economy were hampered by the lack of ability to hire the workers they need and retain them. This resulted in raises to the H-1B numerical limitations and creation of H-1B exemptions.

Congressional Intent cont...

Congress looked to provide relief for aliens subject to processing backlogs and lengthy adjudications. Congress referred to [INS] backlogs as "inordinate delays in labor certification and [INS] visa processing"

The resulting consequence is that "individuals in these circumstances are currently being forced to leave the country and disrupt the projects they are working on simply on account of entirely unreasonable administrative delays."

Congressional Intent cont...

H-1B extensions beyond the 6th year was intended to protect qualified workers from "being forced to leave the country and disrupt the projects they are working on simply on account of entirely unreasonable administrative delays" in labor certification and [INS] visa processing

This allows an individual on an H-1B visa on whose behalf an employer has taken steps to seek an immigrant visa to obtain an extension on that visa so the individual can stay in the United States until a decision is made on his or her case.

Overview of AC21 Statute

On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). This law made certain amendments to AC21.

❸106(a) of AC21

Sec. 106(a), as amended by the 21st Century DOJ Appropriations Act. The H-1B 7th year extension provisions allow for extensions of H-1B status in one-year increments to H-1B aliens who have a labor certification, employment-based immigrant visa petition or application for adjustment of status pending if it has been more than 365 days since the visa petition or the labor certification application has been filed.

Previously, H-1B aliens were subject to a 6-year period of maximum stay.

§ 106(a) cont...

SEC. 106. SPECIAL PROVISIONS IN CASES OF LENGTHY ADJUDICATIONS.

(a) EXEMPTION FROM LIMITATION.—"(a) EXEMPTION FROM LIMITATION.—The limitation contained in section 214(g)(4) of the Immigration and Nationality Act with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) if 365 days or more have elapsed since the filing of any of the following:

§ 106(a) cont...

"(1) Any application for labor certification under section 212(a)(5)(A) of such Act, in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act."

"(2) A petition described in section 204(b) of such Act to accord the alien a status under section 203(b) of such Act."

Thus the labor certification, the I-140 and any other employment based immigrant petition, and the I-485 become the eligible documents.

§ 106(a) cont...

- When the date of filing of a pending or approved labor certification or an I-140 is more than 365 days from the 6 year anniversary date of the H1B status, the beneficiary becomes eligible for consideration of AC21 benefits.

- When the filing date of a pending I-485 is more than 356 days from the 6 year anniversary, the beneficiary becomes eligible for consideration of AC21

§ 106(a) cont...

If an H1B nonimmigrant qualifies for AC21, under sec. 106, grant the extension of stay of such H-1B nonimmigrants in **one-year increments** until a final decision is made to:

- Deny the application for labor certification; or
- If the labor certification was approved, to revoke the approved labor certification; or
- Deny the employment based immigrant petition; or
- Grant or deny the alien's application for an immigrant visa or for adjustment of status.

§ 106(a) cont...

- 20 CFR 656.30(b) provides for a 180-day validity period for labor certifications that are approved.

- All labor certifications that are approved must have an I-140 filed within 180 calendar days of the labor certification's approval date

§ 106(a) cont...

- USCIS will not grant an extension of stay under AC21 if, at the time the adjudication, the labor certification has expired by virtue of not having been timely filed in support of an I-140

- However, once the labor certification is filed within 180 calendar days in support of an I-140 petition, the labor certification remains valid, even if the I-140 petition is denied.

- The same labor cert. can be filed in support of a second I-140 after the first one has been denied.

§ 106(a) I-140s That Do Not Require Labor Certs.

- When determining the applicability of Section 106(a) for employment-based (EB) categories (I-140s) that do not require a labor certification, the 365 days will pertain only to the filing of the EB petition.

I-140 Classifications not requiring labor certification:

- 203(b)(1)(A) Alien of Extraordinary Ability (E-11)
- 203(b)(1)(B) Outstanding Professor/Researcher (E-12) H1B Masters CAP (PHDs)
- 203(b)(1)(C) Multinational Executive or Manager (E-13)

§ 106(a) -I-140s That Do Require Labor Certs.

I-140 Classifications Requiring a Labor Cert.:

- 203(b)(2) Member of Professions (E-21) H1B
- 203(b)(3)(A)(i) Skilled Worker (E-31)
- 203(b)(3)(A)(ii) Professional (E-32)
- 203(b)(3)(A)(iii) Other Worker (EW3)

The vast majority of H1Bs will be filing I-140s in these classes requiring labor certs.

❹ 104(c) of AC21

Sec. 104(c). These provisions allow for extensions of H-1B status until an alien's adjustment of status application can be processed and a decision made, notwithstanding per-country visa limitations that may delay an alien's immigration.

§ 104(c) of AC21 cont...

SEC. 104. LIMITATION ON PER COUNTRY CEILING WITH RESPECT TO EMPLOYMENT-BASED IMMIGRANTS.

...(c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING.—

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act, any alien who—

(1) is the beneficiary of a petition filed under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and

§ 104(c) cont...

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made.

Note* - Although Sec. 104 is titled a "one time" protection, this does not mean that only one extension can be granted. AC21 extensions can be granted for as long as the alien qualifies.

Sec. 104

- Sec. 104 basically provides AC21 benefits for those nonimmigrants with approved I-140 petitions, but the visa is not available due to a backlog.

- Any current nonimmigrant alien who has an approved I-140 but is on the waiting list for a visa at the time of the filing date of the H1B petition, can qualify to be granted H1B status for an additional 3 year stay under AC21

- The Visa Bulletin determines availability

For All AC21 Filings After the 6th Year

- A petitioner must file a Form I-129 on behalf of the nonimmigrant beneficiary.
- The petitioner may be either the beneficiary's current employer or a new employer.
- The validity period may still only be granted within the time allotted by an endorsed LCA.
- All licensing and certification restrictions must still be met.
- The beneficiary need **NOT** be in H-1B status when requesting an additional period of stay beyond the 6-year maximum.

Sections 104(c) and 106

- Though both sections of AC21 use the term "extension of stay," eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States.

- Aliens who are eligible for the 7th year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status

§ 104(c) cont...

Check the DOS Web site to view the visa bulletin:

http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

Filing for an AC21 Extension

- The alien does not have to be in the U.S. at the time of filing.
- The alien does not have to be in H1B status at the time of filing.
- The alien does have to be in a nonimmigrant status at the time of filing for a COS or EOS of AC21 benefits

Spouses of AC21 recipients

- An alien who has reached his/her 6 years in H-1B status, and who has an H-1B spouse who has a pending or approved labor certification and/or pending or approved I-140, is not eligible for extensions under AC21 under the spouses petitions and labor cert.

- The spouse must have their own pending or approved Labor cert. and/or I-140 to be eligible for AC21 benefits.

Accrual of Unlawful Presence

- An alien may stay beyond the 6-year maximum period of stay as defined in INA Section 214(g)(4), and remain in status under AC21 provisions as long as the alien remains in a period of stay authorized through extensions and does not accrue unlawful presence.

§ 105 of AC21, INA 214(n). H-1B "portability"

Sec. 105 (INA 214(n)). The H-1B portability provisions allow a nonimmigrant alien previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files an H-1B petition for the alien. Previously, aliens in this situation had to await [INS] approval before commencing the new H-1B employment.

Extensions For The Balance of the 6 Years And AC21

- Extensions for AC21 benefits can be combined with the balance of the six year maximum and recapture time.

- The maximum time an H1B petition can be approved for is 3 years.

§ 105 cont...

SEC. 105. INCREASED PORTABILITY OF H–1B STATUS.

(a) IN GENERAL.— Section 214 of the Immigration and Nationality Act is amended by adding at the end the following new subsection:

§ 105 cont...

"(m)(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

AC21 Memo 2008

- Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (...) (138KB PDF)
  Donald Neufeld, Acting Associate Director, Domestic Operations 05/30/2008

Approved Petitions

- If provided forward a duplicate KCC for EOS or COS cases
- If consulate notification is requested, the petitioner must provide a duplicate copy of the petition
- If a duplicate copy is not provided the petitioner will be notified that they must file an I824 to notify the consulate
- Letter is found at: O:\ Adjudications\I-824\4-Correspondence
- PIMS process

Approved Petitions

- Approved petitions are routed to State Department's Kentucky Consular Center (KCC) in Williamsburg, Kentucky

CLAIMS Designations and Validity Dates

- 1B1 (H1B) - up to 3 years, but may not exceed validity period endorsed by DOL on LCA
- 1B1 (H-1B2 DOD)- up to 5 years **NO** LCA required
- 1B1 (H-1B3 Model)- Up to 3 years, but may not exceed validity period endorsed by DOL on LCA
- HSC – (H-1B1Singapore/Chile) Up to 1 year, but may not exceed validity period endorsed by DOL on LCA.
- These designations are for CLAIMS updating. All of these are considered as H1B specialty occupations

EOS/Dependents

- Filed on I-539
- Classification is H-4 (spouse or children)
- Children must be under age of **21**
- Evidence: Form I-94, I-797, visa pages, etc.
- Dependent files are attached to related I-129
- Departure is not treated as abandonment
- Family Unity

COS/Dependents

- Filed on I-539
- Classification is H-4 (spouse or children)
- Children must be under the age of **21**
- Evidence: I-94, I-797, proof of relationship (marriage certificate, birth certificate, etc.)
- Must be physically in the U.S. – Departure is treated as abandonment
- Dependents file most often attached to the related I-129

Dependents

- If a child will turn 21 all applicants on the I-539 will be approved to date prior to the child's 21st birthday

- If the child is 21 at time of filing a split decision will be made, the age out child will be denied and the other applicants will be approved

Denials

- When to use an I-292
- When to use an I-541
- When to use both
- Standard Denial formula – IRAC
- Citations in support of our decisions
- 9th Circuit rulings

Systems Checks

- IBIS
- SQ94
  - EOS Approval – not required
  - EOS Denial – not required
  - COS Approval within 15 days before
  - COS Denial within 15 days before
- SEVIS for F, J, or M COS printout on right side of file

No Appeal Rights

There are no appeal rights for:

- Denial for failure to pay the ACWIA or Fraud Detection fee
- Abandonment denials
- The denial of an extension of stay (EOS) or a change of status (COS) portion of the petition

Other Info

- FID - Fraud Intelligence Digest
- Common errors

Summary

- Fees and exceptions
- The Cap
- What is an H-1B temporary worker
- Requirements of the petitioner and beneficiary
- LCA
- 6-year exceptions
- Specific occupations and things to know

Thank You,

The End?

Form I-129 H-1B Adjudication

June 2012

Agenda Training Matters

- Introduction
- Burden of Proof and Standard of Proof
- The Definition of an H-1B Nonimmigrant Worker
- Filing Procedures and Fees
- Numerical Limitations and Exceptions
- Position and Beneficiary Requirements

Agenda Training Matters (Cont'd)

- Petitioner Requirements
- Labor Condition Application Requirements (LCA)
- Exceptions to the 6-Year Maximum Period of Stay
- Adjudication of the Petition
- Summary

Burden of Proof and Standard of Proof

Adjudicator's Field Manual (AFM) 11.1(c)

Burden 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).

Standard of Proof

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence means that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

Application of the Preponderance Standard

- If the petitioner submits evidence that leads USCIS to believe that the claim is "probably true" or "more likely than not," the petitioner has satisfied the standard of proof. ("More likely than not" is generally considered as a greater than 50 percent probability of having something occur.)

- This means that the petition should be approved if the evidence provided tips in favor of the petitioner (50.1%) even if the officer has questions regarding eligibility.

- If a petitioner provides supporting documentation that satisfies the regulatory criteria, and such documentation is legitimate (e.g., not forged, not issued in error, accurate, etc.), USCIS cannot unilaterally impose novel substantive or evidentiary requirements beyond those set forth in regulatory requirements.

Sources of Information for H-1B Adjudication

- Immigration and Nationality Act (INA)
  - Sections 101, 212, 214
- Title 8 Code of Federal Regulations (CFR)
  - Parts 103, 214, 248, 274
- Acts & Legislation
  - American Competitiveness in the Twenty-First Century Act of 2000 (AC21)
- Adopted Decisions
- Guidance and policy memoranda

What is an H-1B Nonimmigrant Worker?

Definition

According to 101(a)(15)(H)(i)(b) of the Act is –

An alien subject to section 212(j)(2) who is coming temporarily to the United States to perform services…in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability…

Divisions of the H-1B Classification

- **H-1B (1B1)** Specialty occupation workers
- **H-1B2 (1B2)** Department of Defense (DOD) cooperative research and development project or co-production project workers
- **H-1B3 (1B3)** Fashion models of distinguished merit and ability

What are the Filing Procedures and Fees?

Filing Procedures

- A United States employer or agent must file Form I-129, *Petition for a Nonimmigrant Worker*, on behalf of an alien to request H-1B nonimmigrant status.

- The petition may be filed up to six months before the anticipated start date of the alien as stated on the petition.

- The petition must be filed at the Service Center with jurisdiction over the place of employment.

- CSC has sole jurisdiction over petitions for cap exempt entities (slide 22).

Fees

- Form I-129 base fee ($325)
- American Competitiveness and Workforce Improvement Act (ACWIA) fee ($1,500 or $750), with some exceptions
  - Applies to first petition and first extension request filed by an employer for a particular worker
- Fraud Prevention and Detection Fee ($500)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker
- Public Law 111-230 fee ($2,000)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker if:
    - The petition is filed on/after August 14, 2010 and before October 1, 2015 and
    - The petitioner employs 50 or more employees in the U.S. and over 50% of those U.S. employees are in H-1B or L-1 nonimmigrant status
- Premium Processing Fee ($1,225), if requesting Premium Processing Service

ACWIA Fee

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay $750

- U.S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay $1,500

ACWIA Fee (Cont'd)

The following entities are exempt from the ACWIA fee:

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education;
- Nonprofit research organizations or governmental research organizations;
- Primary or secondary educational institutions, private or public; and
- Nonprofit entities that engage in an established curriculum-related clinical training program for students.

ACWIA Fee (Cont'd)

Additionally, the ACWIA fee is not required for:

- An amended I-129 petition that does not contain any request for extension of stay;
- An I-129 petition filed for the purpose of correcting a USCIS error; or
- The second or subsequent extension by the same employer for the same employee.

What are the numerical limitations?

Numerical Limitations

The total number of temporary workers who may be issued initial visas or otherwise provided nonimmigrant status for H-1B classification in a fiscal year is currently 65,000. This is known as the "cap."

The cap applies to the principal H-1B nonimmigrant and not to the spouse and children of the H-1B nonimmigrant.

The DOD cooperative research project workers (H-1B2) have their own separate numerical limitation. A maximum of 100 H-1B2 workers can be employed the U.S. at any time.

Numerical Limitations (Cont'd)

- Of the available 65,000 visa numbers,
  - Up to 1,400 visas may be set aside for nationals of Chile under the U.S.-Chile Free Trade Agreement, and
  - Up to 5,400 visas may be set aside for nationals of Singapore under the U.S.-Singapore Free Trade Agreement.
- Unused numbers under the Free Trade Agreements are rolled back into the regular cap.

Numerical Limitations (Cont'd)

- Petitioners can file cap petitions for the next fiscal year beginning on April 1 of the current fiscal year.
- If the cap is met anytime during the first five business days, USCIS will conduct a random selection process (also known as the lottery) on all of the petitions received during those five days. Non-selected petitions will be rejected.
- USCIS may also conduct the random selection process on the final receipt date when the cap is not met within the first five business day.
- Duplicate cap subject petitions (same petitioner and same beneficiary) will be denied if they are filed in the same fiscal year.
- The Fiscal Year (FY) 2013 cap closed on June 11, 2012.

Numerical Limitation Exceptions - Masters Cap

- The first 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher are exempt from the cap. This is also known as the advanced degree exemption or "master's cap."

- Any surplus over the 20,000 is then counted against the general cap.

Numerical Limitation Exceptions - Masters Cap (Cont'd)

- Officers must always apply all other cap exemption provisions first before applying the H-1B master's cap.

- The master's degree (or higher) must be issued from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), 20 U.S.C. 1001(a).

Numerical Limitation Exceptions – Petitioners not subject to the cap INA 214(g)(5)(A) and (B)

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)

- Nonprofit entities that are related to or affiliated with an institution of higher education

- Nonprofit research organizations or governmental research organizations

Let's define these entities...

Institutions of Higher Education

- "Institution of higher education" is defined by the Higher Education Act of 1965;
- Admit students holding a high school diploma (or equivalent);
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency;
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree;
- Qualify as a public or nonprofit institution

Definition of a Nonprofit Organization

- Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6) and

- Has been approved as a tax exempt organization for research or educational purpose by the IRS

Research Organizations

- A nonprofit research organization:
  - is primarily engaged in basic research and/or applied research

- A governmental research organization:
  - is a United States Government entity whose primary mission is the performance or promotion of basic research or applied research.

Basic Research

- Is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind.

- Is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest.

- May include research and investigation in the sciences, social sciences, or humanities.

Applied Research

- Research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met.
- Investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.
- It may include research and investigation in the sciences, social sciences, or humanities.

Possible Evidence Establishing the Petitioner is a Research Organization

- Documentation that establishes the organization's research activities, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization; organizational literature, such as books, articles, brochures, research papers, and other literature describing the purpose and nature of the research activities of the organization;

- A complete copy of the petitioner's most recent IRS Form 990, Return of Organization Exempt from Income Tax. The copies of the tax returns should include all required schedules and statements that identify the organization's primary exempt purpose.

Note: Do not deny a petition solely based on a tax document indicating that the company is a charitable organization.

Related or Affiliated Nonprofit Entities

- When determining an affiliation, USCIS uses 8 CFR 214.2 (h)(19)(iii)(B) which states:
    - that an affiliated or related nonprofit entity is a nonprofit entity that is connected or associated with an institution of higher education through one of the following three prongs

Related or Affiliated Nonprofit Entities (Cont'd)

- Prong 1 - The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation;

- Prong 2 - Operated by an institution of higher education; or

- Prong 3 - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

Note: All initial affiliation petitions will be adjudicated by the affiliation team.

Related or Affiliated Nonprofit Entities-Interim Guidance

- Since USCIS is currently reviewing its policy on H-1B cap exemptions for nonprofit entities that are related to or affiliated with an institution of higher education, USCIS HQ instituted an interim procedure to provide consistency in adjudications until new guidance is issued.

- Interim guidance dated April 28, 2011 gives deference to prior H-1B cap exemption determinations for nonprofit entities made since June 6, 2006.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- To establish receipt of a prior determination of H-1B cap exemption based on affiliation, the petitioner may provide some or all of the following documentation or similar types of evidence:

  - A copy of the previously approved cap-exempt petition (relevant pages of the Form I-129 and pertinent supplements) filed by the petitioner;

  - A copy of the corresponding Form I-797 approval notice (issued after June 6, 2006) for the affiliation-based cap exempt petition; and/or

  - Documentation previously submitted with a petition in support of the claimed cap exemption.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- The petitioner may also include a statement attesting that its organization was determined to be cap-exempt since June 6, 2006 as a nonprofit entity related to or affiliated with an institution of higher education.

- However, a statement alone from the petitioner, without a prior receipt number or other supporting documentation, would not be sufficient.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- A review of CLAIMS may help to substantiate a prior claim of cap exemption as an affiliated or related nonprofit entity.

- Consult with your supervisor when the prior approved petition was adjudicated at the VSC.

    - The CSC and VSC have established points of contact who are able to supply information from local CLAIMS to assist in corroborating the claimed H-1B cap exemption determination.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- Issue a RFE only if the claimed prior cap exemption determination cannot be corroborated through CLAIMS or the evidence in the record.

- Officers should not attempt to re-adjudicate the prior cap exemption determination unless evidence suggests that the prior cap exempt determination was clearly erroneous or that there has been a significant change in circumstances related to the affiliation of the petitioner to an institution of higher education.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

Examples of significant changes may include, but are not limited to:

- Evidence that the nonprofit entity has reorganized to a for-profit entity;

- Evidence that the affiliation agreement with the related or affiliated institution of higher education has expired and has not been renewed automatically or otherwise; or

- Evidence that the new petition is seeking cap exemption based on affiliation or relation to a different institution of higher education.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

Examples of clear error in the prior adjudication may include, but are not limited to:

- Evidence of affiliation with an organization that is NOT an institution of higher education; or
- Evidence of a prior approval that was subsequently revoked on an affiliation ground.

NOTE: ACD must concur and SCOPS must be consulted prior to issuance of an ITD or denial based on evidence of significant changes or clear error.

Numerical Limitation Exceptions – Beneficiary Employed "at" a Cap-Exempt Employer

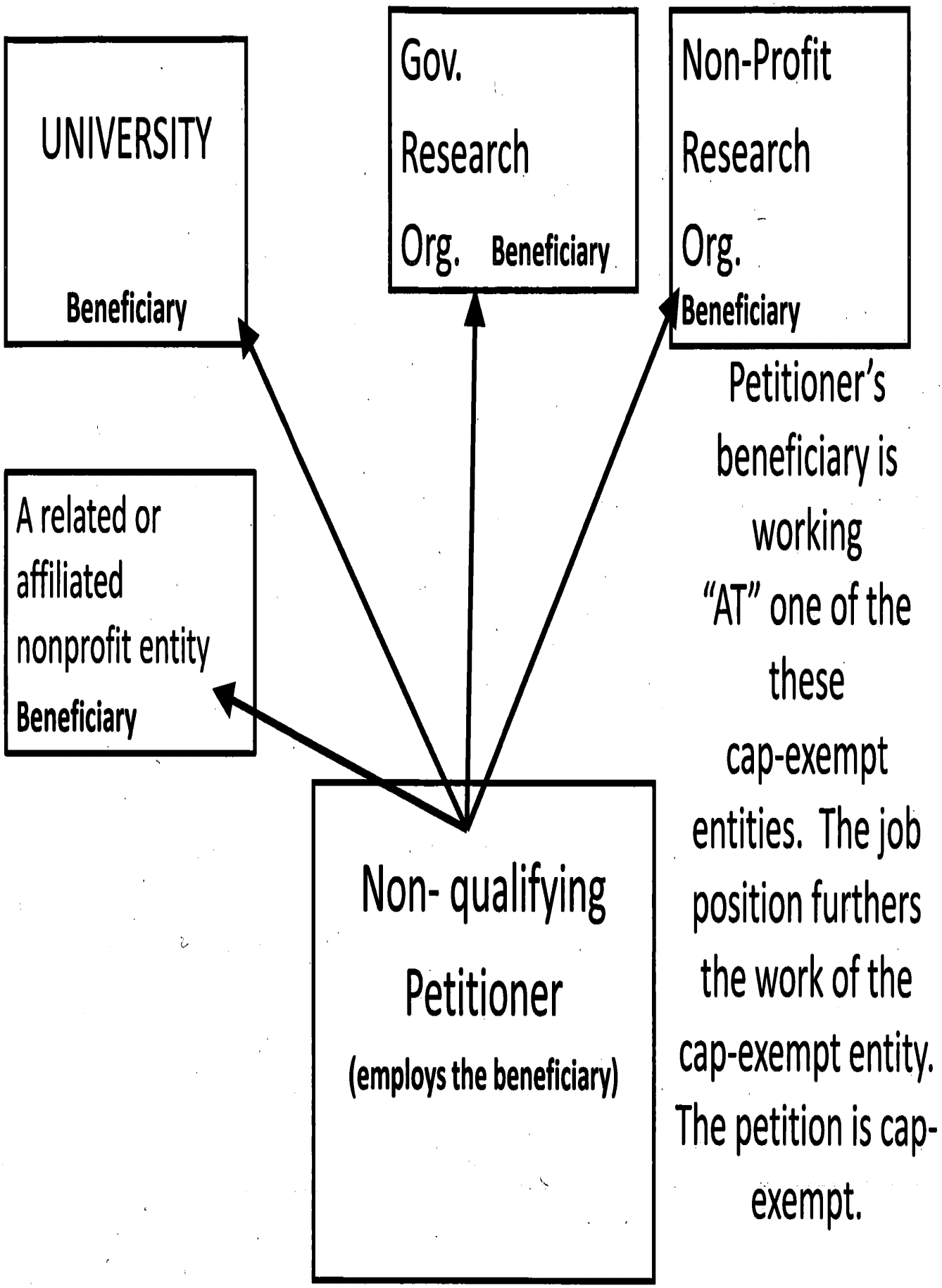
In addition to the exemptions noted previously, even if the petitioner is not a cap exempt institution, an alien is exempt from the H-1B cap if the alien is employed (or has received an offer of employment) **"at"**

- *an institution of higher education,
- *a related or affiliated nonprofit entity,
- *a nonprofit research organization, or
- *a governmental research organization

*referred to as a "qualifying institution"

Numerical Limitation Exceptions – Beneficiary Employed "at" a Cap-Exempt Employer (Cont'd)

- The June 6, 2006 Aytes H-1B cap exemption memo provides guidance on these cases.
- The petitioner will employ and pay the beneficiary, but the beneficiary will work at the site of the cap exempt entity. The following conditions must be met to satisfy that the petition will be cap exempt:
  - The beneficiary must be working "at" a qualifying institution at least part of the time; and
  - The job position "at" a qualifying institution must directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution.


UNIVERSITY
Beneficiary
Gov. Research Org. Beneficiary
Non-Profit Research Org.
Beneficiary
A related or affiliated nonprofit entity
Beneficiary
Non- qualifying Petitioner
(employs the beneficiary)
Petitioner's beneficiary is working "AT" one of the these cap-exempt entities. The job position furthers the work of the cap-exempt entity. The petition is cap-exempt.

Numerical Limitation Exceptions – J-1 Physicians with Waiver

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 cap exemption applies only to medical doctors who have received a Conrad 20/30 waiver under INA 214(l)
- Must work at a hospital designated by the Secretary of HHS as a:
  - Health Professional Shortage Area (HPSA);
  - Medically Underserved Area (MUA); or
  - Medically Underserved Population (MUP).

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- In order to grant a change of status for a J-1 under Conrad 30, the petition should include evidence that the beneficiary has received a waiver of the foreign residency requirement.
  - This can include a copy of the I-797, Approval Notice, for a Form I-612, with an addendum of work locations.
  - Before issuing an RFE for evidence of the waiver grant, officers must first check systems to see if a Form I-612 has been approved in the system. If it is not found, contact VSC via your supervisor to either locate the I-612 approval notice or have it adjudicated.
- A State Workforce Agency/a State Department of Health letter concurrent with the Department of State recommendation may be submitted but is not required.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- Officers should not re-adjudicate the approved I-612 waiver by RFE for documentation (e.g. work locations, employment contracts) unless a material discrepancy in the record exists.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- The beneficiary must fulfill a three-year employment commitment in an HHS-designated shortage area, VA facility or in medical research or training.
  - Exception for a change of employer petition during the three years if there is evidence of extenuating circumstances and that the new employment will also be in a HHS-designated area.
- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled.

Note: H-1B approvals when a beneficiary was unable to fulfill the three-year commitment at the original facility due to extenuating circumstances requires SISO/ACD concurrence.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- Once the beneficiary fulfills the three year commitment, he will remain CAP exempt upon extension/change of employer.

- If the commitment is not fulfilled, the beneficiary will again be subject to the two-year foreign residence requirement and the numerical cap.

- A J-2 dependent cannot COS to any other nonimmigrant classifications except H-4 until the principal fulfills the three-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1. (Approval of J-2 COS to H-1B requires SISO and ACD concurrence.)

Numerical Limitation Exceptions –Additional Exceptions

- Change of employer from one cap-exempt employer to another cap-exempt employer.
- The beneficiary was previously counted against the cap once within the last six years and has not reached the maximum allowable period of stay.
- Has reached the 6-year maximum but is:
  - exempt from the limit (seasonal/intermittent);
  - eligible for recaptured time; or
  - eligible for extension under AC21 sec. 104 or 106.
- H-1B workers performing labor or services in the CNMI and Guam
  - exempt until December 31, 2014.
- Concurrent filing when at least one petition is cap-exempt.

Position and Beneficiary Requirements for a Specialty Occupation Worker

1B1 Specialty Occupation Workers

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge, and

2) the attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

Position Requirements

The petitioner must meet one of the following four criteria:

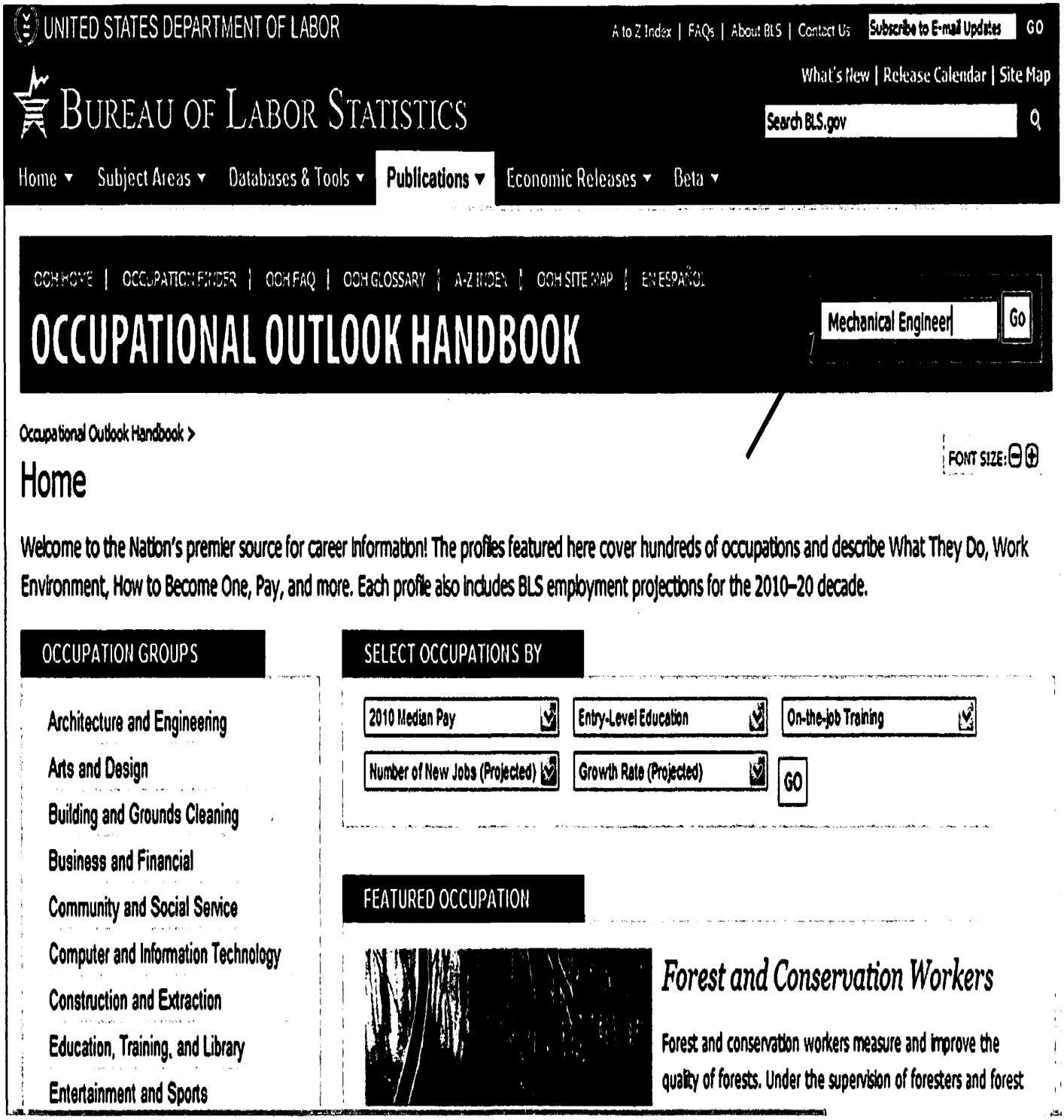
1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3) The employer normally requires a degree or its equivalent for the positions; or
4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Position Requirements

The petitioner must meet **one** of the following four criteria:

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

   Does the Department of Labor's Occupational Outlook Handbook (OOH) recognize the proffered position as one that normally requires a degree in a specific specialty? The OOH can be located at http://www.bls.gov/oco.



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Mechanical Engineers

What Mechanical Engineers Do

About this section

Mechanical engineering is one of the broadest engineering disciplines. Mechanical engineers research, design, develop, build, and test mechanical devices, including tools, engines, and machines.

Duties

Mechanical engineers typically do the following:

- Analyze problems to see how a mechanical device might help solve the problem
- Design or redesign mechanical devices, creating blueprints so the device can be built
- Develop a prototype of the device and test the prototype
- Analyze the test results and change the design as needed
- Oversee the manufacturing process for the device

Mechanical engineers develop and build mechanical devices for use in industrial processes.

Mechanical engineers use many types of tools, engines, and machines. Examples include the following:

- Power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines
- Power-using machines, such as refrigeration and air-conditioning

How to Become a Mechanical Engineer

About this section

Mechanical engineers need a bachelor's degree. A graduate degree is typically needed to be hired or promoted into managerial positions. Mechanical engineers who sell services publicly must be licensed in all states and the District of Columbia.

Education

Nearly all entry-level mechanical engineering jobs require a bachelor's degree in mechanical engineering.

Mechanical engineering degree programs usually include courses in mathematics and life and physical sciences, as well as engineering and design courses. The programs typically last 4 years, but many students take between 4 and 5 years to earn a degree. A mechanical engineering degree program may emphasize internships and co-ops to prepare students for work in industry. Theory is often another main focus, in order to prepare students for graduate-level work.

A few engineering schools allow students who spend 3 years in a liberal arts college studying pre-engineering subjects and 2 years in an engineering school studying core subjects to receive a bachelor's degree from each school.

Some colleges and universities offer 5-year programs that allow students to obtain both a bachelor's and a master's degree. Some 5- or even 6-year cooperative plans combine classroom study with practical work, enabling students to gain valuable experience and earn money to finance part of their education.

Many engineering programs are accredited by ABET (formerly the Accreditation Board for Engineering and Technology). Some employers prefer students from an accredited program. A degree from an ABET accredited program is usually necessary to become a licensed professional engineer.

Position Requirements (Cont'd)

2a) The degree requirement is common to the industry in parallel positions among similar organizations...

Position and Job Postings:

Industry requirements may be identified by reviewing the job listings of organizations similarly situated to the petitioner (duties, educational requirement, experience and skills) for the position in question to determine whether a degree in a specific specialty is a prerequisite.

Position Requirements (Cont'd)

Examples of items to keep in mind when reviewing documents from an industry-related professional association:

- Does a member or representative state that a degree in a specific specialty is required as a minimum entry requirement?
- What is the academic and public status of the association?
- How many members do they have?
- What are the membership requirements?

Examples of items to keep in mind when reviewing documents from firms or individuals in the industry:

- Are these qualified members of a related industry or field?
- Does the evidence detail the job description and educational requirements?

Position Requirements (Cont'd)

2b) ...in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree

- Does the break down of the job description indicate to you that the duties are complex and unique?

- What percentage of time will the beneficiary spend on these complex or unique duties?

Position Requirements (Cont'd)

3) The employer normally requires a degree or its equivalent for the positions

- Employment history of the petitioner for similar positions to that on which the petition is based;

- Contains corroborating evidence of employing individuals in a similar position:
  - Description of duties
  - Pay records
  - Evidence of educational credentials

Position Requirements (Cont'd)

4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

- Does the petitioner's business and position requirements demand duties that are so specialized and complex that they exceed normal industry standard educational preparation?

- How are the duties of the position more specialized and complex from similar positions within the industry?

- Do these requirements necessitate skills that are normally associated with a baccalaureate level degree or higher in a specific specialty?

General Degrees

A degree in the general area of Business Administration may be insufficient to demonstrate that the beneficiary is qualified to perform a specialty occupation. However, a degree in Business Administration with a specific focus in a field of study related to the specialty occupation could qualify the beneficiary to perform the specialty occupation.

Example: A Business Administration Degree with an emphasis in accounting would likely qualify the beneficiary as an accountant, but would not, by itself, qualify him as an architect.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets **one** of the following four criteria:

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Should be for a course of study in the specialty that relates to the occupation
  - Copy of baccalaureate degree
  - Transcripts

Beneficiary Qualifications (Cont'd)

2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Foreign degree and/or transcripts accompanied by a translation
- A foreign bachelor's degree does not necessarily mean that it is equivalent to a **United States** bachelor's degree.
- RFE for educational evaluation if unable to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications (Cont'd)

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.

- Four-year degrees can usually be considered equivalent to a U.S. bachelor's degree, but not always.

- Focus on the course of study for the degree. Be careful not to penalize a beneficiary for the manner in which he/she obtains the degree (e.g., the beneficiary earns a four-year degree in three years, etc.).

Beneficiary Qualifications (Cont'd)

3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure meet the definition of a specialty occupation (e.g., pilots, cosmetologists, flight instructors, barbers, taxi drivers)

Beneficiary Qualifications (Cont'd)

4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience.

Degree Equivalence

(Equivalence to completion of a college degree)

The beneficiary's education, specialized training, and/or progressively responsible experience may be recognized as equivalent to a baccalaureate degree.

Degree Equivalence (Cont'd)

If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence (Cont'd)

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should:
  - Consider formal education only, not practical experience;
  - State if the collegiate training was post-secondary education (e.g., whether the education in question was obtained after completing the U.S. equivalent of high school);

Degree Equivalence (Cont'd)

- Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and

- Briefly state the qualifications and experience of the evaluator providing the opinion.

Degree Equivalence (Cont'd)

4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

Degree Equivalence (Cont'd)

5) A determination by the Service that the equivalent of the degree required has been acquired:

- through a combination of education, specialized training, and/or work experience in areas related to the specialty

AND

- that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Degree Equivalence (Cont'd)

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The petitioner cannot use a combination of education, training and/or work experience to demonstrate eligibility in this situation.

Degree Equivalence (Cont'd)

It must be clearly demonstrated that:

- the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation;
- the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
- the alien has recognition of expertise in the specialty.

Degree Equivalence (Cont'd)

Recognition of expertise in the specialty should be evidenced by at least one type of documentation such as:

- Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

- Membership in a recognized foreign or United States association or society in the specialty occupation;

Degree Equivalence (Cont'd)

- Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- Licensure or registration to practice the specialty occupation in a foreign country; or
- Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Degree Equivalence (Cont'd)

Recognized authority

A recognized authority is a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested.

Degree Equivalence (Cont'd)

Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Licensing Requirements

If the occupation (not the duties) requires a state or local license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for a permanent license, except for administrative reasons, e.g. need Social Security # or DHS permission to be employed to receive licensure.

Identifying Licenses

- Temporary or provisional licenses normally are titled as such and may have requirements stated on the license that need to be completed before a permanent license can be issued.

- However, a few permanent licenses may also list requirements to be completed for an extension of the license and they normally do not have the word "permanent" in the title.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- If otherwise approvable, the petition may be granted for **one year** or for the period that the temporary license is valid, whichever is longer.

Permanent Licenses

- A petition can be approved up to three years for beneficiaries who have permanent licenses

- Permanent licenses will still have an expiration date and may have renewal requirements listed.

  - Expiration dates on permanent licenses have no bearing on validity dates given. If otherwise eligible, the petition may be granted for up to three years.

Licensing Requirements for Teachers

- Public school teachers require teaching credentials, certificates, or licensure from the appropriate state licensing authority
    - e.g., Unified School Districts
- Private schools may not require a teaching credential
    - e.g., Parochial Schools
- Some teaching positions may require a special certification
    - e.g., special education teachers

Certified Health Care Workers

- Certification should not to be confused with licensing.
- Licenses required by certain occupations are issued by the state.
- Certifications required by certain health occupations are also issued by the state.

Uncertified Health Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in the affected health care occupations.

Uncertified Health Care Workers

Unless they have been certified, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified health care workers:

1. Nurses
2. Physical Therapists
3. Occupational Therapists
4. Speech Language Pathologists & Audiologists
5. Medical Technologists
6. Medical Technicians
7. Physician's Assistants

Uncertified Health Care Workers

- In this category, nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Health Care Worker Certifications

At this time, only three entities are approved by USCIS to certify health care workers:

- Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all health care workers
- Foreign Credentialing Commission on Physical Therapy (FCCPT) – issues certifications for physical therapists
- National Board for Certification in Occupational Therapy (NBCOT) – issues certifications for occupational therapists

Health Care Degree Requirements

- Generally, Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field.

- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree.

- Speech Language Pathologists & Audiologists may require a Masters degree.

Nurses

- Most nursing positions do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be specialized.
- Foreign Degrees entitled "Bachelor of Nursing Degree" may not be equivalent to a 4-year U.S. degree
- If approving an H-1B Nurse, (or any position requiring a nursing degree) you must have SISO sign-off.

Nurses (Cont'd)

In contrast to general RN positions, certain specialized nursing occupations may require a 4 year bachelor's or higher degree in a specific specialty:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM)

Nurses (Cont'd)

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Physicians

All H-1B petitions filed for a physician must include evidence that the beneficiary:

- Has a full and unrestricted license to practice medicine in a foreign state;

OR

- has graduated from a medical school in the United States or in a foreign state.

Physicians (Cont'd)

Petitions for physicians performing direct patient care must include:

- Evidence that the beneficiary has the license or authorization required by the state of intended employment to practice medicine

OR

- Evidence that the beneficiary is exempt from law from the licensing requirement

Physicians (Cont'd)

Unless the beneficiary is of national or international renown in the field of medicine, the petitioner must establish that the beneficiary:

Will be employed primarily to teach and/or conduct research for a public or nonprofit private educational or research institution or agency and no patient care will be performed, except that which is incidental to the physician's teaching or research

OR...

Physicians (Cont'd)

The beneficiary has:

- passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) **or**
- is a graduate of a United States medical school;

AND

- has competency in oral and written English (demonstrated through passage of a proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG)); **or**
- is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.

- Medical Residents may have temporary licenses.

  - Exceptions: New York and Connecticut do not issue temporary licenses to their Medical Residents. They can be approved for up to three years.

  - Evidence of no licensing requirement is needed for hospitals in other states.

Position and Beneficiary Requirements for a DOD Cooperative Research Project Worker

1B2 Department of Defense (DOD) Research Project Workers

- Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties.

- The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the requirements are met.

1B2 Department of Defense (DOD) Research Project Workers (Cont'd)

The petition must include:

- a verification letter from DOD project manager;
  - This letter must state that the alien will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD.

- a general description of the alien's duties and indicate the actual dates of the alien's employment on the project; and

- a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment.
  - The petitioner should also indicate the names of aliens whose employment on the project ended within the past year.

1B2 Department of Defense (DOD) Research Project Workers (Cont'd)

- Verify that the petition is accompanied by evidence that the beneficiary has a bachelor's or higher degree or its equivalent in the occupational field in which he or she will be performing the services.

- Because of the sensitivity of these types of petitions, it is prudent to consult with your supervisor before taking action on these cases.

- A maximum of 100 aliens can be employed on a DOD research program at any time. Consult with SCOPS HQ through the appropriate chain of command to ascertain whether this cap has been met before approving a case.

Position and Beneficiary Requirements for a Fashion Model of Distinguished Merit and Ability

1B3 Fashion Models

H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. The alien must come to the United States to perform services that require a fashion model of prominence, and he or she must demonstrate such prominence.

1B3 Fashion Models (Cont'd)

- **Prominence** means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling

1B3 Fashion Models (Cont'd)

- The petitioner should establish that the services to be performed involve an event, production or activity which have a distinguished reputation, OR

- The services to be performed are for an organization or establishment that has a distinguished reputation, or a record of employing prominent persons

1B3 Fashion Models (Cont'd)

- The petition must include:
  - Evidence that the beneficiary is a fashion model of distinguished merit and ability
  - Copies of any written contracts between the petitioner and beneficiary or a summary of the terms of oral agreement (if there is not a written contract.

1B3 Fashion Models (Cont'd)

- Verify that the beneficiary is qualified for the position. To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field of modeling you must have evidence of two of the following:

  - Has achieved national or international recognition for outstanding achievements evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

1B3 Fashion Models (Cont'd)

- Has performed and will perform services as a fashion model for employers that have a distinguished reputation;
- Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field of fashion modeling;
- Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

H-1B Petitioner Requirements

United States Employer

8 C.F.R. § 214.2(h)(4)(ii) defines this as:

A person, firm, corporation, contractor or other association or organization in the U.S. which:

1. Engages a person to work within the U.S.
2. Has an employer-employee relationship with respect to employees under this part; and
3. Has an IRS tax identification number

United States Employer (Cont'd)

The 8 CFR 214.2(h)(4)(ii) definition of "U.S. Employer" also states that an employer – employee relationship is indicated by the fact that the petitioner may:

- hire,
- pay,
- fire,
- supervise, or
- otherwise control the work of the beneficiary.

Employer-Employee Relationship

- In addition to the other requirements for an H-1B visa, a petitioner must satisfy the requirement that it is a U.S. employer or an agent.

- The petitioner must establish that a valid employer–employee relationship exists (or will exist) between itself and the beneficiary, *and* that the relationship will continue to exist throughout the requested H-1B validity period.

Agents

- Under 8 CFR 214.2(h)(2)(i)(F) it is possible for an "agent" to file an H-1B petition.
- The beneficiary must be one who is *traditionally self-employed* or who uses agents to arrange short term employment on his/her behalf with numerous employers or in cases where a foreign employer authorizes the agent to act on its behalf.
- An agent may be:
  - The actual employer (performing the function of an employer);
  - a representative of both the employer(s) and the beneficiary; or
  - A person or entity authorized by the employer to act for (or in place of) the employer.

Agents (Cont'd)

- An agent functioning as an employer must:
  - Guarantee wages and other terms and conditions of employment by contractual agreement with the beneficiary
  - Provide an itinerary of definite employment and information on other planned services.
- An agent in business as an agent must:
  - Provide a complete itinerary of services or engagements (including dates, names and addresses of actual employers, and names and addresses of venues).
  - Contracts between the employers and the beneficiary may be required in questionable cases.
- However, the fact that a petition is filed by an agent who is not the actual employer does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

Purpose of January 8, 2010 Memorandum

- This memorandum is intended to be a forward-looking document and is not intended to be used by adjudicators to re-adjudicate previously approved petitions.

- The memorandum and attached AFM update were issued to provide clear guidance in the context of H-1B petitions on the requirement that the petitioner establish that an employer – employee relationship exists, and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

January 8, 2010 Memorandum

- USCIS interprets the employer–employee relationship to be the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

- This common law test requires that all characteristics of the relationship be assessed and weighed with no one factor being decisive.

Third Party Placement

- Third party placement is the placement of a beneficiary at a work site that is not operated by the petitioner. This is a common practice in some industries.

- Third party placement may make it more difficult to assess whether the requisite employer–employee relationship exists and will continue to exist.

- Third party placement arrangements can meet the employer–employee relationship requirement, but sometimes they do not.

The Right to Control

- USCIS must look at many factors to determine whether the petitioner has the right to control the beneficiary such that a valid employer–employee relationship exists.
- The petitioner must establish that it has the right to control when, where, and how the beneficiary performs the job.

Right to Control vs. Actual Control

- The right to control the beneficiary is different from actual control.
- An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary.
- The employee–employer relationship hinges on the *right* to control the beneficiary.

Factors to Consider

1. Does the petitioner supervise the beneficiary and is such supervision on or off-site?

2. If the supervision is off-site, how does the petitioner maintain such supervision, *e.g.*, weekly calls, reporting back to the main office routinely, or site visits by the petitioner?

3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

Factors to Consider

5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?

6. Does the petitioner evaluate the work-product of the beneficiary, *e.g.* progress/performance reviews?

7. Does the petitioner claim the beneficiary for tax purposes?

8. Does the petitioner provide the beneficiary any type of employee benefits?

9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

Factors to Consider

10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

Remember: No single factor is dispositive.

Self Employed Beneficiary – Sole Stockholder

- USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. *See Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980).

- If a petitioner is able to show, through evidence (e.g., documentation that there is an independent Board of Directors) that in fact the corporation has the independent right to control the employment of the owner/majority shareholder, then the petitioner may be able to establish a valid employer-employee relationship.

Self Employed Beneficiary – Stockholder

- In determining whether a valid employer-employee relationship exists between a stockholder petitioner (the corporation) and the beneficiary, the adjudicator must determine whether it is the corporation that has the independent right to control the work of the employee.

- However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may have difficulty establishing that a valid employment relationship exists in that the beneficiary, who is also the owner, may not be able to establish the requisite "control." See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

Additional Factors for Majority Shareholders and Sole Owners

- Whether the petitioner can hire or fire the beneficiary or set rules or regulations on the beneficiary's work;
- Whether the petitioner supervises the beneficiary's work and, if so, to what extent;
- Whether the beneficiary reports to someone higher in the petitioner's organization;

Additional Factors for Majority Shareholders and Sole Owners (Cont'd)

- Whether the beneficiary is able to influence the petitioner and, if so, to what extent; and/or

- Whether the parties intended the beneficiary to be an employee, as expressed in written agreements or contracts.

Again, please remember: No single factor is dispositive.

Meeting the Test

- The petitioner meets the relationship test if in the totality of the circumstances it presents evidence to establish by a preponderance of the evidence its right to control the beneficiary's employment throughout the duration of the term of employment.

- Officers should be mindful of the nature of petitioner's business and the type of work done by the beneficiary.

- Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.

Documentation of the Employer–Employee Relationship

- The evidence should provide sufficient detail that the employer and the beneficiary are (or will be) engaged in a valid employer-employee relationship.

- If the employer will not have the right to control the employee as required, the petition may be denied for failure of the petitioner to satisfy the requirements of being a U.S. employer under 8 CFR § 214.2(h)(4)(ii).

Evidence of the Relationship in Initial H-1B Petitions

The petitioner can demonstrate an employer – employee relationship by providing a combination of the following or similar types of evidence:

1. A complete itinerary of services or engagements that specifies:

   - the dates of each service or engagement, and
   - the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

2. Copy of signed Employment Agreement between the petitioner and the beneficiary detailing the terms and conditions of employment;

3. Copy of an employment offer letter that clearly describes the nature of the employer – employee relationship and the services to be performed by the beneficiary;

4. A description of the performance review process;

5. Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

6. Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized)

   - that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

7. Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as:
   - a detailed description of the duties the beneficiary will perform,
   - the qualifications that are required to perform the job duties,
   - salary or wages paid, hours worked, benefits,
   - a brief description of who will supervise the beneficiary and their duties, and
   - any other related evidence; and/or

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

8. Copy of position description or any other documentation that describes:

   - the skills required to perform the job offered,
   - the source of the instrumentalities and tools needed to perform the job,
   - the product to be developed or the service to be provided,
   - the location where the beneficiary will perform the duties,
   - the duration of the relationship between the petitioner and beneficiary,
   - whether the petitioner has the right to assign additional duties,

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

- the extent of petitioner's discretion over when and how long the beneficiary will work,
- the method of payment,
- the petitioner's role in paying and hiring assistants to be utilized by the beneficiary,
- whether the work to be performed is part of the regular business of the petitioner,
- the provision of employee benefits, and
- the tax treatment of the beneficiary in relation to the petitioner.

Evidence of the Relationship in EOS H-1B Petitions

- A petition for extension of an H-1B status must establish that a valid employer – employee relationship will continue to exist.

- The petitioner can meet this requirement by providing evidence that the petitioner continues to have the right to control the employment of the beneficiary.

- The petitioner must also document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period.

Evidence of the Relationship in EOS H-1B Petitions (Cont'd)

The petitioner can demonstrate maintenance of the employer – employee relationship by providing a combination of the following or similar types of evidence:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of time sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;

Evidence of the Relationship in EOS H-1B Petitions (Cont'd)

- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (*e.g.* copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: the materials must clearly substantiate the author and date created;
- Copy of dated performance reviews; and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, *e.g.* promotions, demotions, transfers, layoffs, and pay changes with effective dates.

Denial on Extension Based on Failure to Establish Relationship

If while adjudicating the extension request, USCIS may deny the petition if it determines that the petitioner:

- failed to maintain a valid employer – employee relationship with the beneficiary throughout the initial approval period, or
- violated any other terms of its prior H-1B petition

Itinerary Requirement

If the petition requires the beneficiary to perform services at more than one work location, 8 CFR 214.2(h)(2)(i)(B) requires the petitioner to submit a complete itinerary of services or engagements detailing:

- The dates of each service or engagement;

- And the names and addresses of the establishment, venues or locations where the services will be performed.

Concurrent Filing – Two Employers

- An H-1B alien can be employed by two separate petitioners at the same time. A separate petition must be filed by each employer.
- Concurrent employment may only be granted to an alien seeking employment in the same nonimmigrant classification. For example, an H-1B alien may not seek concurrent employment as an H-1B1 (HSC), H-1B2, H-1B3, or vice-versa.
- An H-1B alien who is not subject to the cap is also not subject to the cap for his/her concurrent employment, until such time as the cap-exempt employment ceases.
- If the H-1B alien has ceased to be employed at a cap-exempt entity or organization, then the alien will be subject to the H-1B cap, and the concurrent employment petition may not be approved unless a cap number was available to the alien beneficiary at the time the petition was filed.

Portability under § 105 of AC21

H-1B portability applies to a nonimmigrant who is currently in H-1B status or an authorized period of stay based on a timely filed H-1B petition. H-1B portability does not apply to a person who is in a valid status other than H-1B.

Export Control

- Petitioners are required to answer Part 6 "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States" of Form I-129.
- If a petitioner did not answer this question, the adjudicator must issue a RFE.
- The RFE for Export Control is located in O:Common.

Debarment

- In accordance with 20 CFR 655.855, DOL notifies USCIS about organizations that have engaged in certain actions that render them subject to mandatory debarment (212(n)(2)(C)(i) and (iii).

- During a period of debarment, USCIS is prohibited from approving any petitions filed by the petitioner (including pending petitions filed prior to the period of debarment).

- The ban does not generally affect previously approved petitions.

Labor Condition Application (LCA)

Labor Condition Application (LCA)- General Requirements

- DOL Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA.*
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.

*(Except H-1B2 petitions for DOD research project workers)

Labor Condition Application (LCA)- General Requirements (Cont'd)

- Validity dates - employment may only be authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.
- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one beneficiary.
- Because only one alien can be on an H-1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.
- Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted.

Labor Condition Application (LCA)- Contents

- Employers information
- Rate of pay
- Period of employment and occupation information
- Information related to work location
- Employer Labor Condition Statements
- Public disclosure information
- Declaration of employer
- Contact Information
- Number of alien workers sought

Labor Condition Application (LCA)- SMSA

An LCA is also required for each Standard Metropolitan Statistical Area (SMSA) where the beneficiary will be working:

- This is an area designated by DOL
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- More than one work location may be listed on an LCA

Labor Condition Application (LCA)- Purpose

The employer attests on the LCA that:

- it will pay the H-1B employee the greater of the prevailing or actual wage;
- the working conditions for the H-1B employee will be similar to the working conditions for similar U.S. workers;
- there is not a strike or lockout occurring at the place of employment; and
- it has provided notice of filing of an LCA at the H-1B employee's worksite.

Labor Condition Application (LCA)- Review

- Check validity dates of the LCA
- The LCA must reflect the specialty occupation that the beneficiary will be employed in
- The LCA must reflect the location where beneficiary will be working
- If the beneficiary is to work at multiple sites in more than one SMSAs, all SMSAs must be listed on the LCA. Multiple work locations may be included on the same or separate LCAs.

Labor Condition Application (LCA)- Review (Cont'd)

- In the event that the duties of the proffered position do not correspond with the occupational specialty certified on the LCA, you may issue a request for evidence for:
  - an LCA, certified prior to the date of the filing of the present petition, for the occupation that corresponds to the proffered duties.
  - further clarification of the proffered position that confirms the occupation on the LCA is correct for the position.
- Note: SISO concurrence is required for issuance of this RFE.

Labor Condition Application (LCA)- Review (Cont'd)

- The petitioner must obtain the LCA before filing the H-1B petition.
- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.
- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Limitations on Stay and Exceptions

Initial Period of Stay

- For specialty occupations and fashion models, the validity period may be for up to three years
  - may not exceed the validity period of the corresponding LCA
  - may be limited by other factors (e.g., temporary licensure, etc.)
- For DOD cooperative research project workers, the validity period may be for up to five years

Extension of Stay (EOS)

- For specialty occupations and fashion models, the validity period may be for up to three years (generally, not to exceed a maximum of six years)
    - may not exceed the validity period of the corresponding LCA
    - may be limited by other factors
- For DOD cooperative research project workers, the validity period may be for up to five years (not to exceed ten years)

Validity Period for EOS

- EOS approved (same employer)
  - authorized from the date of expiration
  - backdate the validity date to the day after the beneficiary's status expires to eliminate gaps
- EOS approved (new employer)
  - valid from date of adjudication unless the employment will commence on a future date

Limitation on Stay-Exceptions

- Limitations on the duration of time spent in H-1B status refer only to the principal H-1B worker and do not apply to the spouse and children

- Time spent as an H-4 dependent does not count against the maximum allowable period of stay

Limitation on Stay-Seasonal or Intermittent Exception

- The 6-year limitation shall not apply to H-1B aliens who did not reside continually in the U.S. and whose employment was seasonal or intermittent or was for an aggregate of six months or less per year.

- The 6-year limitation shall not apply to H-1B aliens who reside abroad and regularly commute to the U.S. to engage in part-time employment.

Limitation on Stay-Seasonal or Intermittent Exception (Cont'd)

- To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for such an exception. 8 CFR 214(2)(h)(13)(v)

- Such proof could consist of evidence such as arrival and departure records, copies of tax returns of the petitioner, and records of employment abroad.

Limitation on Stay-AC21

The American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313, was signed into law on October 17, 2000. The law provided some exceptions to the maximum period of stay for H-1B nonimmigrants.

§ 106(a) of AC21

- The H-1B 7th year extension provisions allow for extensions of H-1B status in one-year increments to H-1B aliens who have:
  - A pending Form I-140 filed on behalf of the beneficiary at least 365 days prior to conclusion of the six-year limit on stay

OR

  - A permanent labor certification filed at least 365 days prior to conclusion of the six-year limit on stay and
  - The permanent labor certification is either pending or, if approved, was filed with a Form I-140 petition within 180 days of the approval

§ 106(a) of AC21 (Cont'd)

- When determining the applicability of Section 106(a) for employment-based (EB) categories (I-140s) that do not require a labor certification, the 365 days will pertain only to the filing of the EB petition.

- I-140 Classifications not requiring labor certification:

  - 203(b)(1)(A) Alien of Extraordinary Ability (E-11)

  - 203(b)(1)(B) Outstanding Professor/Researcher (E-12)

  - 203(b)(1)(C) Multinational Executive or Manager (E-13)

§ 106(a) of AC21 (Cont'd)

- USCIS will not grant an extension of stay under AC21 if, at the time the adjudication, the labor certification has expired by virtue of not having been timely filed in support of an I-140

- However, once the permanent labor certification is filed within 180 calendar days in support of an I-140 petition, the labor certification remains valid, even if the I-140 petition is denied.

- The same permanent labor cert. can be filed in support of a second I-140 after the first one has been denied.

§ 104(c) of AC21

Allows for extensions of H-1B status until an alien's adjustment of status application can be processed and a decision made, notwithstanding per-country visa limitations that may delay an alien's immigration.

§ 104(c) of AC21 (Cont'd)

- Sec. 104 provides AC21 benefits for those nonimmigrants with approved I-140 petitions, but for whom the visa is not available due to a backlog in the per-country visa limitations.

- Any current nonimmigrant alien who has an approved I-140 but is on the waiting list for a visa due to per-country limitations at the time of the filing date of the H-1B petition, can qualify to be granted H-1B status for additional 3-year periods stay under AC21 until a visa is available.

- The Visa Bulletin determines availability (http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

- Eligibility for section 104 must be established at the time of filing I-129 petition.

AC21 Extensions In General

An eligible H-1B nonimmigrant may be granted an extension of stay pursuant to AC21 in either one-year (106(a)) or three-year (104(c)) increments until a final decision is made to:

- Deny the application for labor certification; or
- If the labor certification was approved, to revoke the approved labor certification; or
- Deny the employment based immigrant petition; or
- Grant or deny the alien's application for an immigrant visa or for adjustment of status.

AC21 Extensions In General (Cont'd)

- A petitioner must file a Form I-129 on behalf of the nonimmigrant beneficiary.
- The petitioner may be either the beneficiary's current employer or a new employer.
- The validity period may still only be granted within the time allotted by an endorsed LCA.
- All licensing and certification restrictions must still be met.
- The beneficiary need **NOT** be in H-1B status when requesting an additional period of stay beyond the 6-year maximum.

AC21 Extensions In General (Cont'd)

- The alien does not have to be in the U.S. at the time of filing.

- The alien does have to be in a nonimmigrant status at the time of filing for a COS or EOS for AC21 benefits (remember that there are still specific filing requirements for EOS or COS, in general).

H-1B Spouses of AC21 Beneficiaries

- A nonimmigrant who has reached his/her 6 years in H-1B status, and who has an H-1B spouse that has a pending or approved labor certification and/or pending or approved I-140, is not eligible for H-1B extensions under AC21 under the spouse's petitions and labor cert.

- The spouse must have his/her own pending or approved permanent labor cert. and/or I-140 to be eligible for an H-1B extension under AC21.

Extensions for the Balance of the 6 Years and AC21

- Extensions for AC21 benefits can be combined with the balance of the six year maximum and recapture time.

- Remember: The maximum time an H-1B specialty occupation or fashion model petition can be approved for is 3 years.

Recaptured Time

- See the Adopted Decision, Matter of IT, Ascent (September 2, 2005)

- The 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when the beneficiary is lawfully admitted and physically present in the U.S.

- The petitioner must submit supporting documentary evidence to meet its burden of proof. (e.g. copies of passport stamps, I-94s, and/or plane tickets)

- Unsubstantiated recapture time claimed may not be granted.

Adjudication of the Petition

The Petition and Visa Process

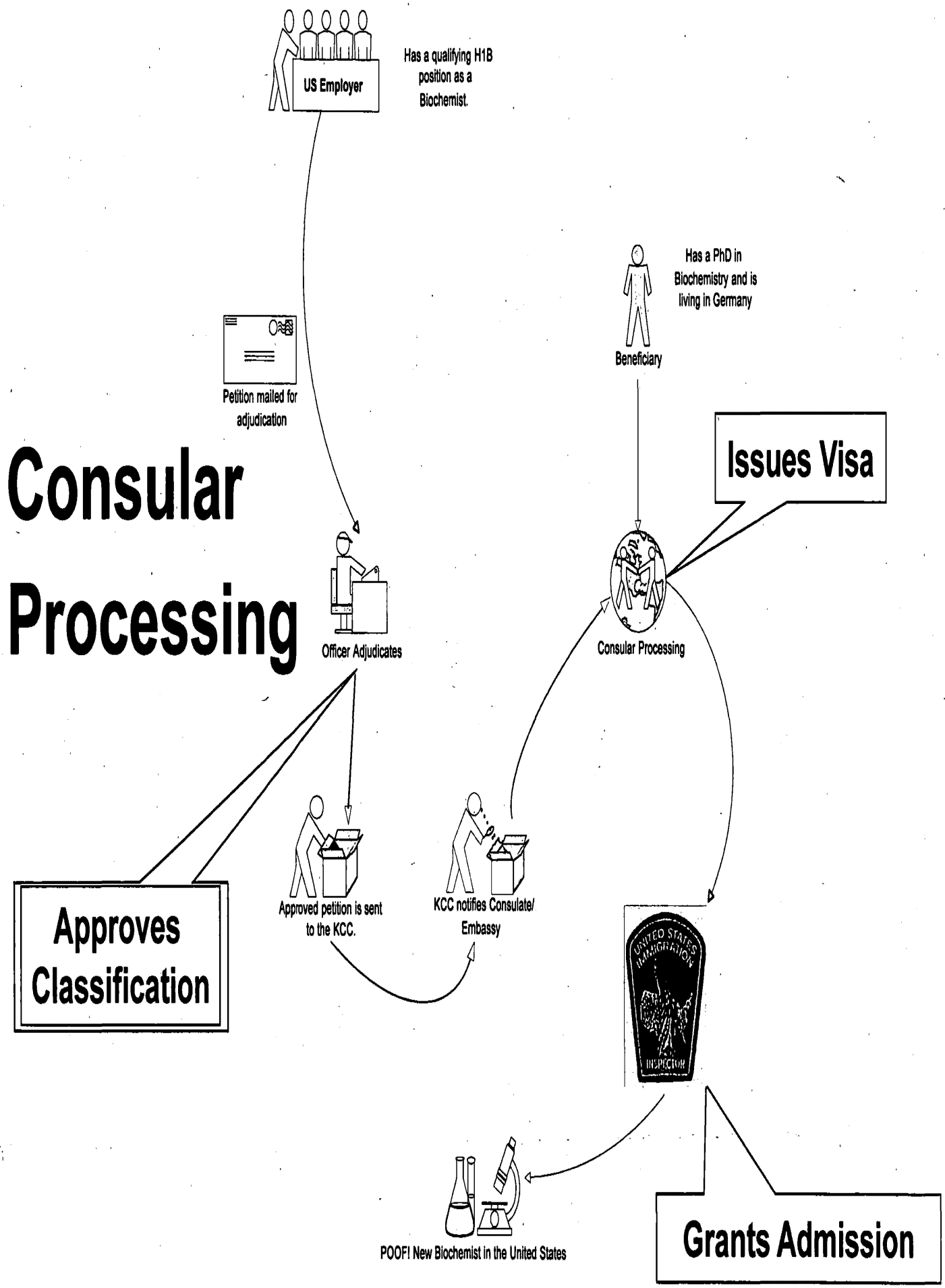
- The petitioner may request that notice of an approved H-1B petition be sent to a U.S. consulate abroad so that the alien may apply for an H-1B visa, or that the alien's status be changed or extended to H-1B in the U.S.

- It is critical to remember that the eligibility for H-1B classification is a separate analysis from whether the beneficiary has maintained valid status and is, therefore, eligible to extend or change status.

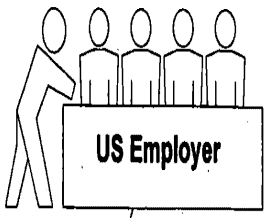
Consulate Notification

- If the beneficiary is not in the U.S. they are not eligible for a change of status or an extension of stay.

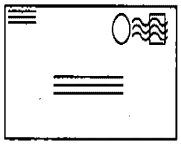
- If we approve the H-1B petition we will send a duplicate copy of the approved petition (if one has been provided) to the consulate (through KCC) in the beneficiary's foreign country.


US Employer
Has a qualifying H1B position as a Biochemist.
Petition mailed for adjudication
Has a PhD in Biochemistry and is living in Germany
Beneficiary
Consular Processing
Issues Visa
Officer Adjudicates
Approves Classification
Approved petition is sent to the KCC.
KCC notifies Consulate/ Embassy
UNITED STATES IMMIGRATION
INSPECTOR
POOF! New Biochemist in the United States
Grants Admission

Change of Status

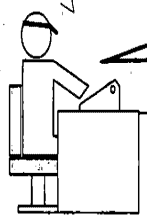


Has a qualifying H1B position as a Biochemist.



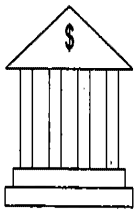
Petition mailed for adjudication

Officer approves the nonimmigrant classification and the change to H-1B status

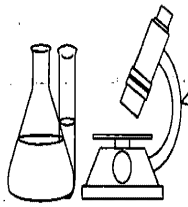


Officer adjudicates

Beneficiary
Just graduated with a PhD in Biochemistry.

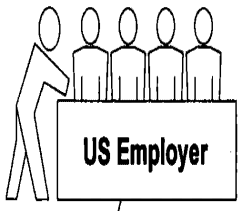


Harvard University

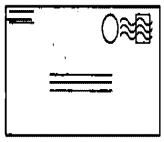


POOF! New Biochemist in the United States

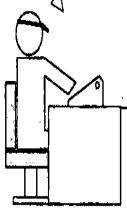
Extension of Status



Has a qualifying H1B position as a Biochemist.



Petition mailed for adjudication

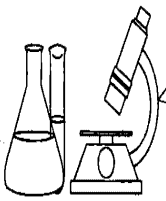


Officer adjudicates

Officer approves the nonimmigrant classification and extends the beneficiary's H-1B status

Approval notice with new I-94 attached

Beneficiary



Biochemist extended with same or new employer in the United States

Requirements for Extension of Stay (EOS)

- Beneficiary must be in the U.S. at the time of filing the petition.
- Passport must be valid at the time of filing.
- Beneficiary does not have to be physically in the U.S. while the EOS is pending.
- Departure is not treated as abandonment.
- Must be maintaining status.
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if there are extraordinary circumstances.

RFE & Denials on EOS Petitions

- See Memo dated April 23, 2004, titled 'The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity'

- "Material Error"

- "Substantial Change in Circumstances"

- "New Material Information"

RFE & Denials on EOS Petitions

The Deputy Director will review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

Advanced Parole

- A nonimmigrant in H-1B status with a pending adjustment of status application may apply for and receive advanced parole before leaving the U.S.

- Upon returning to the U.S. the nonimmigrant may be paroled in.

- If the beneficiary wishes to continue H-1B employment with the previous H-1B petitioner, the petitioner can then file an I-129 requesting H-1B status.

Adjudicating Petition for Beneficiary on Advanced Parole

- If the previous granted H-1B status would have still been valid at the time the petition is filed for a nonimmigrant requesting admittance as an H-1B, adjudicate as any normal EOS filing.

- If the previous status would have already been expired at the time of filing, adjudicate as any normal file that will be adjudicated as a split decision.

Requirements for Change of Status (COS)

- Beneficiary must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused under extraordinary circumstances

Change of Status (COS)-Prohibitions

There are some nonimmigrant classifications that do not permit a change to H-1B status. These classifications include, but are not limited to:

- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- M-1 student - 8 CFR 248.1(d)
  - If the education or training which the student received while an M-1 student enables the student to meet the qualifications for temporary worker classification the COS will be denied. (SEVIS I-20 forms).
  - Must be maintaining status (I-94, 797, etc.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-2B – An H-2B who has spent 3 years in the U.S. under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they are outside of the US for the immediately preceding 3 months.

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-3 – An H-3 trainee who has spent 24 months in the US under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they have resided outside of the US for the immediate prior 6 months.

F-1 COS to H-1B

- Interim Rule Published on 4/8/08 – Extends the period of OPT time from 12 months to 29 months for F-1 students who have completed a STEM degree in the United States.
- STEM: science, technology, engineering or mathematics
- STEM extended OPT employment must be with a U.S. employer enrolled in the E-verify program
- F-1 students on OPT maintaining valid F-1 status until the expiration of their OPT are authorized to remain in the U.S. for up to 60 days after completion of their OPT to prepare for departure.

F-1 COS to H-1B-"Cap Gap"

Under the interim rule, the status and any employment authorization under 8 CFR 274a.12(c)(3)(i)(B) and (C) for an F-1 student who is the beneficiary of a COS petition will be automatically extended until October 1 of the FY in which the H-1B visa is being requested where the H-1B COS petition is timely filed requesting an October 1 employment start date.

The automatic extension is terminated if the H-1B petition is rejected, denied or revoked.

Requests for Evidence (RFE)

- USCIS may issue an RFE and/or Notice of Intent to Deny (NOID) when the petitioner has failed to establish eligibility for the benefit being sought.

- The RFE should specifically state what is at issue and be tailored to request specific types of evidence from the petitioner that directly relate to the deficiency USCIS has identified.

- The RFE should not require a specific type of evidence unless provided for by the regulations (*e.g.* an itinerary of service dates and locations), nor request information that has already been provided.

- Officers should state what element the petitioner has failed to establish and provide examples of documents that could be provided to cure the deficiency.

Approved Petitions

- If provided, forward a duplicate to KCC for EOS or COS cases
- If consulate notification is requested, the petitioner must provide a duplicate copy of the petition
- If a duplicate copy is not provided for consular notification during the course of adjudication, the petitioner will be notified that they must file an I-824 to notify the consulate
- Letter is found at: O:\ Adjudications\I-824\4-Correspondence
- PIMS process

Split Decisions

- Remember if a nonimmigrant in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H-1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H-1B petition and the adjudication of the COS or EOS request.

- If they are not in or maintaining status when filing an EOS or COS and we approve the H1B petition, we may deny the EOS or COS. This is called a split decision.

Split Decisions (Cont'd)

- Approve the classification
- Deny extension of stay (EOS) or change of status (COS)
- In order to effectuate the H-1B status, the beneficiary would have to depart the United States and re-enter on a valid H-1B visa (unless visa exempt).

Denials

- When to use an I-292
- When to use an I-541
- When to use both
- Standard Denial formula – IRAC
- 9th Circuit rulings

No Appeal Rights

There are no appeal rights for:

- Denial for failure to pay the ACWIA or Fraud Detection and Prevention fee
- Abandonment denials
- The denial of an extension of stay (EOS) or a change of status (COS) portion of the petition

Systems Checks

Ensure that you have completed all required systems checks.

Summary

- Burden of Proof and Standard of Proof
- The Definition of an H-1B Nonimmigrant Worker
- Filing Procedures and Fees
- Numerical Limitations and Exceptions
- Position and Beneficiary Requirements
- Petitioner Requirements
- Labor Condition Application Requirements (LCA)
- Exceptions to the 6-Year Maximum Period of Stay
- Adjudication of the Petition

Questions?

If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the U.S. Citizenship and Immigration Services (USCIS) containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

H-1B Extension beyond the Six-Year Limit: The U.S. Citizenship and Immigration Services (USCIS) finds that the requested date for employment exceeds the six-year limit for the H-1B status. However, it is not clear from the record how the petitioner has determined the beneficiary qualifies to extend beyond the sixth-year. There are four ways a beneficiary may qualify to extend his or her employment beyond the sixth-year limit:

1. Recapturing any time outside the U.S. including seasonal or intermittent employment, etc.;

2. remaining outside the U.S. for 1 continuous year, enabling them to be eligible to start a new six year period, upon satisfying current CAP restrictions or exemptions.

3. exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status; or

4. exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status when an H-1B nonimmigrant with approved I-140 petition is unable to adjust status due to limitation on visa availability by country.

Accordingly, the petitioner must choose one of the four reasons below and support it with the listed documentation to establish eligibility for extension beyond the six-year limit.

Recaptured Time—A beneficiary may be able to extend his/her H-1B nonimmigrant status past the six-year limit if there was time spent outside the United States. The amount of time a beneficiary may extend his/her status equals the amount of time spent outside the United States.

To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for this exception. Submit the following:

- Calculation of the total time in days spent outside the United States.

- A copy of an itinerary showing departure and return dates.

- Clear, legible copies of all passport pages including identification pages, visa pages, any page that has an entry or exit stamp on it, and blank pages.

RECAPTURED TIME – General RFE Procedure:

a.) Petitioner is requesting a validity period that is beyond the six-year limit:

IF...	THEN...
The petitioner does not specifically request recaptured time, and • no other RFE issues exist.	Only grant the remaining eligible time without an RFE.
The petitioner does specifically request recaptured time; but • the request for recaptured time is unsupported; and • no other RFE issues exist.	Only grant the remaining eligible time without an RFE.

(Rev. 04-16-09)

RECAPTURED TIME CALCULATOR: There is a calculator in the I-129, H-1B, RFE folder. Use Windows Explorer to get to the calculator. It will not work in "Word."

For more information on recaptured time see: See Matter of IT Ascent and Aytes memo dated 10/21/2005, located in the H-1B, Legal Reference Info, Time Recapture folder.

OR

One year outside the United States: If the beneficiary has resided or been physically present outside the United States continuously for the immediate prior year, he or she is eligible to begin again a new six-year limit, providing they qualify for the current CAP restrictions or exemptions. Submit the following:

- Calculation of the total time in days spent outside the United States.
- A copy of an itinerary showing departure and return dates.
- Clear, legible copies of all passport pages including identification pages, visa pages, any page that has an entry or exit stamp on it, and blank pages.

OR

Section 106(a), Sixth-Year Limitation Exemption Due to Lengthy Adjudication: There are special provisions for exemption from the six-year maximum limitation of authorized stay

in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status. The 21st Century DOJ Appropriations Act (November 02, 2002) amends § 106(a) of AC21 to permit H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

1. 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or

2. 365 days or more have passed since the filing of an EB immigrant petition.

Further, the 21st Century Department of Justice Appropriations Authorization Act, allows for the extension of H-1B nonimmigrant worker status, for an alien who qualifies for this exemption, in one-year increments, until such time as a final decision is made:

- to deny the alien's labor certification application, if it is required for the alien to obtain status as an employment based immigrant, or if the labor certification is approved, to deny the EB immigrant petition that was filed pursuant to the approved labor certification; or

- to deny the alien's employment based immigrant petition; or

- to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

In order to establish eligibility for an extension beyond the 6-year maximum period, submit the following:

- Verification from DOL that the labor certification application has been pending for 365 days, <u>if it is required for the alien to obtain status as an employment based immigrant</u>, and that the petitioner is still pursuing its labor certification;

- A copy of the Form I-797, Notice of Action, to show that 365 days or more have passed since an employment based immigrant petition was filed on behalf of or by the H-1B nonimmigrant beneficiary.

- If the petitioner' s Form ETA-9089 was denied by the DOL, submit evidence from the DOL that the petitioner has appealed that decision and that the appeal is still pending with the Board of Alien Labor Certification Appeals (BALCA).

- If the petitioner's employment based petition has been denied, submit evidence from the AAO (copy of I-797 or receipt notice) that the petitioner has appealed that decision and that the appeal is still pending.

IMPORTANT! See Michael Aytes Memorandum dated December 05, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional periods of Admission beyond the H-1B Six year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year. It is located in AC21, Legal Reference, folder.

DECOUPLING H-4 AND L-2 FROM H-1B AND L-1 TIME: Time spent as an H-4 and L-2 dependent no longer counts against the maximum allowable periods of stay available to principals in H-1B and L-1 status.

PERIODS OF STAY IN H-1B STATUS BEYOND THE SIX YEAR MAXIMUM: H-1B aliens under AC21 need not be in H-1B status when requesting an additional period of stay beyond the six year maximum.

H-1B "REMAINDER" OPTION: Pending the AC21 regulations, USCIS for now will allow an alien to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap. (Rev. 12-21-2006)

OR

Section 104(c), Sixth-Year Limitation Exemption - One-Time Protection Under Per Country Ceiling: On October 17, 2000, an exemption to the six-year H-1B limitation was created by The American Competitiveness in the Twenty-First Century Act ("AC21"), Public Law 106-313. Further, section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions, who are unable to adjust status due to a limitation on visa availability by country, to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant may be eligible for this benefit even if he or she has exhausted the maximum 6-year period of authorized stay for H-1B nonimmigrants under INA 214(g)(4). The statute states that the beneficiary must:

(a) have a petition filed on his or her behalf for a preference status under INA 203(b)(1), (2), or (3) (an employment based ("EB") I-140 petition); and

(b) be eligible to be granted that status except for the per-country visa availability limitations.

SECTION 104(c): The beneficiary must have an approved I-140 but their visa has been regressed (no visa available at time of adjudication). For a "Visa Availability Bulletin" go to the CSC website. Just under the address bar there is "Links" bar. Click on the "USCIS" button and pick "DOS Visa Bulletin" from the drop down menu.

Extensions are granted in increments of up to three years. Although the law is for a one-time protection under the per-country ceiling, USCIS recognizes that in some cases per country limits may take more than three years for the alien to be eligible to adjust.

There is no requirement that the beneficiary have a pending I-485 to be eligible for the One-Time Protection Under Per Country Ceiling because if no visa is available there I-485 will be rejected by data entry.

See December 27, 2005, Michael Aytes, 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) in the Legal Reference folder under AC21.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved extensions of stay under AC21 Section 104(c) in increments of three years until a decision is made on the nonimmigrant's application for adjustment of status. In order to establish eligibility for an extension under this section submit the following:

- a copy of the alien's Form I-797, approval notice for an I-140 immigrant worker petition.

Note: If the petitioner filed the I-140 and I-485 concurrently, and the I-140 has not yet been adjudicated then the petitioner may wish to seek exemption of the sixth-year limitation due to lengthy adjudication as shown above.

H-1B EMPLOYER NOT THE SAME AS I-140 PETITIONER: An H-1B worker can get an H-1B extension under section 104 even if the extension is filed by an employer other than the one who filed the approved I-140.

There is nothing under AC21 section 104(c) that requires that the beneficiary be working for the I-140 petitioner in order to qualify for an extension beyond the 6-year maximum period of authorized stay for H-1B nonimmigrants. The statute only states that the beneficiary must (a) have a petition filed on his or her behalf for a preference status under INA section 203(b)(1),(2) or (3) (an employment based ("EB" petition); and (b) be eligible to be granted that status except for the per-country limitations. This is reflected on page 3 of the June 19, 2001, memo by Michael D. Cronin on the "Initial Guidance of Processing H-1B Petitions as Affected by the "AC21" Public Law 106-396". (Rev. 03-02-06)

Form I-129 H-1B Adjudication

March 2013

U.S. Citizenship and Immigration Services

Burden of Proof and Standard of Proof

Adjudicator's Field Manual (AFM) 11.1(c)

Burden 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).

Standard of Proof

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence means that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

Divisions of the H-1B Classification

- **H-1B (1B1)** Specialty occupation workers
- **H-1B2 (1B2)** Department of Defense (DOD) cooperative research and development project or co-production project workers
- **H-1B3 (1B3)** Fashion models of distinguished merit and ability

Fees

- Form I-129 base fee ($325)
- American Competitiveness and Workforce Improvement Act (ACWIA) fee ($1,500 or $750), with some exceptions
  - Applies to first petition and first extension request filed by an employer for a particular worker
- Fraud Prevention and Detection Fee ($500)
  - Applies to all initial H-1B status request filed by a specific employer for a particular worker
- Public Law 111-230 fee ($2,000)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker if:
    - The petition is filed on/after August 14, 2010 and before October 1, 2015 and
    - The petitioner employs 50 or more employees in the U.S. and over 50% of those U.S. employees are in H-1B or L-1 nonimmigrant status
- Premium Processing Fee ($1,225), if requesting Premium Processing Service

ACWIA Fee

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay $750

- U.S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay $1,500

ACWIA Fee (Cont'd)

The following entities are exempt from the ACWIA fee:

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education;
- Nonprofit research organizations or governmental research organizations;
- Primary or secondary educational institutions, private or public; and
- Nonprofit entities that engage in an established curriculum-related clinical training program for students.

What are the numerical limitations?

Numerical Limitations

The total number of temporary workers who may be issued initial visas or otherwise provided nonimmigrant status for H-1B classification in a fiscal year is currently 65,000. This is known as the "cap."

The cap applies to the principal H-1B nonimmigrant and not to the spouse and children of the H-1B nonimmigrant.

Numerical Limitation Exceptions - Masters Cap

- The first 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher are exempt from the cap. This is also known as the advanced degree exemption or "master's cap."
  - Any surplus over the 20,000 is then counted against the general cap.
- The master's degree (or higher) must be issued from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), 20 U.S.C. 1001(a).

Institutions of Higher Education

- "Institution of higher education" is defined by the Higher Education Act of 1965;
- Admit students holding a high school diploma (or equivalent);
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency;
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree;
- Qualify as a public or nonprofit institution

Numerical Limitation Exceptions – Petitioners not subject to the cap INA 214(g)(5)(A) and (B)

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)

- Nonprofit entities that are related to or affiliated with an institution of higher education
  - All initial affiliation cases are adjudicated by the affiliation team.

- Nonprofit research organizations or governmental research organizations

Numerical Limitation Exceptions – J-1 Physicians with Waiver

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 cap exemption applies only to medical doctors who have received a Conrad 20/30 waiver under INA 214(l)
- Must work for 3 years at a hospital designated by the Secretary of HHS as a:
  - Health Professional Shortage Area (HPSA);
  - Medically Underserved Area (MUA); or
  - Medically Underserved Population (MUP).
- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled.

Position and Beneficiary Requirements for a Specialty Occupation Worker

1B1 Specialty Occupation Workers

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge, and

2) the attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

Position Requirements

The petitioner must meet **one** of the following four criteria:

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3) The employer normally requires a degree or its equivalent for the positions; or
4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

General Degrees

A degree in the general area of Business Administration may be insufficient to demonstrate that the beneficiary is qualified to perform a specialty occupation. However, a degree in Business Administration with a specific focus in a field of study related to the specialty occupation could qualify the beneficiary to perform the specialty occupation.

Example: A Business Administration Degree with an emphasis in accounting would likely qualify the beneficiary as an accountant, but would not, by itself, qualify him as an architect.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets **one** of the following four criteria:

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
   - RFE for educational evaluation if unable to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications (Cont'd)

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.

- Four-year degrees can usually be considered equivalent to a U.S. bachelor's degree, but not always.

- Focus on the course of study for the degree. Be careful not to penalize a beneficiary for the manner in which he/she obtains the degree (e.g., the beneficiary earns a four-year degree in three years, etc.).

Beneficiary Qualifications (Cont'd)

3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure meet the definition of a specialty occupation (e.g., pilots, cosmetologists, flight instructors, barbers, taxi drivers)

Beneficiary Qualifications (Cont'd)

4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience.

Degree Equivalence

(Equivalence to completion of a college degree)

If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence (Cont'd)

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should:
  - Consider formal education only, not practical experience;
  - State if the collegiate training was post-secondary education (e.g., whether the education in question was obtained after completing the U.S. equivalent of high school);
  - Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and
  - Briefly state the qualifications and experience of the evaluator providing the opinion.

Degree Equivalence (Cont'd)

4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

Degree Equivalence (Cont'd)

5) A determination by the Service that the equivalent of the degree required has been acquired:

- through a combination of education, specialized training, and/or work experience in areas related to the specialty

AND

- that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Degree Equivalence (Cont'd)

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The petitioner cannot use a combination of education, training and/or work experience to demonstrate eligibility in this situation.

Degree Equivalence (Cont'd)

It must be clearly demonstrated that:

- the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation;
- the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
- the alien has recognition of expertise in the specialty.

Degree Equivalence (Cont'd)

Recognition of expertise in the specialty should be evidenced by at least one type of documentation such as:

1. Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

2. Membership in a recognized foreign or United States association or society in the specialty occupation;

Degree Equivalence (Cont'd)

3. Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

4. Licensure or registration to practice the specialty occupation in a foreign country; or

5. Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Degree Equivalence (Cont'd)

Recognized authority

A recognized authority is a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested.

Degree Equivalence (Cont'd)

Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Licensing Requirements

If the occupation (not the duties) requires a state or local license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for a permanent license, except for administrative reasons, e.g. need Social Security # or DHS permission to be employed to receive licensure.
  - If all other requirements are met, allow for 1 year to obtain the permanent license.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- If otherwise approvable, the petition may be granted for **one year** or for the period that the temporary license is valid, whichever is longer.

Permanent Licenses

- A petition can be approved up to three years for beneficiaries who have permanent licenses

- Permanent licenses will still have an expiration date and may have renewal requirements listed.

  - Expiration dates on permanent licenses have no bearing on validity dates given. If otherwise eligible, the petition may be granted for up to three years.

Occupations that Typically Need a License

- Public school teachers require teaching credentials, certificates, or licensure
  - Should have license/certification in the area of intended employment
  - Some require special certification. Example: special education teachers
- Some charter school and/or private school teachers depending on the State or charter agreement
- Most healthcare occupations
- Engineers offering services to the public
- Architects
- Lawyers

Uncertified Health Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in the affected health care occupations.

- Certification should not be confused with licensure.

Uncertified Health Care Workers

Unless they have been certified, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified health care workers:

1. Nurses
2. Physical Therapists
3. Occupational Therapists
4. Speech Language Pathologists & Audiologists
5. Medical Technologists
6. Medical Technicians
7. Physician's Assistants

Uncertified Health Care Workers

- In this category, nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Health Care Worker Certifications

At this time, only three entities are approved by USCIS to certify health care workers:

- Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all health care workers
- Foreign Credentialing Commission on Physical Therapy (FCCPT) – issues certifications for physical therapists
- National Board for Certification in Occupational Therapy (NBCOT) – issues certifications for occupational therapists

Health Care Degree Requirements

- Generally, Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field.

- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree.

- Speech Language Pathologists & Audiologists may require a Masters degree.

Nurses

- Most nursing positions do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be specialized.
- Foreign Degrees entitled "Bachelor of Nursing Degree" may not be equivalent to a 4-year U.S. degree
- If approving an H-1B Nurse, (or any position requiring a nursing degree) you must have SISO sign-off.

Nurses (Cont'd)

In contrast to general RN positions, certain specialized nursing occupations may require a 4 year bachelor's or higher degree in a specific specialty:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM)

Nurses (Cont'd)

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Physicians

All H-1B petitions filed for a physician must include evidence that the beneficiary:

- Has a full and unrestricted license to practice medicine in a foreign state;

OR

- has graduated from a medical school in the United States or in a foreign state.

Physicians (Cont'd)

Petitions for physicians performing direct patient care must include:

- Evidence that the beneficiary has the license or authorization required by the state of intended employment to practice medicine

OR

- Evidence that the beneficiary is exempt from law from the licensing requirement

Physicians (Cont'd)

Unless the beneficiary is of national or international renown in the field of medicine, the petitioner must establish that the beneficiary:

- Will be employed primarily to teach and/or conduct research for a public or nonprofit private educational or research institution or agency and no patient care will be performed, except that which is incidental to the physician's teaching or research

OR...

Physicians (Cont'd)

The beneficiary has:

- passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) **or**
- is a graduate of a United States medical school;

AND

- has competency in oral and written English (demonstrated through passage of a proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG)); **or**
- is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.

- Medical Residents may have temporary licenses.

  - Exceptions: New York does not issue temporary licenses to their Medical Residents. They can be approved for up to three years.

  - Evidence of no licensing requirement is needed for hospitals in other states.

H-1B Petitioner Requirements

United States Employer

8 C.F.R. § 214.2(h)(4)(ii) defines this as:

A person, firm, corporation, contractor or other association or organization in the U.S. which:

1. Engages a person to work within the U.S.
2. Has an employer-employee relationship with respect to employees under this part; and
3. Has an IRS tax identification number

United States Employer (Cont'd)

The 8 CFR 214.2(h)(4)(ii) definition of "U.S. Employer" also states that an employer – employee relationship is indicated by the fact that the petitioner may:

- hire,
- pay,
- fire,
- supervise, or
- otherwise control the work of the beneficiary.

Employer-Employee Relationship

- In addition to the other requirements for an H-1B visa, a petitioner must satisfy the requirement that it is a U.S. employer or an agent.

- The petitioner must establish that a valid employer–employee relationship exists (or will exist) between itself and the beneficiary, *and* that the relationship will continue to exist throughout the requested H-1B validity period.

Agents

- Under 8 CFR 214.2(h)(2)(i)(F) it is possible for an "agent" to file an H-1B petition.
- The beneficiary must be one who is *traditionally self-employed* or who uses agents to arrange short term employment on his/her behalf with numerous employers or in cases where a foreign employer authorizes the agent to act on its behalf.
- An agent may be:
  - The actual employer (performing the function of an employer);
  - a representative of both the employer(s) and the beneficiary; or
  - A person or entity authorized by the employer to act for (or in place of) the employer.

Agents (Cont'd)

- An agent functioning as an employer must:
  - Guarantee wages and other terms and conditions of employment by contractual agreement with the beneficiary
  - Provide an itinerary of definite employment and information on other planned services.
- An agent in business as an agent must:
  - Provide a complete itinerary of services or engagements (including dates, names and addresses of actual employers, and names and addresses of venues).
  - Contracts between the employers and the beneficiary may be required in questionable cases.
- However, the fact that a petition is filed by an agent who is not the actual employer does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

Purpose of January 8, 2010 Memorandum

"Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" Donald Neufeld Memo

- This memorandum is intended to be a forward-looking document and is not intended to be used by adjudicators to re-adjudicate previously approved petitions.

- The memorandum and AFM update were issued to provide clear guidance in the context of H-1B petitions on the requirement that the petitioner establish that an employer – employee relationship exists, and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

January 8, 2010 Memorandum

- USCIS interprets the employer–employee relationship to be the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

- This common law test requires that all characteristics of the relationship be assessed and weighed with no one factor being decisive.

Third Party Placement

- Third party placement is the placement of a beneficiary at a work site that is not operated by the petitioner. This is a common practice in some industries.

- Third party placement may make it more difficult to assess whether the requisite employer–employee relationship exists and will continue to exist.

- Third party placement arrangements can meet the employer–employee relationship requirement, but sometimes they do not.

The Right to Control

- USCIS must look at many factors to determine whether the petitioner has the right to control the beneficiary such that a valid employer–employee relationship exists.
- The petitioner must establish that it has the right to control when, where, and how the beneficiary performs the job.

Right to Control vs. Actual Control

- The right to control the beneficiary is different from actual control.
- An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary.
- The employee–employer relationship hinges on the *right* to control the beneficiary.

Factors to Consider

1. Does the petitioner supervise the beneficiary and is such supervision on or off-site?

2. If the supervision is off-site, how does the petitioner maintain such supervision, *e.g.*, weekly calls, reporting back to the main office routinely, or site visits by the petitioner?

3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

Factors to Consider

5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?

6. Does the petitioner evaluate the work-product of the beneficiary, *e.g.* progress/performance reviews?

7. Does the petitioner claim the beneficiary for tax purposes?

8. Does the petitioner provide the beneficiary any type of employee benefits?

9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

Factors to Consider

10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

Remember: No single factor is dispositive.

Self Employed Beneficiary – Sole Stockholder

- USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. *See Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980).

- If a petitioner is able to show, through evidence (e.g., documentation that there is an independent Board of Directors) that in fact the corporation has the independent right to control the employment of the owner/majority shareholder, then the petitioner may be able to establish a valid employer-employee relationship.

Self Employed Beneficiary – Stockholder

- In determining whether a valid employer-employee relationship exists between a stockholder petitioner (the corporation) and the beneficiary, the adjudicator must determine whether it is the corporation that has the independent right to control the work of the employee.

- However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may have difficulty establishing that a valid employment relationship exists in that the beneficiary, who is also the owner, may not be able to establish the requisite "control." See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

Additional Factors for Majority Shareholders and Sole Owners

- Whether the petitioner can hire or fire the beneficiary or set rules or regulations on the beneficiary's work;
- Whether the petitioner supervises the beneficiary's work and, if so, to what extent;
- Whether the beneficiary reports to someone higher in the petitioner's organization;
- Whether the beneficiary is able to influence the petitioner and, if so, to what extent; and/or
- Whether the parties intended the beneficiary to be an employee, as expressed in written agreements or contracts.

Please note: These petitions are adjudicated by the EIR team.

Meeting the Test

- The petitioner meets the relationship test if in the totality of the circumstances it presents evidence to establish by a preponderance of the evidence its right to control the beneficiary's employment throughout the duration of the term of employment.

- Officers should be mindful of the nature of petitioner's business and the type of work done by the beneficiary.

- Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.

Documentation of the Employer–Employee Relationship

- The evidence should provide sufficient detail that the employer and the beneficiary are (or will be) engaged in a valid employer-employee relationship.

- If the employer will not have the right to control the employee as required, the petition may be denied for failure of the petitioner to satisfy the requirements of being a U.S. employer under 8 CFR § 214.2(h)(4)(ii).

Evidence of the Relationship in Initial H-1B Petitions

The petitioner can demonstrate an employer – employee relationship by providing a combination of the following or similar types of evidence:

1. A complete itinerary of services or engagements;
2. Copy of signed Employment Agreement between the petitioner and the beneficiary detailing the terms and conditions of employment;
3. Copy of an employment offer letter that clearly describes the nature of the employer – employee relationship and the services to be performed by the beneficiary;
4. A description of the performance review process;
5. Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

6. Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized)
   - that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

7. Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as:
   - a detailed description of the duties the beneficiary will perform,
   - the qualifications that are required to perform the job duties,
   - salary or wages paid, hours worked, benefits,
   - a brief description of who will supervise the beneficiary and their duties, and
   - any other related evidence; and/or

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

8. Copy of position description or any other documentation that describes:

   - the skills required to perform the job offered,
   - the source of the instrumentalities and tools needed to perform the job,
   - the product to be developed or the service to be provided,
   - the location where the beneficiary will perform the duties,
   - the duration of the relationship between the petitioner and beneficiary,
   - whether the petitioner has the right to assign additional duties,

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

- the extent of petitioner's discretion over when and how long the beneficiary will work,
- the method of payment,
- the petitioner's role in paying and hiring assistants to be utilized by the beneficiary,
- whether the work to be performed is part of the regular business of the petitioner,
- the provision of employee benefits, and
- the tax treatment of the beneficiary in relation to the petitioner.

Itinerary Requirement

If the petition requires the beneficiary to perform services at more than one work location, 8 CFR 214.2(h)(2)(i)(B) requires the petitioner to submit a complete itinerary of services or engagements detailing:

- The dates of each service or engagement;
- And the names and addresses of the establishment, venues or locations where the services will be performed.

Other Requirements: Export Control

- Petitioners are required to answer Part 6 "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States" of Form I-129.
- If a petitioner did not answer this question, the adjudicator must issue a RFE.
- The RFE for Export Control is located in O:Common.

Debarment

- In accordance with 20 CFR 655.855, DOL notifies USCIS about organizations that have engaged in certain actions that render them subject to mandatory debarment (212(n)(2)(C)(i) and (iii).

- During a period of debarment, USCIS is prohibited from approving any petitions filed by the petitioner (including pending petitions filed prior to the period of debarment).

- The ban does not generally affect previously approved petitions.

Labor Condition Application (LCA)

Labor Condition Application (LCA)- General Requirements

- DOL Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA.*
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.

*(Except H-1B2 petitions for DOD research project workers)

Labor Condition Application (LCA)- General Requirements (Cont'd)

- Validity dates - employment may only be authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.
- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one beneficiary.
  - Because only one alien can be on an H-1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.
  - Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted.

Labor Condition Application (LCA)- SMSA

An LCA is required for each Standard Metropolitan Statistical Area (SMSA) where the beneficiary will be working:

- This is an area designated by DOL
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- More than one work location may be listed on an LCA

Labor Condition Application (LCA)- Review

- Check validity dates of the LCA
- The LCA must reflect the specialty occupation that the beneficiary will be employed in
- The LCA must reflect the location where beneficiary will be working
- If the beneficiary is to work at multiple sites in more than one SMSAs, all SMSAs must be listed on the LCA. Multiple work locations may be included on the same or separate LCAs.

Labor Condition Application (LCA)-Review (Cont'd)

- In the event that the duties of the proffered position do not correspond with the occupational specialty certified on the LCA, you may issue a request for evidence for:
  - an LCA, certified prior to the date of the filing of the present petition, for the occupation that corresponds to the proffered duties.
  - further clarification of the proffered position that confirms the occupation on the LCA is correct for the position.
- Note: SISO concurrence is required for issuance of this RFE.

Labor Condition Application (LCA)-Review (Cont'd)

- The petitioner must obtain the LCA before filing the H-1B petition.

- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.

- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Limitations on Stay

Initial Period of Stay

- For specialty occupations, the validity period may be for up to three years
  - may not exceed the validity period of the corresponding LCA
  - may be limited by other factors (e.g., temporary licensure, contracts, etc.)

Limitations on Stay

8 C.F.R. 214.2(h)(13)(iii)(A)

- An H-1B alien in a specialty occupation… who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.
  - If a petitioner is seeking to start a new 6-year period for a beneficiary who has already spent time in H or L status, make sure that they have been outside of the U.S. for at least one year. Brief trips to the U.S. are not interruptive of the 1-year period but do not count toward the 1-year period.

Adjudication of the Petition

Consulate Notification

- If the beneficiary is not in the U.S. they are not eligible for a change of status or an extension of stay.

- If we approve the H-1B petition we will send a duplicate copy of the approved petition (if one has been provided) to the consulate (through KCC) in the beneficiary's foreign country.

Requirements for Change of Status (COS)

- Beneficiary must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused under extraordinary circumstances

Change of Status (COS)-Prohibitions

There are some nonimmigrant classifications that do not permit a change to H-1B status. These classifications include, but are not limited to:

- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)
  - There are special waiver requirements for J-1 foreign medical graduates.
- A J-2 dependent of a J-1 Conrad doctor cannot COS to any other nonimmigrant classifications except H-4 until the principal fulfills the three-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1. (Approval of J-2 COS to H-1B requires SISO and ACD concurrence.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- M-1 student - 8 CFR 248.1(d)
  - If the education or training which the student received while an M-1 student enables the student to meet the qualifications for temporary worker classification the COS will be denied. (SEVIS I-20 forms).
  - Must be maintaining status (I-94, 797, etc.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-2B – An H-2B who has spent 3 years in the U.S. under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they are outside of the US for the immediately preceding 3 months.

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-3 – An H-3 trainee who has spent 24 months in the US under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they have resided outside of the US for the immediate prior 6 months.

F-1 COS to H-1B-"Cap Gap"

Under the interim rule, the status and any employment authorization under 8 CFR 274a.12(c)(3)(i)(B) and (C) for an F-1 student who is the beneficiary of a COS petition will be automatically extended until October 1 of the FY in which the H-1B visa is being requested where the H-1B COS petition is timely filed requesting an October 1 employment start date.

The automatic extension is terminated if the H-1B petition is rejected, denied or revoked.

Requests for Evidence (RFE)

- USCIS may issue an RFE and/or Notice of Intent to Deny (NOID) when the petitioner has failed to establish eligibility for the benefit being sought.

- The RFE should specifically state what is at issue and be tailored to request specific types of evidence from the petitioner that directly relate to the deficiency USCIS has identified.

- The RFE should not require a specific type of evidence unless provided for by the regulations (*e.g.* an itinerary of service dates and locations), nor request information that has already been provided.

- Officers should state what element the petitioner has failed to establish and provide examples of documents that could be provided to cure the deficiency.

Split Decisions

- Remember if a nonimmigrant in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H-1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H-1B petition and the adjudication of the COS or EOS request.

- If they are not in or maintaining status when filing an EOS or COS and we approve the H1B petition, we may deny the EOS or COS. This is called a split decision.

Questions?

Div 1 Roundtable Summary - 11/10/2010

Agenda Items

1. Discuss 'Rules/Standards of Evidence' – "preponderance standard" (either with or without PP)

2. Discuss EER, Bobbie Johnsons email regarding validity dates and not giving special treatment to companies (i.e. Cognizant)

3. Discuss 'Assertions vs. Documentation" and place it into context with type of entity, totality of evidence and the "preponderance" standard.

4. Time permitting – open it up to the floor for general questions.

Attendance – Div 1 (ISOs, SISOs, ACD), EB Seniors, Other divisions' ISOs assisting with H-1B adjudication, CFDO, Counsel, QA

1. Discussed "Rules/Standards of Evidence: There are three Standards:

- Preponderance (51%)
- Clear and Convincing
- Beyond Reasonable Doubt

The standard of proof applied in most administrative immigration proceedings is the "**preponderance of the evidence**" standard.

* Refer to Aytes Memo (01/11/06) that discussed Burden of Proof and Standard of Proof for guidance.

2. Discuss the submitted contracts/MSAs vs. the requested employment date.

* Refer to Bobbie Johnsons email sent July 28, 2010 and previous roundtable note dated 10-21-10 for guidance.

Answer to questions on how to grant the validity date:

Officers should look at the totality of the circumstances and other factors such as: reputable companies vs. 10/25/10 companies; history of filings; FID's records...etc. If the petitioner is a reputable company who has had a good filing history, never benched its employees, then the validity date may be determined based on general terms and conditions listed in the submitted MSAs. Officers do not need to send out an RFE asking for a particular document to justify the requested employment date. On the other hands, if officers do not know anything about the petitioner who just happens to be in the 10/25/10 category, or do have reasons to believe that the petitioner may have been an H1B violator (i. e. FID), then they should scrutinize the petition, RFE, limit the requested employment date and possibly deny the case if the petitioner do not establish the validity of the requested employment date.

3. Discuss "Assertion vs. Documentation"

Assertion is the petitioner's statement in the petition. Documentation is evidence that verifies the assertion. Officers do not need to request documentation for every assertion. Again, officers should look at the totality of the evidence and apply the "preponderance" standard. Depend on the petitioner and its nature of business, duties asserted by the petitioner may be acceptable. Again, treat each case based on its own merits.

4. General Questions

Q. Can we request an objective documentary evidence, such as DE6s, payroll records etc., to determine the eligibility because the submitted document is considered "self-serving"?

A. Officers should not mandate a particular document from the petitioner; nor should officers disregard the submitted evidence because it is deemed "self-serving". We may face legal issues if we request a specific type of evidence that is not required by regulations. However, if there are discrepancies found in the record, then officers may be able to request collaborating documents to resolve the discrepancies. In this case, officer should articulate the reasons for requesting a particular document, provided that it is material to the issue identified in the RFE/ITD. In the situation when the availability of "specialty works" is of concern, officers may provide a list of suggested documents in the RFE. In either case, if the petitioner fails to comply and petition is eventually denied, the issues addressed should be related to specialty occupation and/or discrepancies found in the record. Do not deny the petition solely because the petition fails to provide a particular document requested in the RFE.

Q. Restriction on RFE/Denial an "EOS with the same petitioner" petition based on Yates memo's guidance

A. According to Yates memo," a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference". However, upon the request for extension with the same petitioner, if it has been found that (1) there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility, then prior approval of the petition need not be given deference. Officers do have authority to RFE/deny, in the exercise of his or her discretion, the extension request by the same petitioner in the same classification.

In this case, officers should apply the guidance memo wisely. When reviewing the documents submitted with EOS filings, do not second guessing and do not RFE for additional evidence just because the submitted evidence in the record is deemed insufficient according to officers' standard. A material error, a substantial change in circumstances, or new material information must be clearly articulated in a request for evidence or decision denying the benefit.

It is noted that change in work locations and/or end clients is considered "Change in the previously approved employment". This can be treated as same as new employment/change employer filings. Yates memo's guidance does not apply to this type of cases.

Q. Why do we still RFE some big IT consulting companies such as Tata, Infosys, Wipro...etc when they've already had long history of credible filings?

A. While it is true that we do not need to scrutinize petitions filed by certain organizations based on their history of filings. However, depend on the evidence provided in the record, RFE is necessary in some cases. All petitions should be equally treated regardless of the size of the company.

Concern on the out- of- date info on FID record - Joe will bring up this concern on the meeting with the CFDO next week and will request the FID record to be updated.

10/21/2010 - Div 1 Roundtable Summary

Attendance - Div 1 (ISOs, SISOs, ACD), EB Seniors, Div 2 and Div 12 ISOs assisting with H-1B adjudication, CFDO, Counsel, QA

* Discussed I-129 H-1B CAP Exemption
  - CAP exempt - (1) Nonprofit research org or governmental research org
    (2) Institutions of higher education or related or affiliated nonprofit entity
    - EB Seniors readdressed definition of related or affiliated
    - Introduced new "**Affiliation chart**" drafted by Counsel
      - Discussed 3 prongs used to establish affiliation
        - Shared ownership or control by the same board or federation,
        - Operated by an institution of higher education, or
        - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

    (3) Third Party Petitioners employed "AT":
    - Institutions of higher education or a related or affiliated non-profit entity,
    - A nonprofit research organization, or
    - A governmental research organization

* Follow Aytes Memo (06/06/06) regarding affiliation except example from the memo that states that a beneficiary must be working at least 51% of the time at the qualifying institution. The bene does NOT need to spend the majority of their time at the qualifying institution. (Anticipation of a new memo to address this is forthcoming from HQ).

* Cognizant Talking Points:

As a reminder, anything that applies to Cognizant will also apply with other filings. Generally, we should be following the e-mail that was sent in July 2010 regarding "EE-Relationship and Validity Period" which applies not only to Cognizant but to all H1B petitions.

NO RFE

- If the file already contains initial evidence of EE relationship but it does not cover the full validity period requested on the petition. We would limit the validity to the time that can be established. If the evidence is for less than a year. **We will give them one year.**

- Depending on the totality of filing, we can give them the full validity if the contract/end client letter indicates that there is an **automatic renewal clause. An RFE may be issued if the contract/end-client letter is outdated.**

RFE

- Contract/End client letter is outdated.
- End-termination date was clearly **redacted** from the contract/end-client letter
- **No End/termination date** in the contract or end-client letter. Again, case to case basis if we can articulate a reason to believe that the beneficiary will be benched.

A "Cognizant" specific RFE is in O:common. This template addresses both EE and availability of specialty occupation. Use it "when appropriate" since there are filings that will NOT require an RFE.

In addition, you can use the RFE for other petitioners, if appropriate. We've used it for WIPRO, Infosys. The RFE still follows the OCC approved RFE. It does not mandate specific evidence to be submitted. Petitioners are provided with options.

* CFDO - Fraud Referral Process has changed. More information available in the Div 11 O:common folder

- Virtual offices - CFDO created a VO list to assist ISOs with adjudication.

This list is used to identify possible VOs and should not be used as the sole basis for denying a case. The entire totality of the evidence should be used when making a final adjudicative decision.

Follow Up - Next roundtable will be the first week of November. The topics will include EE relationship, specialty occupation work availability, and standard of proof (preponderance of the evidence).

COMPLEXITY AND UNIQUENESS OF THE PROFFERED POSITION

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the alien beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The overarching issue to be discussed in this proceeding is whether the position offered to the beneficiary requires a baccalaureate degree or higher in a specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

INA 214(i)(1) defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

INA 214(i)(2) outlines the fundamental requirements of a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation,

or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is further defined at 8 C.F.R. §214.2(h)(4)(ii) as:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

USCIS will attempt to determine whether the petitioner has established that its particular position is so complex or unique that it can be performed only by an individual with a degree pursuant to the latter portion 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

See individual "Word" documents in this folder for examples of ANALYSES: Block, Copy, Paste, and Edit appropriate text here.

CONCLUSION 1: Use when only evidence provided was for whether degree normally required

The petitioner also failed to establish any of the remaining three criteria: that a degree requirement is common to the industry in parallel positions among similar organizations, or alternatively that the proffered position is so complex or unique that it can be performed only by an individual with a degree; that the petitioner normally requires a degree or its equivalent for the position; or that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties s usually associated with the attainment of a baccalaureate or higher degree.

CONCLUSION 2: General Blanket Denial Statement.

The petitioner has failed to establish that any of the four factors enumerated in 8 C.F.R. 214.2(h)(4)(iii)(A) are present in this proceeding. The petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. The petitioner also has not show that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. Nor did the petitioner present documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions amount organizations similar to the petitioner. It is also noted that the record does not include evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

CSC Discusses Specialty Occupations

Cite as "*Posted on* AILA InfoNet at Doc. No. 00050901 (May 9, 2000) ."

CSC Discussion Group Summary

The AILA representatives were:

Cynthia Lange
Kathrin Mautino
Angelo Paparelli
Nancy-Jo Merritt
Jeff Appleman [Jeff participated in the planning for the meeting, but was unable to attend]
Crystal Williams [AILA National Office]

Dona Coultice, Director of the CSC, led the INS group. The other CSC representatives were:

Howard Dison
Nancy Albe
Ernie _____
Joe Holiday
Sheila Fisher
Blake Odo
Rachel Wilcox
Mary Agnelly

Also present was Pandora Wong, from DOL, Region IX

On March 9, 2000, a group from AILA sat down with a group from the CSC to discuss the definition and treatment of "specialty occupations." The discussion's focus was on trying to clarify the INS thinking that underlies the recent rash of H-1B denials. AILA pointed out the legislative history of the 1990 Act with respect to Congress' intent to expand the interpretation of eligibility for the H-1B category. INS, on the other hand, seems to take a receding view of eligibility. The following observations were made by the INS participants:

Jobs in flux. The CSC takes the view that the nature of many occupations has changed in recent years, such that a number of jobs that once required a degree no longer require one. One INS participant noted that her son, who is only graduating from high school, is being courted by tech companies for computer industry jobs. Some jobs in these categories (such as website designer, computer graphic designer, programmer, etc.) are seen as being performed sometimes by high school or 2-year graduates, and sometimes by professionals with degrees. The point is to convince the CSC that a given job falls on the side of the continuum that requires the degree.

Avoid minimalist/DOT job descriptions. INS participants seem to regard the provision of short and general job descriptions, or of descriptions lifted directly from the DOT, as practically

an invitation to deny. Adjudicators indicated a willingness to "stretch" to approve when they know about the company (Intel and Microsoft were specifically mentioned), but are unlikely to do so for a company they don't know. Also, there is a constant evolution and changeover of adjudicators, meaning that each new adjudicator is not necessarily informed by past knowledge obtained at the CSC.

Identify which criteria under 214.2(h)(4)(iii)(A) you are relying on. You must demonstrate that one of the four alternative criteria for proving the position is in a specialty occupation is met. Spell out which categories you are trying to prove, and provide evidence to back up the assertion. If the adjudicator thinks you've proven the case in any one category, the petition will be approved. If the adjudicator thinks you are "getting there" with respect to at least one category, an RFE would be issued. If the adjudicator doesn't know which category you're trying to prove, the case will be denied (or a "kitchen sink" RFE will be issued). "The four areas are optional; we only need one, and if we can't tell which one you are relying on, we may choose one that doesn't meet the requirements." The example given was "web page designer." "Our children design web pages. What is it about your requested web page designer's duties that places that job in one of the four categories?" Graphic designers were mentioned again in this context, as requiring only a two-year degree. If you have a petition for a graphic designer, you need to point to which of the four categories supports the specific job in the petition. [During this part of the discussion, the supervisors were nodding affirmatively, clearly in strong agreement. The job title alone is not sufficient.]

If using "the employer normally requires a degree" criterion, take extra care. The adjudicator has to be convinced that the degree is more that an employer preference. (Example given: Everyone that the employer hires as a taco vendor has a degree. That doesn't mean that the job truly requires a degree.) INS doesn't like to adjudicate based on the job definition, but instead looks to what is so specialized about the job. INS will look elsewhere to see if a job is really a specialty occupation, such as the employer's internet web site regarding what jobs are open and what is advertised on the web as requirements (therefore, if you are presenting requirements different from what's on the employer's website, you need to explain the differences). Adjudicators also feel that there are people working in the Service Center who "are very knowledgeable" about certain occupations, so the adjudicators may check with them.

How to prove that the employer normally requires a degree. The CSC strongly prefers that the employer prove the educational background of those in the job now, rather than in the past. If there are not others in the job now, the background of the last incumbent is helpful (if the last incumbent failed in the job because he didn't have a degree, this can be helpful to the case). If you don't affirmatively address the background of the last person in the job, an RFE may ask you to address it.

Where jobs that appear to be alike have different levels of difficulty. It was acknowledged that some apparently similar jobs within an employer's business can have different levels of sophistication, and thus different levels of requirements. It can help to point this out and expand on it. For example, if an employer has a grouping of junior level jobs that perform some of the less complex duties associated with a particular occupation, indication of this can help to prove that there are other jobs that concentrate on the more complex duties: in other words, simpler

duties are left to the positions that don't require a degree, while the more senior people in the same apparent occupation would need a degree because they are not involved in those simpler duties.

Proving that the degree requirement is common to the industry. To show that the companies you are using for comparison are in the same industry, present evidence of how you are defining the industry. Unlike the DOL prevailing wage context, it is fair here to look at such factors as company size and geographic location—"companies of similar size and scope" is an acceptable standard to INS.

All occupations are on the table. There is no occupation that one can assume will be considered a specialty occupation just because it always has been. "Predictability creates an issue," according to the Service Center Director. Industries are changing rapidly, and she wants adjudicators to perform real analysis of job duties, rather than just looking at job titles. For example, a job may be called Engineer, but if too many duties are really those of a technician, the job is not a specialty occupation.

Role of precedent decisions and adverse information. Adjudicators noted their belief that there will be times that a precedent decision will be deemed outdated and thus not followed. AILA pointed out that precedent decisions are binding unless INS announces that it will contest the precedent. AILA also reminded the INS of its obligation to provide evidence of adverse information leading to a denial.

The DOT's SVP is not a factor. Pandora Wong discussed how the SESAs use the DOT and OOH primarily to compare wage information. She said that the DOL does not question the SVP level once the SESA has determined a wage level. There had been some concern by practitioners that the CSC was relying heavily on the OOH. The CSC staff was derisive of the use of DOT job descriptions, and also of the use of the SVP. Mary Agnelly said that INS had been advised that the SVP "does not serve our purposes." The AILA group pressed the SVP as a useful guide to educational level, as having been prepared by a sister agency after extensive research and surveys. The CSC staff did not seem receptive.

Smaller companies are questioned more. If a company has only a handful of employees, it is more likely that the CSC will have questions (particularly if the job duties are straight from the DOT). You should give evidence that the company really needs someone in this position, such as showing volume of transactions. A case in which a company had four H-1B petitions showing salaries that together exceeded the company's gross income was given as an example of a questionable situation. Situations such as upcoming IPOs, private financing, and positioning for selling the company were pointed out as possible, and increasingly frequent, scenarios explaining such phenomena. INS suggested that the documentation include such information to overcome these potential problems. In response to sensitivities about confidentiality in such circumstances, INS suggested the petitioner either take its chances or wait until after the situation can be made public to petition for the person. AILA noted that there is an Executive Order regarding minimization of disclosure that provides guidance in this regard.

The relationship between the company's business needs and the position is crucial. A small company with five or six employees requesting a full-time accountant should be prepared to demonstrate the need for the accountant, such as showing a high volume of transactions. Differentiate the company's need from what an outsider might expect is needed. The example given by the CSC was a successful H for a gardener/anthropologist at Williamsburg.

INS feels scrutinized on these issues. The Service Center Director indicated that she feels under considerable pressure from Congress and the press with respect to letting "fraud" go undetected. At the same time, she is starting to feel pressure from the other side (noting in particular the Lofgren hearing) about unwarranted denials and delays.

Problems in sorting out fraud. Adjudicators noted that a lot of the "kitchen sink" RFEs are attempts to sort out potential fraud at the adjudications level so that it does not have to send the case to Investigations. It was acknowledged that these generalized laundry lists are symptoms of the adjudicators being reluctant to say what is really bothering them about the case for fear that they will give away what cues them to look deeper. AILA members suggested that the RFEs be more directed, perhaps asking for evidence of the company's bona fides and suggesting some documentation that could satisfy the INS' suspicions, rather than sending long lists that don't state the problem but seem to require every piece of documentation listed, down to the fire escape plan. INS noted that background material on the company filed up front can help, particularly for those companies that are not household names.

Proving equivalency. The CSC is more apt to recognize experience as equivalent to a degree if there is some education to back it up. If there is only a bare 12 years of experience, it is particularly important to show that the experience was progressive and to show such evidence as the qualifications (i.e., degree) of the person's supervisors in those jobs. Letters from the prior employers can be particularly helpful.

Proving the degree requirement is specialized. INS reminded that the job doesn't just have to require a degree—it must require a degree in a specialized field. One question that is often asked by INS is whether the degree can be obtained in the U.S. INS pointed to fields (such as textiles) where U.S. programs are usually only 2-year. The battle will be more uphill to show these are specialty occupations. College catalogues from U.S. schools showing the existence of the 4-year course of study can be helpful, particularly for fields that are rare in the U.S. For more common fields in which the programs tend more to be 2-year, multiple college catalogues would be needed to be persuasive.

Adjudicators' pet peeves. When the adjudicators were asked what really drives them crazy, some answers were: when the job title doesn't reflect the duties described; when the support letter just says "please refer to the OOH"; when the Form 1020 is completed but the answers only say "see enclosed"; on EOS's, the major field of study, highest degree completed and salary are not stated; on the supplement when the prior periods of stay question is not completed.

Special Assessment

(U//FOUO) Criminal Exploitation of H1B Specialty Occupation Visas

23 October 2006

Homeland Security

Office of Intelligence and Analysis
Homeland Security

Special Assessment

(U//FOUO) Criminal Exploitation of H1B Specialty Occupation Visas

23 October 2006

(U) Attention: Federal Departments and Agencies, State Homeland Security Advisors, and State and Local Law Enforcement.

(U) Distribution Notice: Requests for further dissemination must be approved by the DHS/Office of Intelligence and Analysis (I&A) Directorate—Production Management at IA.PM@hq.dhs.gov.

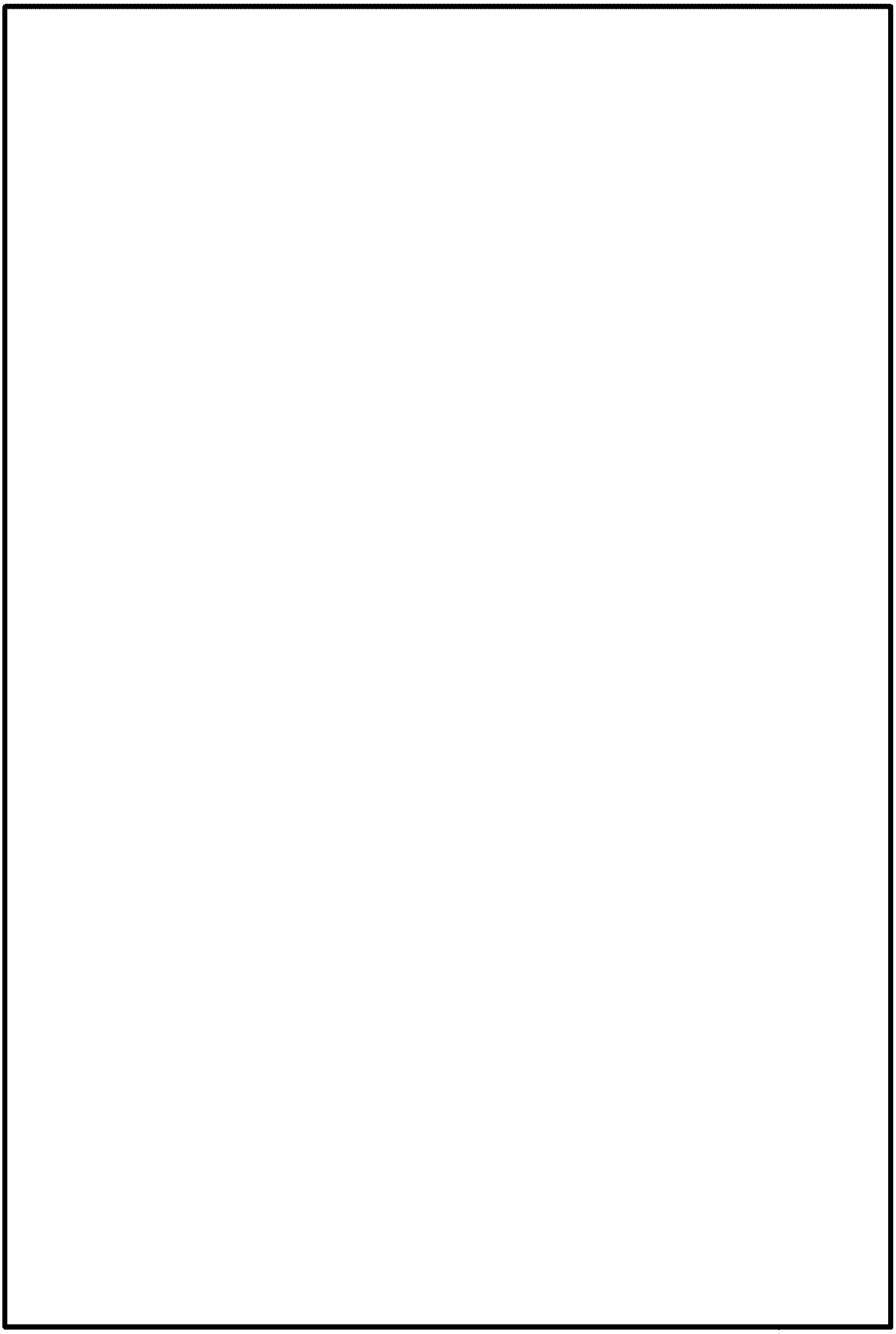
(U) Scope

(U//FOUO) The purpose of this Special Assessment is to provide information on the potential for exploitation of the H1B Specialty Occupation visa to fraudulently gain entry into the United States.

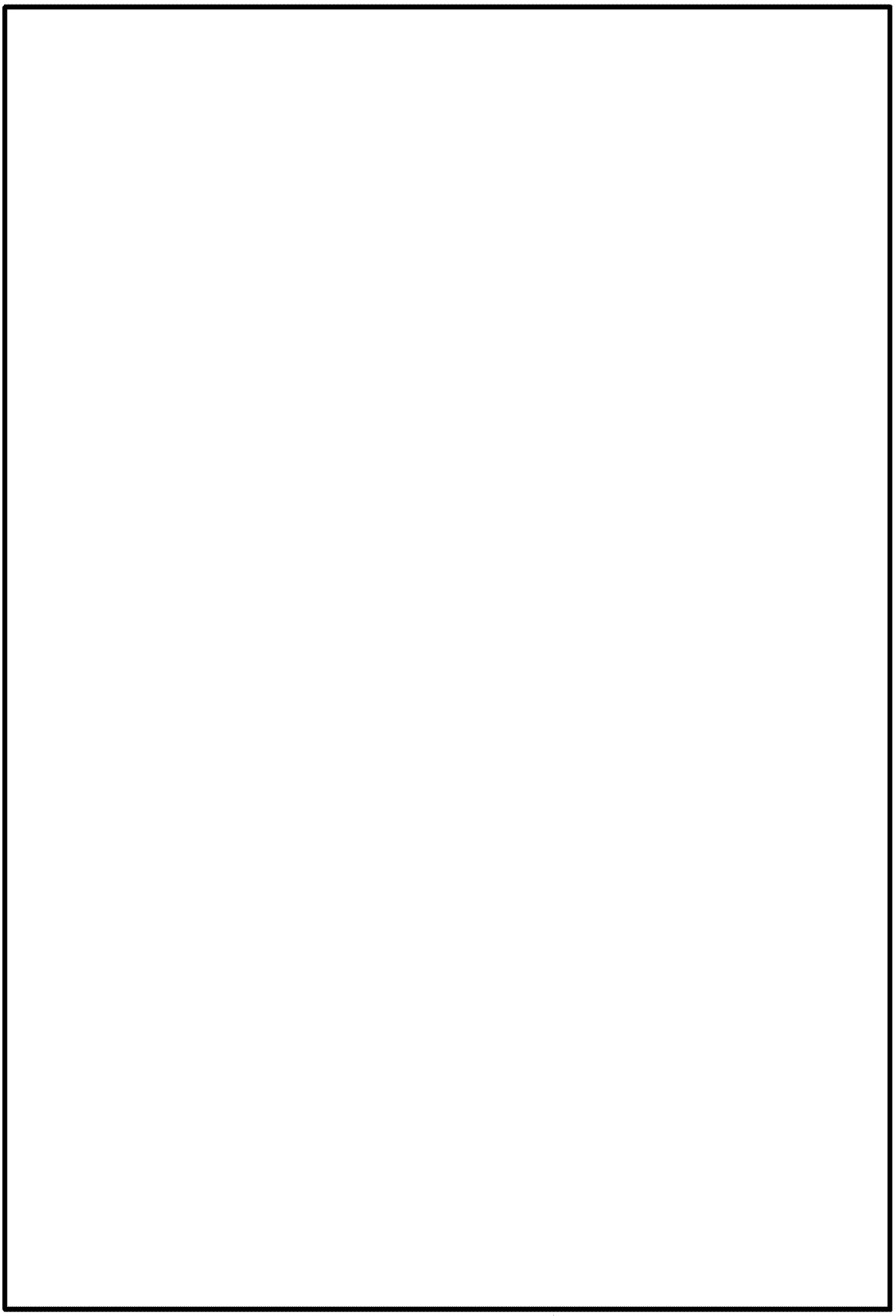
(U) Key Findings

(b)(7)(e)

(b)(7)(e)

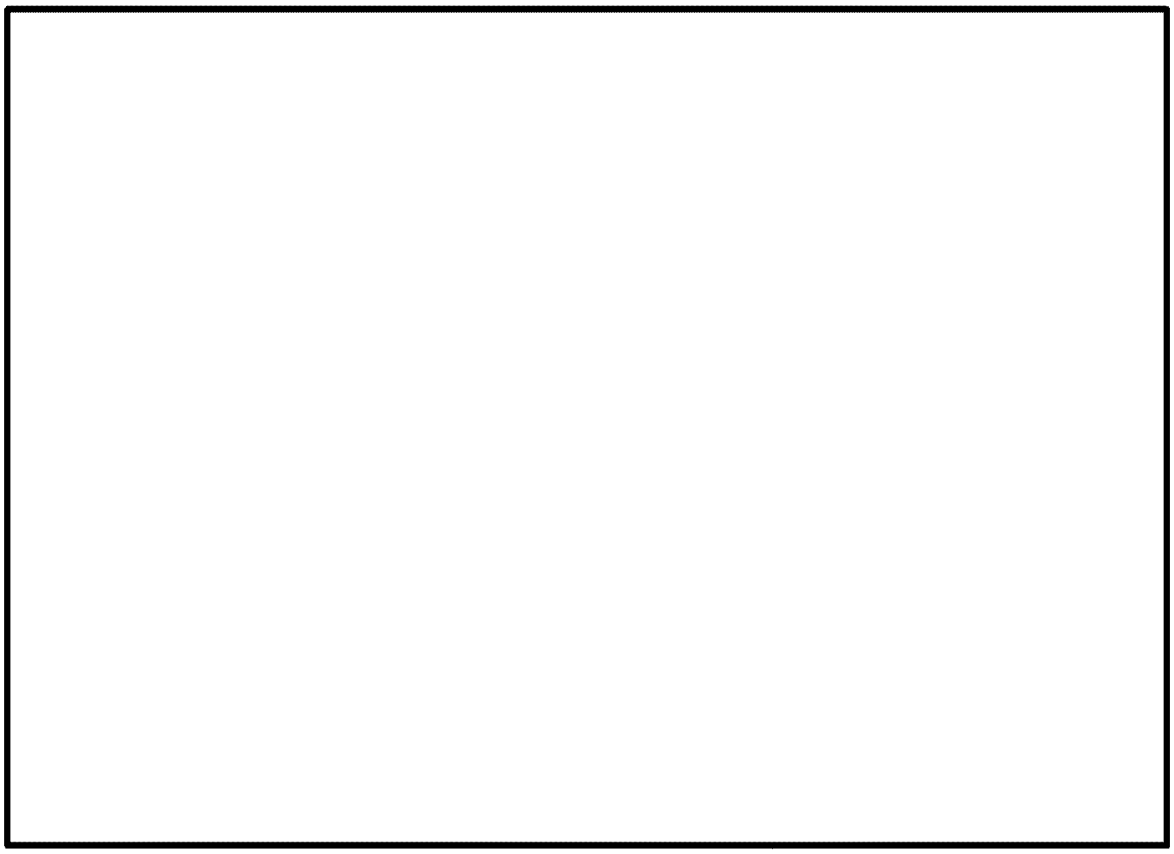


(b)(7)(e)



(b)(7)(c)

(b)(7)(e)



(b)(7)(e)

SAMPLE ANALYSIS:

- Actual job duties determine specialty occupation.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000).

To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id at 388. *See also* Matter of Michael Hertz Associates 19 I. & N. Dec. 558 (Comm'r 1988) (The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility).

ALIEN'S DEGREE MUST RELATE TO THE POSITION OFFERED.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

You filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The [first, second, third, next, only] issue to be discussed is whether you have established that the beneficiary is qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is directly related to the position being offered.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)....

INA 214(i)(1) defines the term "specialty occupation" as one that requires, among other elements: "(B) attainment of a bachelor's or higher degree **in the specific specialty** (or its equivalent) as a minimum for entry into the occupation in the United States." (Emphasis added).

The term "specialty occupation" is further defined at 8 C.F.R. 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor...and which requires the attainment of a bachelor's degree or higher **in a specific specialty**, or its equivalent, as a minimum for entry into the occupation in the United States. (Emphasis added).

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. 214.2(h)(4) (iii)(C) further lists four criteria, one of which must be met, for a beneficiary to qualify to perform services in a specialty occupation. Essentially, the beneficiary must:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

According to the statute and regulations the H-1B classification is not established merely by the beneficiary's possession of a baccalaureate degree (or equivalent). It must also be demonstrated that there exists a nexus between the nature of the beneficiary's degree (or equivalent) and the position duties proposed by the petitioner. The required degree must

be in a specific specialty, that is, in a discipline that contains a body of highly specialized knowledge that is necessary for performance of the position. In this context, USCIS interprets "degree" in all of the four criteria of 8 C.F.R. 214.2(h)(4)(iii)(A) as one in a specific specialty. Therefore, unless it is in a specific specialty, a degree or degree-equivalent requirement will not qualify a position as an H-1B specialty occupation.

USCIS' precedent decisions have confirmed that a generalized degree, such as that in business administration, absent specialized experience, is insufficient to qualify an alien beneficiary in a specialty occupation: Matter of Ling, 13 I. & N. Dec. 35, 37 (a petitioner with a business administration degree must establish a particular area and occupation in the field of business administration in which he is engaged or plans to be engaged and must also establish that he meets the special academic and experience requirements of that designated activity, as a prerequisite to a determination as to professional status."); Matter of Shin, 11 I. & N. Dec. at 688 ("The mere acquisition of a degree or equivalent experience does not, of itself, qualify a person as a member of a 'profession.' The knowledge acquired must also be of nature that is a realistic prerequisite to entry into the particular field of endeavor."); Matter of Asuncion, 11 I. & N. Dec. 660 (Reg. Comm. 1966) (Traits common to a "professional" include recognition as a member of these professions normally requires the successful completion of a specified course of education on the college or university level, culminating in the attainment of a specific type of degree or diploma); Matter of Michael Hertz Associates, 19 I. & N. Dec. 558 (Comm'r 1988) (Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility).

Furthermore, USCIS' interpretation has been upheld in numerous federal court decisions as a reasonable interpretation that is consistent with section 214(i)(1) of the Act. See Tapis International v. INS, 94 F.Supp. 2d 172, 175 (D.Mass. 2000) ("INS was not unreasonable in interpreting the guidelines to demand that an employer require a degree in a specific field. Otherwise a position would qualify if any bachelor's degree were required"); Hird/Blaker Corporation v. Slattery, 764 F.Supp. 872, 875 ("First, the degree must involve a 'precise and specific course of study which relates directly and closely to the position in question.' An occupation that requires a general degree such as business administration or liberal arts, therefore, is not a 'profession.'"); Shanti, Inc. v. Reno, 36 F.Supp.2d 1151 (D.Minn. 1999) (An alien who possessed a degree in business administration but had no previous experience in field of restaurant management was not qualified to perform services in a specialty occupation, and that the position of restaurant manager was not a "specialty occupation"); All Aboard Worldwide Couriers, Inc. v. Attorney General, 8 F.Supp.2d 379 (S.D.N.Y. 1998) (No abuse of discretion where petitioner unable to establish that its competitor organizations require job candidates to have a B.A. in a specific, *specialized* area).

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

Your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

SAMPLE ANALYSIS 1of 4:

- Degree unrelated to the position offered.

See shell in the "Equivalency" folder: "Forgn Ed Eval, Unrelated Field." This should be coupled with an analysis of whether the beneficiary possesses the equivalent of a degree in the appropriate field based upon work experience.

SAMPLE ANALYSIS 2 of 4:

- Position is an amalgam position with no specific specialty;
- none of the duties appear to be in a specialty occupation.

Upon review of the record, the proffered position appears to be that of events planner, with major responsibilities in contract negotiation and monitoring. As such it is an amalgam position containing elements of a short-term contract specialist, a hotel or travel manager, and an events planner. The Handbook does not contain a classification that is analogous to the proffered position.

In addition, none of the elements of the proffered position appear to require a minimum of a baccalaureate degree in a specific specialty for entry into the position. For example, if the Handbook's lodging manager classification is viewed as related to the proffered position, this classification does not require a baccalaureate degree in a specific specialty: "Hotels increasingly emphasize specialized training. Postsecondary training in hotel or restaurant management is proffered for most hotel management positions, although a college liberal arts degree may be sufficient when coupled with related hotel experience." Without more persuasive testimony, you have not established the first criterion of 8 C.F.R. 214.2(h)(4)(iii)(A)

SAMPLE ANALYSIS 3 of 4:

- Position is a combination of jobs with no specific specialty;
- none of the duties appear to be in a specialty occupation.

You are an Arizona corporation that operates special sports and leisure industry events on behalf of a variety of clients. You have three employees and a gross annual income of $1,400,000. You seek to employ the beneficiary as a Director of Operations for a period of three years.

In correspondence supporting the initial petition, you stated that the proffered position would be responsible for the development, application and management of all software and computer systems required by the employer for all company produced events. The director of operations would be required to interface and coordinate all corporate efforts with individual client's management and professional staff in areas of marketing, advertising, event management, scoring and software coordination. You indicated that, in order to perform the duties of the position, an individual would need a bachelor's degree in marketing, leisure management, computer science/marketing, or its equivalent. You stated that these responsibilities required a person who had completed college level English and Communication course work. Completion of college level public relations and marketing courses was also a necessity to help the director of operations address various audiences in an appropriate manner.

The proffered position requires a wide range of skills necessary for the planning and completion of events involving potentially thousands of participants. The skills required, however, appear to be general managerial skills that can be obtained through education or past work experience. There is no requirement that the education conform to a specific specialty. Indeed, it appears that any number of educational pursuits, and/or work experiences would suffice, provided that supporting course work include various courses specific to the proffered position. You have, therefore, not met the first criterion listed above.

SAMPLE ANALYSIS 4 of 4:

- Alien possesses a degree but not in a field indicated by the OOH.

Your organization is an environmental engineering business. You seek to employ the beneficiary as a water quality controller.

Upon review of the record, you have not established that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a specific specialty. The proffered position is similar to that of an environmental scientist. The Department of Labor's Occupational Outlook Handbook (Handbook), 2012 - 2013 edition, finds that environmental scientists require at least a bachelor's degree in hydrogeology; environmental, civil, or geological engineering; or geochemistry or geology. The beneficiary holds a baccalaureate degree in "Natural Resources Engineering (Fisheries)" and a master's degree in "Fishery Management" from Iranian institutions. An evaluator from the

Academic Credentials Evaluation Institute, Inc. found the beneficiary's education equivalent to a Bachelor of Science in Fisheries degree and a Master of Science in Fisheries degree as awarded by regionally accredited U.S. institutions of higher education. The record, however, contains no evidence that the beneficiary's degrees in a fisher-related field qualify him as an environmental scientist, a position that requires at least a bachelor's degree in hydrogeology; environmental, civil, or geological engineering; or geochemistry or geology. For this reason, the petition may not be approved.

As such, the beneficiary is not qualified for classification as a specialty occupation worker.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

CERTIFIED LCA DOES NOT EQUAL SPECIALTY OCCUPATION

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

· To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. ·

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The [first, second, third, next, only] issue to be addressed is whether the mere issuance of a certified labor condition application qualifies the proffered position as a specialty occupation.

RULE:

101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

INA 214(c)(1) states, in part:

> The question of importing any alien as a nonimmigrant under section 101(a)(15)(H), (L), (O), or (P)(i) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant . . .

INA 212(n)(1) states in part:

> No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:
>
> (D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(4)(i)(B)(2) states:

> Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom the H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in 214(i)(2) of the Act.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

The petitioner contends that the proffered position is a specialty occupation by virtue of having obtained a certified labor condition application from the United States Department of Labor ("USDOL").

However, as provided in 8 C.F.R. 214.2(h)(4)(i)(B)(2) above, certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. Instead, it states that the director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. In the present case, the evidence is insufficient to establish that the position involves a specialty occupation.

CONCLUSION:

Consequently, the petitioner's contention that the issuance of a certified labor condition

from the USDOL, without more, satisfies the petitioner's burden of proof in establishing that the proffered position constitutes a specialty occupation is without merit.

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

SAMPLE ANALYSIS 4:

- Contract between petitioner and client sufficiently detailed, but proposed job duties are not in a specialty occupation using 4-prong analysis.

The petitioner is a staffing solutions, business systems development, and marketing business with 10 employees and a gross annual income of $500,000. It seeks to employ the beneficiary as a test engineer for a period of three years.

The record contains a summary of the terms of employment indicating that the petitioner has hired the beneficiary and will pay the beneficiary's salary. Even though the documentation may demonstrate that the petitioner and beneficiary share an employer-employee relationship, as with employment agencies as petitioners, USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to absurd results. If USCIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. Id at 388. *See also* Matter of Smith, 12 I. & N. Dec. 772 (D.D. 1967), it was concluded that a firm which pays the beneficiary directly and guarantees full-time employment is the actual employer. *See also* Matter of Ord, 18 I. & N. Dec. 285 (Comm'r 1982); Matter of Artee Corporation, 18 I. & N. Dec. 366 (Comm'r 1982); Matter of Walsh and Pollard, 20 I. & N. Dec. 60 (BIA 1988), citing Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987).

Counsel submits a contract that the beneficiary would be rendering test engineering work at Compunet Systems Solutions, a business that has a contract and work order request form with the petitioner. In this contract, dated January 2, 2001, between the petitioner and Compunet, Compunet is described, in part, as follows:

> Compunet is a provider of systems, networking, software, and hardware installations and development and employs a staff of network engineer, systems analysts, test engineers, electrical engineers and other technical staff on a per project need.

This contract includes a "Job Order Request Form" with the following job description for a test engineer:

> Perform a variety of engineering work in electronics gadgets and components; inspect, test, repair, maintain and service telecommunications; develop operational, maintenance and testing procedures for electronic products, components, equipment and systems; perform general monitoring and troubleshooting in production lines; provide support to field technicians, cable

locations, direct and coordinate activities concerned with manufacture, construction, installation, maintenance, operation, and modification of electronic equipment; test system operations using testing equipment and diagnose malfunctions; perform other functions related to engineering work using engineering education background engineering work using engineering education background and skills and may assist in inspecting electronic equipment, instruments, product and systems to ensure conformance to specifications.

The proffered position appears to be primarily that of a technical support specialist. In its Occupational Handbook, 2002 - 2003 edition, the Department of Labor describes the position of a technical support specialist, in part, as follows:

[OOH DUTIES]

Thus, while there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs, while other jobs may require only a computer-related associate degree. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not demonstrated that is client has, in the past, required the services of individuals with baccalaureate or higher degrees in engineering, for the offered position. Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to its client. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

SAMPLE ANALYSIS 2

Events Planner

- Detail-oriented position does not equal more specialized or complex.

In response to USCIS' Request for Evidence, Counsel clarified the original duties of the proffered position. While this clarification of duties does indicate that the proffered position is detail-oriented, they do not necessarily establish that the proffered position is any more specialized or complex than any other events planning job. Without more persuasive evidence as to the specialized nature of the offered job, the petitioner has not met the fourth criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

SAMPLE ANALYSIS 5:

- Duties described are common to other similar positions

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The duties detailed by the petitioner include: research and review of medical literature to be summarized for the dentist; and supervision of patient billing and insurance filings; are not so unique or complex as to require a baccalaureate level of education to perform them. They are routinely performed by individuals not holding bachelor's degrees in any specific specialty. The duties may be performed with the attainment of knowledge provided in various educational programs, or through training and/or job related experience.

SAMPLE ANALYSIS 3:

- Job duties indicate entry-level position

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

The position description states that the beneficiary would perform "only delegated, selected or routine task[s] . . . under close supervision." This indicates that the position is not particularly complex or unique and the petitioner submitted no evidence to the contrary.

GENERAL MARKETPLACE CONSIDERATIONS NOT RELEVANT TO A DETERMINATION OF SPECIALTY OCCUPATION

INTRODUCTION: COUNSEL ASSERTS THAT MARKETPLACE REQUIRES MANAGERS TO HAVE A DEGREE

Counsel makes an "observation" to the effect that, with regard to the H-1B specialty occupation status of management positions, USCIS policy and adjudications are inconsistent with marketplace reality:

> It is the observation of this Attorney of Record that (1) the positions taken by the USCIS are inconsistent with reality and current conditions in the U.S. business market place concerning the area of "degree holding and non-degree persons holding management positions" and (2) Immigration and Naturalization (INS) employees acting in the name of the Director of the Service Center in following guidelines, directives, Operations Instructions, Headquarters' memos concerning "complex and specialized occupations."
>
> But what is the real question to be reviewed? Most people finishing high school go on to seeking higher education. Thirty/forty years ago the median standard of education was a high school diploma. Today, in most non-government jobs, the basic entry requirement is either an associate or bachelor's degree. In the world marketplace the U.S. is a white collar job market. You just don't find much on the job training any more. A great majority of our country's low end jobs have gone abroad. Organizations like **Panda Express** fast food establishments set nationwide standards by requiring their managers to have at least a bachelor's degree. The standard set by the USCIS in the area of management jobs needs to be reviewed even before it looks to the area of specialized and complex duties. It is just not in tune with the marketplace. Today, a manager of human resources must deal with state and federal tax, health, environmental and safety problems. He/she also has to deal with on the job personality social and financial problems, and numerous other areas that schooling has exposed them to. Most non-schooled persons would not be hired by industry to management jobs because of the liability and litigation issues alone. Revisit the marketplace and you will rarely find a non-government establishment hiring a non-degreed person to a management position.

RULE:

USCIS focuses only on the evidence of record, and the evidence of record does not substantiate this observation of counsel. Mere assertions of counsel without documentary support do not constitute evidence. Matter of Obaigbena, 19 I. & N. Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 506 (BIA 1980); Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983). USCIS must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. Matter of Izumii, 22 I. & N. Dec. 169 (Assoc. Comm'r, Examinations 1998). Accordingly, counsel's "observations" here and elsewhere in the record have no evidentiary value, although they

may serve to focus the USCIS' review on specific issues of concern to counsel. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

You (the petitioner) filed a Form I-129, Petition for a Nonimmigrant Worker, with U.S. Citizenship and Immigration Services ("USCIS") to classify the beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA").

According to Form I-129, your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $[amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

For the reasons set forth below, your petition for H-1B classification is denied.

ISSUE

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

Section 101(a)(15)(H)(i)(b) of the INA defines an H-1B nonimmigrant as an alien who is coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the INA defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the INA states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The regulations at Title 8, Code of Federal Regulations ("8 C.F.R.") § 214.2(h)(4)(ii) state, in pertinent part:

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

You must meet all of the applicable statutory and regulatory provisions to establish eligibility for the benefit sought.

The title of the offered position does not determine whether a particular position qualifies as a specialty occupation. USCIS also considers the duties of the offered position and nature of the petitioner's business operations. Each position is evaluated based upon the nature and complexity of the duties to be performed for the specific employer. For a position to qualify as a specialty occupation, the duties of the position must primarily involve specialty occupation work.

The beneficiary's credentials are relevant only when the offered position is found to qualify as a specialty occupation. The fact that a beneficiary holds a bachelor's or higher degree in a field of study related to the offered position is not relevant when determining if the evidence establishes that the offered position qualifies as a specialty occupation.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

OPTIONAL - RFE - Read closely and add or delete info if necessary: During the adjudication of this petition, USCIS sent you a request for evidence (RFE) notifying you that additional information/evidence was required. In the RFE, USCIS provided you with a non-exhaustive list of documentation to submit in support of your assertion that the position qualifies as a specialty occupation.

OPTIONAL - Position Description:

You describe the duties of the offered position as follows:

> If the adjudicator feels it is essential to the analysis, the duties or a summary of the duties may be described here. But, it is not absolutely necessary.
>
> If you quote the petitioner's description of duties, indent 0.5" from Left & Right margins.

END OPTIONS

Begin discussion of the four criteria

When attempting to establish whether the position qualifies as a specialty occupation, you must show that the position satisfies the applicable statutory and regulatory provisions, including one of four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The four criteria are:

(1) **A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position**

On the Form I-129, you indicated that you seek the beneficiary's services as a [Insert Nursing Type Position]. However, in reviewing whether the offered position qualifies as a specialty occupation, the duties to be performed are determinative rather than the job title. In this case, the duties of the offered position are consistent with those of a Registered Nurse (RN).

According to the U.S. Department of Labor's *Occupational Outlook Handbook*[1] ("OOH") and the State Board of Nursing (Board), most Registered Nurse positions in [Name of State] do not normally require a U.S. bachelor's or higher degree in nursing, or its equivalent, as the minimum for entry into these particular positions.

The OOH describes the training and other qualifications required for a [Registered Nurse], in part, as follows:

[Cite the training and other qualifications as provided in the OOH.]

The OOH and the Board recognize that there are three general paths for becoming a registered nurse, i.e., a Bachelor's of Science degree in Nursing (BSN), an Associate's degree in Nursing (ADN), or a diploma from an approved nursing program. Further, licensed graduates of any of the three types of educational programs (BSN, ADN, or diploma) qualify for entry-level positions. The OOH and the Board do not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into these particular positions.[2]

You have not established that a bachelor's or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. Thus, you have not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

> **(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;**

USCIS will discuss this criterion in two parts as follows:

> **2a. Degree Requirement is Common to the Industry in Parallel Positions among Similar Organizations**

To satisfy this prong, you must establish that a requirement of at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions

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[1] USCIS recognizes the OOH as an authoritative source on the duties and educational requirements of the occupations that it addresses. For more information on registered nurses, see the online version of the OOH at http://www.bls.gov/ooh/healthcare/registered-nurses.htm.

[2] Further, you have not provided probative evidence from another objective, authoritative source that satisfies this criterion of the regulations.

that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the OOH or the Board reports that the industry requires a bachelor's or higher degree in a specific specialty, or its equivalent; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The conclusions about a degree requirement for a [Registered Nurse] as shown in the OOH and the State Board of Nursing were discussed in the previous section.

2a. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have submitted no evidence to demonstrate that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the nursing field in parallel positions among similar organizations. Accordingly, you have not established that the offered position satisfies this criterion of the regulations.

2a. SAMPLE ANALYSIS 2 OF 4 - Job listings submitted but insufficient:

Although you submitted [...one...two...twelve...thirty...etc....] job listings, the listings you provided are insufficient to establish that a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.

Option 1 of 4 - Employers not recognized: Further, it is difficult to ascertain whether the employers who published these announcements are similar to your organization.

Option 2 of 4 – Employers recognized but unlike the petitioner: Also, the job listings are from employers dissimilar to your organization.

Option 3 of 4 - Job Announcements DO NOT specify a required educational background:

More importantly, while they all require a bachelor's degree, the majority of the announcements do not specify how the claimed requirement of a degree is directly related to the duties and job responsibilities of a particular position.

Option 4 of 4 - Job Announcements DO specify an educational background but do not limit the field of study:

Although some of the announcements do specify an educational background, they do not limit the field of study to particular fields that are directly related to the offered position, such as [Choose Or Add: nursing], but instead allow for a wide variety of fields of study including [Choose Or Add:...liberal arts, ...sociology,...psychology, ...literature, ...journalism, ...philosophy ....advertising ...public affairs ...public speaking ...English ...political science ...and ...creative and technical writing... and so on]

2a. SAMPLE ANALYSIS 3 OF 4 - No documentation submitted from industry-related professional associations, firms, or individuals:

In addition, you submitted no documentation demonstrating that an industry-related professional association requires a bachelor's degree or higher in a specific specialty, or its equivalent, for entry into the field. Further, you did not submit letters or affidavits from firms or individuals in the [nursing] industry attesting that such businesses routinely employ and recruit only degreed individuals. Also, no other evidence was submitted that is sufficient to establish that the degree requirement is common to the industry in parallel positions among similar organizations. Accordingly, you have not met this criterion of the regulations.

2a. SAMPLE ANALYSIS 4 OF 4 - Documentation was submitted from industry-related professional associations, firms, or individuals but does not specify that a baccalaureate degree in a specific specialty, or its equivalent, is required:

Although the record contains letters from [...one...two...five...etc.] [Choose Or Add: representatives of businesses and/or professors ...etc.] who state that a bachelor's degree is required for [Insert Job Title] positions, none of these individuals specify that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the position.

[Optional:] Further, the record does not include sufficient evidence to substantiate that the business representative(s) and/or professor(s) are associated with your industry.

The record does not establish the individuals' qualifications or their experience giving such opinions. Further, the individuals do not provide probative evidence establishing any particular research materials used in order to support the conclusions regarding the academic requirements for the position (e.g., statistical surveys, authoritative industry publications, or professional studies).

[Final Conclusion for all Sample Analysis in Criterion 2a:]

As such, you have not submitted sufficient documentation to show that the degree requirement is common to the industry in parallel positions among similar organizations.

2b. Complexity or Uniqueness of the Offered Position.

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, you may show that the offered position is so complex or unique that it can be performed only by an individual with a degree. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

2b. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have not submitted any documentation to establish that this position involves duties that are so unique or complex that only an individual with at least a bachelor's degree in a specific specialty, or its equivalent, could perform them.

2b. SAMPLE ANALYSIS 2 OF 4 - Described duties are generic in nature:

You submitted a breakdown of the job duties for the offered position along with the percentage of time that the beneficiary will spend on the various duties. However, the submitted list of duties is generic in nature and provides no further detail as to the unique or complex nature of the offered position. You have not sufficiently demonstrated complexity or uniqueness as an aspect of the offered position. Further, the evidence is not sufficient to establish that the offered position is more unique or complex than other similar positions within the same industry that can be performed by individuals who do not possess a bachelor's or higher degree in a specific specialty, or its equivalent.

Without additional evidence showing the unique or complex nature of the position, or how this position differs from other similar positions within the same industry, you have not established that the offered position satisfies this criterion of the regulations.

2b. SAMPLE ANALYSIS 3 OF 4 - Offered position not as complex as listings:

You have not demonstrated that the job duties of the offered position are as complex as those listed in the advertised positions. For example, the duties of the job listings include [List THOSE Duties from the job listings that are more complex than the duties of the offered position: e.g...."budgeting, training, supervising staff, monitoring and managing a national, regional, or local programs, etc.,...."]. These duties are more complex and/or unique than those of the offered position.

2b. SAMPLE ANALYSIS 4 OF 4 - Assertions of counsel do not constitute evidence:

You assert that the position is complex and unique. However, you have not submitted documentary evidence to support this statement. Mere assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I& N Dec. 503, 506 (BIA 1980). USCIS

must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi,* 22 I& N Dec. 169, 185 (Assoc. Comm'r 1998). Without additional evidence, you have not established this criterion.

[Final Conclusion for all Sample Analysis in Criterion 2b:]

You have not established that the offered position involves duties that are either so complex or unique that only an individual with a degree in a specific specialty could perform them.

(3) The employer normally requires a degree or its equivalent for the position;

(3) SAMPLE ANALYSIS 1 OF 3 - New Position - No evidence provided:

[Choose One: You have not hired anyone previously for the offered position/You had no evidence to present on this issue, as this is the first person you intend to employ in the offered position.] As such, you have not established this criterion.

(3) SAMPLE ANALYSIS 2 OF 3 - Long-standing Position – No evidence submitted to show it normally requires a degree:

Although your organization has been established since [Year], you have not demonstrated that you have, in the past, required the services of individuals with bachelor's degree or higher in a specific specialty, or its equivalent, for the offered position. You assert that your job announcements specified a minimum of a bachelor's degree in the field(s) of [nursing.].

However, the record contains no corroborating documentation, such as copies of your job announcements, a list of the names of your past [Registered Nurses], proof of their employment, or evidence of their educational backgrounds.

You have the burden of proof to establish eligibility for the requested immigration benefit. Making assertions without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I& N Dec. 190, 194 (Reg. Comm'r 1972).

(3) SAMPLE ANALYSIS 3 OF 3 - Position does not meet the statutory definition of specialty occupation:

You claim to have hired only individuals with a bachelor's degree or higher in [nursing] for the offered position. However, the evidence has not established that the position requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent).

Therefore, even though you claim that you normally require a bachelor's degree for this position, the position still does not require a bachelor's or higher degree in a specific specialty, or its equivalent, and therefore it does not qualify as a specialty occupation. *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (stating that an employer may not use token bachelor's degree requirements to mask the fact that a position in general is not a specialty occupation). *See* 214(i)(1) of the INA and 8 C.F.R. § 214.2(h)(4)(ii).

[Final Conclusion for all Sample Analysis in Criterion (3):]

As such, you have not submitted sufficient documentation to demonstrate that you normally require at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

(4) SAMPLE ANALYSIS 1 OF 2 - No evidence submitted – Petitioner's unsubstantiated assertions are insufficient to establish specialized & complex duties:

The record contains insufficient information to establish the specialized and complex nature of the offered position.

To satisfy this criterion, you must demonstrate that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. However, relative specialization and complexity have not been sufficiently developed as an aspect of the offered position (through the job duties, the evidence regarding your business operations or by any other means) to distinguish it from other, similar [registered nurse positions] for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required.

There is insufficient documentation in the record to satisfy this criterion of the regulations.

(4) SAMPLE ANALYSIS 2 OF 2 - No evidence submitted – Counsel's clarification is insufficient to establish specialized & complex duties:

In response to our RFE, you clarified the duties of the offered position. While this clarification of duties does demonstrate that the offered position requires a certain amount of skill, training, and/or attention to detail, it does not establish that the offered position is any more specialized or complex than any other [registered nurse] position that can be performed by an individual who does not possess a bachelor's or higher degree in a specific specialty, or its equivalent.

Without additional evidence as to the specialized and complex nature of the offered job, you have not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

[End Sample Analysis for Criteria (4)]

CONCLUSION:

You have not established that the offered position meets any of the four criteria of a specialty occupation enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, your petition for H-B classification is denied.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

NOTICE OF INTENT TO REVOKE

This notice is in reference to the Form I-129, Petition for Nonimmigrant Worker, which was filed by the petitioner pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act. The petition was filed at the California Service Center for [Insert Beneficiary Name], and approved by the United States Citizenship and Immigration Services ("USCIS") on [Insert Date].

USCIS has received information regarding the beneficiary's qualification for the classification sought. In accordance with Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(11)(iii) it is the intent of USCIS to revoke the petition.

When attempting to establish whether the position is a specialty occupation, the petitioner must show that the position meets one of four criteria. 8 C.F.R. 214.2(h)(4)(iii)(A) lists the four criteria as: (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; (3) The employer normally requires a degree or its equivalent for the position; or (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

[Enter the information received regarding the qualification of the position].

Therefore, this position does not meet any of the preceding criteria for classification as a specialty occupation.

The petitioner is afforded thirty (30) days from the date of this notice to submit additional evidence or arguments for consideration in these proceedings. Additionally, when USCIS serves a notice by mail, three (3) days are added to the prescribed period in which to respond. 8 C.F.R. 103.8(b). Any evidence or arguments will be reviewed before to a final determination in this matter. Failure to respond will result in the adjudication of the petition based on the current record, including the preceding information.

Kathy A. Baran
Director

Attachment to ITR Coversheet

cc: Attorney Name, Esq.

Attachment to ITR Coversheet

SAMPLE ANALYSIS 4:

Use of inter-net job postings to show degree in specialty field normally required:

- Internal job posting contradicts H-1B petition.
- One ad persuasive, but four ads unpersuasive.
- Some ads do not require a degree in a specific specialty.
- Other ads have a degree requirement, but no specialty.

The petitioner is a human resources management company that seeks to employ the beneficiary as a business development analyst.

According to the evidence submitted, the beneficiary would perform duties that entail, in part: conferring with management regarding expansion goals; developing strategic business plans and policies to enter new markets and introduce innovative packages and services; preparing a market study of employers in the area and other communities and analyzing the data; identifying needs of the target clients; and recommending and implementing customer-driven activities to raise the level of customer retention and loyalty.

USCIS does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that USCIS considers. Each position must be evaluated based upon the nature and complexity of the actual job duties. In addition, the beneficiary's merely obtaining a degree in a related area does not guarantee the position is a specialty occupation. Performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

USCIS often looks to the United States Department of Labor's ("USDOL") Occupational Outlook Handbook ("OOH" or "Handbook") when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The proffered position appears to be closest in nature to a Marketing Manager, and that the Handbook reports that employers in general do not require a bachelor's degree in a specific specialty as the minimum entry into a marketing manager position.

With respect to the Internet postings, the duties of Manpower Professional's posting are similar to those of the proffered position and is, therefore, persuasive in establishing this criterion. Nevertheless, the four other postings: HR Anew, Jefferson Wells International, Spherion, and Catalina Marketing Corporation do not require a bachelor's degree in a specific specialty. HR Anew accepts a bachelor's degree in economics, finance, marketing, or business administration. Jefferson Wells International accepts a bachelor's degree in finance, accounting, business, business administration, or management. Spherion accepts a bachelor's degree in the vaguely termed discipline of "business or a related field." Equally important, the duties of the Spherion posting are very dissimilar from those of the proffered

position. Finally, Catalina Marketing Corporation requires a bachelor's degree; however, a specific specialty is not indicated. Consequently, the four posting outweigh the probative value of the Manpower posting. Thus, the internet postings are insufficient to establish the first criterion.

Notably, USCIS finds that the petitioner's document entitled "Job Opening", which the president of the petitioning entity signed, specifically states that the minimum qualifications for the proffered position are:

> Education and Training: Bachelor of Science degree in Business Administration, Management, Marketing, or other related courses required. In the absence of a bachelor's degree in business, at least 10 years work experience as sales and marketing professional with emphasis on strategic planning, product development and servicing of accounts.

Thus, the petitioner's job announcement plainly evinces that a bachelor's degree in a specific specialty is not required to enter into the proffered position: a variety of bachelor's degrees are accepted and work experience, which does not equate to a bachelor's degree, is a substitute for a bachelor's degree.

SAMPLE ANALYSIS 2:

- Company president used to perform duties and has MBA degree; however
- Job posting shows degree requirement, but no specific field of study.

With regard to this third criterion, namely, that the employer normally requires a baccalaureate degree or its equivalent for the proffered position, the petitioner stated that the president of the company had previously performed the purchasing job responsibilities, and he had both a bachelor's degree and a master's degree in business. Nevertheless, the petitioner, in its job posting submitted in response to USCIS' request for further evidence, clearly established that it only requires a baccalaureate degree, not a baccalaureate degree in a specific specialty, for the proffered position. Without more persuasive evidence, the petitioner has not established the third criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

DEGREE AVAILABILITY DOES NOT EQUAL SPECIALTY OCCUPATION

ISSUE:

The issue to be determined here is whether mere availability of a degree for a specific field of study suggests that such a degree is normally required and, therefore, a specialty occupation.

SAMPLE ANALYSIS 1: CHIEF AUDIO ENGINEER

Counsel declares that, because there are specialized college programs that focus on the knowledge and skills required for the chief audio engineer position, this clearly indicates that it is customary for employers to require a bachelor's degree. U.S. Citizenship and Immigration Services (USCIS) disagrees with this assertion. Employers do not decide what the qualifications are for a position based on whether a specialized program is offered by a college: employers determine the qualifications for a position based on the necessary level of knowledge and skill required to perform the duties of the position.

SAMPLE ANALYSIS 2: INDUSTRIAL ENGINEERING ASSISTANT

The petitioner is seeking the beneficiary's services as an industrial engineering assistant. The beneficiary would perform duties that entail: monitoring purchase orders; maintaining cost controls; planning the use of facilities; and analyzing statements, organizational charts, and workers' job duties. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in industrial engineering.

USCIS concludes that the offered position is not a specialty occupation because the job is not an industrial engineering position; it is an engineering technician position.

Although counsel observes that more than 1,000 U.S. colleges or universities offer degrees in industrial engineer, such an observation is no relevance to these proceedings. USCIS did not state that the job of industrial engineer is not a specialty occupation. USCIS concluded correctly that the proffered position is not one of an industrial engineer and therefore, it does not require a baccalaureate degree or its equivalent, in a specific specialty.

Computer Consultants & Staffing Agencies
Third Party Placement/"Job-Shop"
On- OR Off-site Employment

- NOT A SPECIALTY OCCUPATION -
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You filed Form I-129, Petition for a Nonimmigrant Worker, on [Insert Date Filed], to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

Your organization, [Insert Name of Petitioner], is a [City, State], [for-profit OR non-profit] enterprise engaged in [nature of petitioner's business...software development and consulting services...etc....] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years.

Position is not a Specialty Occupation

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

When a petition is filed for classification as an H1B worker, you must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education business specialties accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

When determining whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not use a title, by itself. The specific duties of the proffered position, combined with the nature of your business operations are factors that USCIS considers. USCIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the

attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although you are requesting to classify the beneficiary as an alien employed in a specialty occupation, you are not the entity that will be providing such duties to the beneficiary.

You are in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. You negotiate contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. You then pay the worker, in this case the alien, directly from an account under your own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

ANALYSIS:

Subsequent to the filing of the petition, USCIS requested that you provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, you were requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence you deemed would establish sufficient specialty occupation work.

OPTION #1 – Petitioner claims beneficiary will work "in-house" on a project(s):

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on a project for [you OR name of the end-client]. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, proposal; contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] to establish that the beneficiary would work on a project during his tenure with your organization.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

While the beneficiary may in fact be tasked to work on a project according to the provided evidence, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #2 – Petitioner claims beneficiary will work "in-house" on proprietary or pre-packaged software:

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on your proprietary or pre-packaged software. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] claiming that the beneficiary would work on the proprietary or pre-packaged software during his tenure with you.

While you claim to have your own proprietary or pre-packaged software product, the record is insufficient to support this claim. For instance, you did not submit evidence of: [Choose or add:]

- critical reviews of your software in trade journals that describes the purpose of the software, its cost, its ranking among similarly produced software manufacturers;
- your software inventory;
- sufficient warehouse space to store your software inventory;
- the marketing analysis for your final software product;

- a cost and pricing analysis for your software product;
- sufficient work space and equipment to support the production of your software; and/or
- software training materials.

Additionally, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement specific projects and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #3 – Petitioner provided contracts, work orders, etc., but not with "end-client;"

On [Insert date petitioner responded], you responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between you and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that you have work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence you believe would support your claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period. Inasmuch as you are not a firm needing computer related positions to complete your projects, the record does not show any specific work to be done.

END OPTIONS

The present record does not demonstrate the specific duties the beneficiary would perform under contract for your clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir.

2000) held that for purposes of determining whether a proffered position is a specialty occupation, a petitioner acting in a similar manner as your organization is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work to be performed is for an entity other than your organization. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

The record, as presently constituted, is insufficient to establish that the position offered to the beneficiary qualifies as a specialty occupation and that you have sufficient work for the requested period of intended employment.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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You filed Form I-129, Petition for a Nonimmigrant Worker, on [Insert Date Filed], to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

Your organization, [Insert Name of Petitioner], is a [City, State], [for-profit OR non-profit] enterprise engaged in [nature of petitioner's business...software development and consulting services...etc....] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years.

Position is not a Specialty Occupation

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

When a petition is filed for classification as an H1B worker, you must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education business specialties accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

When determining whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not use a title, by itself. The specific duties of the proffered position, combined with the nature of your business operations are factors that USCIS considers. USCIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the

attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although you are requesting to classify the beneficiary as an alien employed in a specialty occupation, you are not the entity that will be providing such duties to the beneficiary.

You are in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. You negotiate contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. You then pay the worker, in this case the alien, directly from an account under your own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

ANALYSIS:

Subsequent to the filing of the petition, USCIS requested that you provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, you were requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence you deemed would establish sufficient specialty occupation work.

OPTION #1 – Petitioner claims beneficiary will work "in-house" on a project(s):

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on a project for [you OR name of the end-client]. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, proposal, contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] to establish that the beneficiary would work on a project during his tenure with your organization.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

While the beneficiary may in fact be tasked to work on a project according to the provided evidence, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #2 – Petitioner claims beneficiary will work "in-house" on proprietary or pre-packaged software:

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on your proprietary or pre-packaged software. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] claiming that the beneficiary would work on the proprietary or pre-packaged software during his tenure with you.

While you claim to have your own proprietary or pre-packaged software product, the record is insufficient to support this claim. For instance, you did not submit evidence of: [Choose or add:]

- critical reviews of your software in trade journals that describes the purpose of the software, its cost, its ranking among similarly produced software manufacturers;
- your software inventory;
- sufficient warehouse space to store your software inventory;
- the marketing analysis for your final software product;

- a cost and pricing analysis for your software product;
- sufficient work space and equipment to support the production of your software; and/or
- software training materials.

Additionally, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement specific projects and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #3 – Petitioner provided contracts, work orders, etc., but not with "end-client:"

On [Insert date petitioner responded], you responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between you and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that you have work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence you believe would support your claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period. Inasmuch as you are not a firm needing computer related positions to complete your projects, the record does not show any specific work to be done.

END OPTIONS

The present record does not demonstrate the specific duties the beneficiary would perform under contract for your clients.

Therefore, you have not established that the position offered to the beneficiary qualifies as a specialty occupation and that you have sufficient work for the requested period of intended employment.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

Computer Consultants & Staffing Agencies
Third Party Placement/"Job-Shop"
On- OR Off-site Employment

- NOT A SPECIALTY OCCUPATION -
(Rev. 01-29-2009)

Generally, this format is used for "10-25-10" computer consulting firms or staffing agencies that have aberrant filing practices, (e.g., 10 employees with hundreds of petitions filed in a short period of time).

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

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The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on [Insert Date Filed], to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

The petitioner, [Insert Name of Petitioner], is a [City, State], [for-profit OR non-profit] enterprise engaged in [nature of petitioner's business...software development and consulting services...etc....] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years.

Position is not a Specialty Occupation

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

When a petition is filed for classification as an H1B worker, the petitioner must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an

application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education business specialties accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
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> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
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>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

When determining whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not use a title, by itself. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations are factors that USCIS considers. USCIS must examine the ultimate

employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although the petitioner is requesting to classify the beneficiary as an alien employed in a specialty occupation, the petitioner is not the entity that will be providing such duties to the beneficiary.

The petitioner is in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. The petitioner negotiates contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. The petitioner then pays the worker, in this case the alien, directly from an account under its own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

ANALYSIS:

Subsequent to the filing of the petition, USCIS requested that the petitioner provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, the petitioner was requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence the petitioner deemed would establish sufficient specialty occupation work.

OPTION #1 – Petitioner claims beneficiary will work "in-house" on a project(s):

On [Insert date petitioner responded], the petitioner responded by stating that the beneficiary will be working in-house on a project for the petitioner. The petitioner submitted [Describe the documents submitted: e.g., a cover letter, itinerary, proposal; contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] to establish that the beneficiary would work on a project during his tenure with the petitioner.

OPTIONAL: Read Carefully: However, none of the documents submitted specifically request the services of the beneficiary; list the beneficiary's itinerary; describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

While the beneficiary may in fact be tasked to work on a project according to the evidence provided by the petitioner, the very nature of the petitioner's consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the in-house work claimed by the petitioner, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #2 – Petitioner claims beneficiary will work "in-house" on proprietary or pre-packaged software:

On [Insert date petitioner responded], the petitioner responded by stating that the beneficiary will be working in-house on its proprietary or pre-packaged software. The petitioner submitted [Describe the documents submitted: e.g., a cover letter, itinerary; contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] claiming that the beneficiary would work on the proprietary or pre-packaged software during his tenure with the petitioner.

While the petitioner claims to have its own proprietary or pre-packaged software product, the record is insufficient to support its claim. For instance, the petitioner did not submit evidence of: [Choose or add:]

- critical reviews of the petitioner's software in trade journals that describes the purpose of the software, its cost, it's ranking among similarly produced software manufacturers;
- the petitioner's software inventory;
- sufficient warehouse space to store the petitioner's software inventory;
- the marketing analysis for the petitioner's final software product;
- a cost and pricing analysis for the petitioner's software product; and/or
- sufficient work space and equipment to support the production of the petitioner's software.
- software training materials.

Additionally, the very nature of the petitioner's consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement specific projects and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the in-house work claimed by the petitioner, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #3 – Petitioner provided contracts, work orders, etc., but not with "end-client"

On [Insert date petitioner responded], the petitioner responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between the petitioner and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that the petitioner has work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted specifically request the services of the beneficiary; list the beneficiary's itinerary; or describe in detail the work to be performed by the beneficiary.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence the petitioner believes would support its

claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary when he enters the United States through the duration of the requested H-1B validity period . Inasmuch as the petitioner is not a firm needing computer related positions to complete their projects, the record does not show any specific work to be done.

END OPTIONS

The present record fails to demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for purposes of determining whether a proffered position is a specialty occupation, a petitioner acting in a similar manner as the present petitioner is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work to be performed is for an entity other than the petitioner. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As such, the petitioner has not established that the duties of the proffered position for the beneficiary require a specialty occupation and that it has sufficient work for the requested period of intended employment. Therefore, the beneficiary is ineligible for classification as a specialty occupation worker.

As such, the petitioner has not established that the beneficiary is eligible for classification as an alien employed in a specialty occupation.

CONCLUSION:

Pursuant to INA 291, the burden of proof in these proceedings rests solely with the petitioner. Here that burden has not been met.

Consequently, the petition is hereby denied for the [Choose: two, three, four, etc....] above stated reasons, with each considered as an independent and alternative basis for denial.

POSITION NOT A SPECIALTY OCCUPATION

DIRECT QUOTES/CITES – FORMATING: When citing anything, (e.g., statute, regulation, policy, or the record) for use anywhere in the decision it must be indented 0.5" from both the left and right margins.

> To indent, place the cursor on the line, paragraph, or blocked text that you wish to indent. Then click on "Format" at the top left side of this screen. Next, click on "Paragraph." Click on the tab, "Indents and Spacing." Under "Indentation" click on the up arrow until you get the number 0.5" in both the "Left" and "Right" indentation fields.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

To delete boxes, right click on the little box that appears in the upper left corner and cut. –

You filed Form I-129, Petition for a Nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the alien beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized

knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements of a specialty occupation:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

...an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

When determining whether a particular job qualifies as a specialty occupation, USCIS does not use a title, by itself. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that USCIS considers. Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

Your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

OPTIONAL - RFE - Read closely and add or delete info if necessary: Subsequent to the filing of the petition, you were requested to provide additional evidence to include a detailed description of the actual duties to be performed by the beneficiary on a day-to-day basis, and evidence to establish that the position meets the standards to qualify as a specialty occupation. Additionally, you were requested to submit more information about the products and services provided by the company; and lists and/or organizational charts showing employees and the positions they occupy.

OPTIONAL - Position Description:

You describe the duties of the proffered position as follows:

> If the adjudicator feels it is essential to the analysis, the duties or a summary of the duties may be described here. But, it is not absolutely necessary.
>
> If you quote the petitioner's description of duties, indent 0.5" from Left & Right margins.

END OPTIONS – Begin discussion of the four criteria

When attempting to establish whether the position is a specialty occupation you must show that the position meets one of four criteria. 8 C.F.R. 214.2(h)(4)(iii)(A) lists the four criteria as:

> **(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;**

USCIS recognizes the Occupational Outlook Handbook (OOH), a publication of the United States Department of Labor, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. You have certified a Labor Condition Application (LCA) with the Department of Labor (DOL) that the proffered position is a [Insert the occupation listed in the LCA]. An analysis of the proposed duties also reveals that the duties appear to be within the section pertinent to the occupation listed under the title [Insert Specific Position Title from the OOH] in the OOH, 2012-2013 edition.

OPTIONAL - Duties Described in the OOH:

The OOH describes the duties of a [Insert Specific OOH Position Title], in part, as follows:

> If the adjudicator feels it is essential to the analysis, the duties, or a summary of the duties, may be described here. However, it is not absolutely required.
>
> If you quote the OOH, indent 0.5" from Left & Right margins.

REQUIRED - Training Described in the OOH:

The OOH describes the training and other qualifications required for [Insert Specific OOH Position Title], in part, as follows:

> Cite the training and other qualifications as provided in the OOH that indicate that a baccalaureate degree is not the normal minimum requirement.
>
> If you cite the OOH, indent 0.5" from left & right margins.

As shown in the OOH, although a baccalaureate level of training is [Insert as appropriate: ...preferred, ...generally required, ...etc.], the position of [Insert Specific OOH Position Title] is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. There is no apparent standard for how one prepares for a career as a [Insert Position] and no requirement for a degree in a specific specialty. The requirements appear to vary by employer as to what

course of study might be appropriate or preferred. As a result, the proffered position cannot be considered to have met this criterion.

> **(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;**

USCIS will discuss this criterion in two parts as follows:

> **2a. Degree Requirement is Common to the Industry in parallel Positions among similar Organizations**

Factors often considered by USCIS when determining the industry standard include: whether the OOH reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; whether letters or affidavits from firms or individuals in the industry attest that such firms routinely employ and recruit only degreed individuals; or copies of job announcements from similar organizations as the petitioner. Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) [*quoting* Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)].

The conclusions about a degree requirement for [Enter specific OOH job title] as shown in the OOH were discussed in the previous section.

2a. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have submitted no evidence to demonstrate that a degree in a specific field of study is common to the [Identify the type of industry in which the petitioner is involved, e.g.: ...import/export...dental practice...residential home care...liquor store...gas station...dry cleaner...] industry in parallel positions among similar organizations. Accordingly, this criterion will not be discussed further.

2a. SAMPLE ANALYSIS 2 OF 4 - Job listings submitted but insufficient:

Although you submitted [... one... two...twelve...thirty...etc....] job listings, none of the listings is sufficient evidence of a degree requirement being common to the industry in parallel positions among similar organizations.

Option 1 of 4 - Employers not recognized: Further, it is difficult to ascertain whether the employers who published these announcements are similar to your organization.

Option 2 of 4 – Employers recognized but unlike the petitioner: Also, the job listings are from employers dissimilar to your organization.

Option 3 of 4 - Job Announcements DO NOT specify a required educational background:

More importantly, while they all require a bachelor's degree, the majority of the announcements do not specify a required educational background.

Option 4 of 4 - Job Announcements DO specify an educational background but do not limit the field of study:

Although some of the announcements do specify an educational background, they do not limit the field of study to a particular field that is appropriate to the proffered position, such as [Choose Or Add: ...business ...science ...computers ...engineering...], but allow for a wide variety of backgrounds to include [Choose Or Add:...liberal arts, ...sociology, ...psychology, ...literature, ...journalism, ...philosophy ...advertising ...public affairs ...public speaking ...English ...political science ...and ...creative and technical writing.... And So On]

2a. SAMPLE ANALYSIS 3 OF 4 - No documentation submitted from industry-related professional associations, firms, or individuals:

In addition, you submitted no documentation that any industry-related professional association has made a bachelor's degree a requirement for entry into the field. Further, you have not submitted letters or affidavits from firms or individuals in the [Identify the type of industry in which the petitioner is involved, e.g.: ...import/export...dental practice...residential homecare...liquor store...gas station...dry cleaner...] industry which attest that such businesses routinely employ and recruit only degreed individuals. Also, no other evidence was submitted that is sufficient to establish that the degree requirement is common to the industry in parallel positions among similar organizations. Accordingly, you have not met this criterion.

2a. SAMPLE ANALYSIS 4 OF 4 - Documentation was submitted from industry-related professional associations, firms, or individuals but does not specify that a baccalaureate degree in a specific specialty is required:

Although, the record contains letters from [...one...two...five...etc.] [Choose Or Add: representatives of businesses and/or professors ...etc.] who state that a bachelor's degree is required for [Insert Job Title] positions, none of these individuals specify that a baccalaureate degree in a specific specialty is required.

[Optional:] Further, the record does not include sufficient evidence to substantiate that the business representative(s) and/or professor(s) are associated with your industry.

In this case the evidence does not establish that these individuals hold a degree in a particular field related to the proffered position. Also, the record does not establish the individuals' qualifications or their experience giving such opinions, and the basis for conclusions supported by copies of citations of any research material.

[Final Conclusion for all Sample Analysis in Criterion 2a:]

As such, you have not submitted sufficient documentation to show that the degree requirement is common to the industry in parallel positions among similar organizations.

2b. Complexity and Uniqueness of the Proffered Position.

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, you may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

2b. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

In the present petition, you have not submitted sufficient documentation to show that this position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them.

2b. SAMPLE ANALYSIS 2 OF 4 - Described duties are generic in nature:

You submitted a breakdown of the job duties for the proffered position along with the percentage of time that the beneficiary will spend on the various duties. However, the submitted list of duties is generic in nature and provides no further detail as to the unique or complex nature of the proffered position. This breakdown is not viewed as sufficient to establish that the proffered position is more unique or complex than other similar positions within the same industry. Without additional evidence showing the unique or complex nature of the position, or how this position differs from other similar positions within the same industry, you have not met this criterion.

2b. SAMPLE ANALYSIS 3 OF 4 - Proffered position not as complex as listings:

You have not demonstrated that the job duties in the proffered position are as complex as those listed in the advertised positions. For example, the duties of the job listings include [List THOSE Duties from the job listings that are more complex than the duties of the proffered position: e.g...."budgeting, training, supervising staff, monitoring and managing a national, regional, or local sales program, etc.,...."], all of which are more complex than the proffered position.

2b. SAMPLE ANALYSIS 4 OF 4 - Assertions of counsel do not constitute evidence:

In the instant petition, counsel asserts that the position is complex and unique; however, no documentary evidence is provided to support this statement. Mere assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I. & N. Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 506 (BIA 1980); Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983). USCIS must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. Matter of Izumii, 22 I. & N. Dec. 169 (Assoc. Comm. Examinations 1998). Without additional evidence, you have not established this criterion.

[Final Conclusion for all Sample Analysis in Criterion 2b:]

As such, you have not submitted sufficient documentation to show that this position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them.

(3) The employer normally requires a degree or its equivalent for the position;

(3) SAMPLE ANALYSIS 1 OF 4 - New Position - No evidence provided:

[Choose One: You have not hired anyone previously for the proffered position. ...Or... You had no evidence to present on this issue, as this is the first offering of the proffered position.] As such, you have not established this criterion.

(3) SAMPLE ANALYSIS 2 OF 4 - Long-standing Position – No evidence submitted to show it normally requires a degree:

Although your organization has been established since [Year], you have not demonstrated that you have, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty such as [Insert Degree Requirement: e.g., ...marketing ...math ...business administration ...etc....], for the offered position. Your assertion that your past and present job announcements specified a minimum of a baccalaureate degree in the field of [Insert Field of Study: e.g., ...sales ...marketing ...etc....] is noted.

The record, however, contains no corroborating documentation, such as a list of the names of your past [Insert Job Title: e.g., ...sales representatives ...clerks ...etc....], proof of their employment, and evidence of their educational backgrounds.

Since the burden of proof to establish eligibility for benefits sought rests with you, the petitioner, under section 291 of the Act to accord the beneficiary with a specific visa classification, simply going on record with unsupported statements without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972).

(3) SAMPLE ANALYSIS 3 OF 4 - Position does not meet the statutory definition of specialty occupation:

In this case, although you claim to have hired only individuals with a bachelor's degree or higher in [Insert Field of Study: ...Business Administration, Economics, Marketing,...etc.] the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though you have required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to illogical results.

(3) SAMPLE ANALYSIS 4 OF 4 - Employer's Self-imposed Standards – Use this only for positions that are obviously not specialty occupations, such as auto & aircraft mechanics, plumbers, carpenters, construction workers, child day-care workers, dishwashers, etc.:

Although you assert that you normally require a baccalaureate degree for the proffered position, your reasoning is problematic when viewed in light of the statutory definition of specialty occupation.

Your creation of a position with an obligatory bachelor's degree requirement will not conceal the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation.

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to illogical results.

If USCIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id at 388. See also Matter of Michael Hertz Associates 19 I. & N. Dec. 558 (Comm. 1988) (The requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility).

[Final Conclusion for all Sample Analysis in Criterion (3):]

As such, you have not submitted sufficient documentation to show that you normally require a degree or its equivalent in a specific specialty for the position.

> **(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.**

(4) SAMPLE ANALYSIS 1 OF 2 - No evidence submitted – Petitioner's unsubstantiated assertions are insufficient to establish specialized & complex duties:

The record contains insufficient information to establish the specialized and complex nature of the proffered position.

As already discussed above, the evidence does not distinguish the difference between the duties to be performed by the beneficiary and those normally performed by [Insert Job Title], and how the duties of the proffered position are more specialized and complex. As such, there is insufficient documentation on record to establish that the duties to be performed are so specialized and complex that the knowledge required to perform the duties would be associated with the attainment of a baccalaureate or higher degree in a specific specialty.

(4) SAMPLE ANALYSIS 2 OF 2 - No evidence submitted – Counsel's clarification is insufficient to establish specialized & complex duties:

In response to USCIS' Request for Evidence, counsel clarified the original duties of the proffered position. While this clarification of duties does indicate that the proffered position requires a certain amount of skill, training, and attention to detail, they do not establish that the proffered position is any more specialized or complex than any other [Insert Job Title] job. Without additional evidence as to the specialized and complex nature of the offered job, you have not met the fourth criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

[End Sample Analysis for Criteria (4)]

CONCLUSION:

You have not established that any of the four factors enumerated in 8 C.F.R. 214.2(h)(4)(iii)(A) are present in this proceeding. It is, therefore, concluded that you have not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the U.S. Citizenship and Immigration Services (USCIS) containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

H-1B Specialty Occupation

Specialty Occupation means an occupation which requires the theoretical and practical application of a body of highly specialized knowledge and which requires the attainment of a baccalaureate or higher degree or its equivalent, in a specific specialty, as a minimum, for entry into the occupation in the United States.

Provide the following to establish that the present petition meets the criteria for H-1B petitions involving a specialty occupation:

EVIDENCE PERTAINING TO THE PROFFERED POSITION

Position requirements: Submit the following additional evidence to establish that the proffered position qualifies as a specialty occupation:

- Job Description: Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. Include specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field.

  OPTIONAL: Additionally, if the beneficiary will supervise or direct others submit a copy of a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels. List all divisions in the company. Clearly identify the proffered position in the chart. Also, show the names and job titles for those persons, if any, whose work will come under the control of the proposed position. Indicate who will direct the beneficiary, by name and job title.

- Standards for a Specialty Occupation Position: In order to qualify as a specialty occupation, the position must meet one or more of the following standards for a specialty occupation:

  1) Baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; or that

  2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may

show that its particular position is so complex or unique that it can be performed only by an individual with a degree; or that

3) the employer normally requires a degree or its equivalent for the position; or that

4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The following is a discussion of the four criteria for a position to qualify as a specialty occupation; why the position presently does not appear to qualify; and/or additional requested documentation to submit in support of the petition:

1) **A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;**

The Occupational Outlook Handbook (OOH),(a publication of the United States Department of Labor), indicates that a(n) [Insert specific OOH position title] is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. There is no standard for how one prepares for a career as a [Insert Position] and no requirement for a degree in a specific specialty. The requirements appear to vary by employer as to what course of study might be appropriate or preferred. As a result, the proffered position cannot be considered to have met this criterion.

Therefore, provide additional evidence to establish that the proffered position qualifies under one or more of the remaining three criteria:

2) **the degree requirement is common to the industry in parallel positions among similar organizations (i.e., organizations with [INSERT NUMBER] employees) or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;**

- Position: Provide evidence that the position of [title of position] is a common position required by similarly sized offices with similar annual incomes. Also provide evidence that the petitioner's competitors normally require degrees in a specific specialty for closely related positions to that of [position].

- Job Listings: Provide evidence to establish a degree requirement is common to the industry in parallel positions among similar organizations. Evidence may include job listings or advertisements. However, the job listings must clearly show that the employers who published the job announcements are similar to the petitioner's organization. More importantly, the listings must clearly show the

specific educational background required to perform the duties of the proffered position.

- Industry-related professional association: Documentation may be submitted to show that an industry-related professional association has made a bachelor's degree in a specific specialty a requirement for entry into the field.

  Provide the minimum requirements and criteria used to apply for membership in the association in which the beneficiary claims membership. Also, include evidence that lists the number of current members, the status held by the association in the international community and in the academic field, and any other conditions or requirements for membership.

- Firms or Individuals in the Industry: Provide letters or affidavits from firms or individuals in the industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty; or copies of job announcements from similar organizations as the petitioner. Also, provide the following:

  1. The writer's qualifications as an expert;
  2. The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
  3. How the conclusions were reached; and
  4. The basis for the conclusions supported by copies or citations of any research material used.

3) **the employer normally requires a degree or its equivalent for the position;**

- Position Announcement: To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicants to have a minimum of a baccalaureate or higher degree or its equivalent in a specific specialty.

- Past Employment Practices: Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher in a specific specialty, to perform the duties of the proffered position. Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

- Petitioner's Products or Services: Explain what differentiates the petitioner's products or services from others in the industry and why it requires a baccalaureate level of study to perform the duties of the position. Provide documentary examples of the petitioner's products or services (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.), in order to establish the petitioner's claims that it normally requires a degree in a specific specialty to perform the proposed duties.

4) **the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.**

As discussed in the Occupational Outlook Handbook there is no clear standard for how one prepares for a career in the proffered position and no requirement for a degree in a specific specialty. The requirements appear to vary by employer as to what course of study might be appropriate or preferred. Merely performing the normal duties of a position that does not routinely require a baccalaureate degree in a specific specialty does not establish that the duties are specialized and complex even if the beneficiary has a degree in a field of study related to the occupation - every college graduate does not qualify as a member of a specialty occupation.

Therefore, in such cases, when determining whether a particular job qualifies as a specialty occupation the specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the USCIS considers.

- Nature of the Position: Provide, in layman's terms, a clear explanation of what differentiates the proffered position from other related "non-specialty occupation" positions. Compare and contrast those duties to be performed that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated - exceeding industry or normal position standards – such that a baccalaureate level of education in a specific field of study is a realistic prerequisite for entry into the proffered position. Be exact and provide documentation to substantiate the claims of complexity.

- Nature of the Petitioner's Business: Where the petitioner alleges a unique business model to substantiate specialized or complex duties, explain what separates the petitioner's business operations from others in the industry or the field. Provide a clear comparison and/or contrast of the operational complexity of the petitioner's business with other businesses in the industry or to the norm of other positions in the field.

Clarify what it is about the petitioner's business that is so specialized, distinctive and /or exceptional that it requires the services of an individual with a degree in a specific field of study even though it is not an industry minimum standard.

Provide documentary examples such as press releases, business plans, promotional materials, advertisements, patents, critical reviews, articles, photographs of prototypes, etc. that substantiate claims of complexity and specialization above that experienced in the industry or the field.

SAMPLE ANALYSIS:

- Letters of recognition of expertise in the specialty occupation were not from recognized authorities in the same specialty occupation.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three expert letters from alleged recognized authorities in the same specialty occupation. The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program Director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

SAMPLE ANALYSIS 5:

- Variety of skills and abilities does not equal complex or unique.

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

Despite counsel's assertions, the record fails to establish that the proffered position is either so complex or so unique that only an individual with a bachelor's degree in a specific specialty could perform it.

The duties, as enumerated and described in the record, require a spectrum of skills and abilities, including, but not limited to: write clearly, effectively, and creatively; develop communication tools to inform and persuade various audience sets; develop proposals and other work products based upon a strong understanding of the Internet; develop effective communication and marketing strategies for the petitioner's customer base; write coherent and methodical instructional and technical manuals; employ a working knowledge of vector-based design packages; develop and maintain an Internet-based newsletter; edit; supervise and guide a team of junior copywriters and market research analysts for collection of data for newsletter articles; improve the creative content of the petitioner's Internet site; compile reports and make recommendations on improving the petitioner's services research, partly through supervision and guidance of market research analysts; make recommendations for the purchase of new Internet technology; analyze and make recommendations about the feasibility of acquiring web modules; enhance customer brand loyalty through web-customization and personalization; and tailor marketing messages to customer usage patterns.

While the duties are multiple and diverse, they do not comprise a position that is especially complex or unique. The petitioner's duty descriptions and its assessment of work-time allocations clearly show that the beneficiary's primary involvements would be in effective writing and in Internet marketing management. These functions do not require a degree in any specific specialty. Likewise, the record indicates that knowledge required for the Internet aspects of the position can be attained by work experience, coursework short of a college degree, or a combination of both.

SAMPLE ANALYSIS 5:

Different job duties:

- Job duties in ads are more complex than the proffered position

USCIS may also consider whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (*quoting* Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

Although the petitioner submitted two job listings, neither of the listings is persuasive evidence of a degree requirement being common to the industry in parallel positions among similar organizations. The petitioner has not demonstrated that the job duties in the proffered position are as complex as those listed in the advertised positions. For example, the duties of the job listings include "budgeting, training, supervising staff, monitoring and managing business growth . . ."

In addition, the petitioner submitted no documentation that any professional association has made a bachelor's degree a requirement for entry into the filed, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms routinely employ and recruit only degreed individuals. Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations under the second criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

SAMPLE ANALYSIS 7:

- A Physical Therapist permitted to work as a Physical Therapy Aide under a licensed Physical Therapist - is not a specialty occupation.

The petitioner is a rehabilitation center which seeks to employ the beneficiary as a physical therapist for a period of three years.

Counsel asserts that the beneficiary is qualified to practice physical therapy in California.

The beneficiary does not hold a license to practice physical therapy in California. Counsel asserts that the beneficiary may practice physical therapy under the supervision of a licensed physical therapist. However, the Physical Therapy Board of California sent a letter to the beneficiary which states in part:
"You are not authorized to work as a physical therapist license applicant. However, you may work as an aide ..."

The Department of Labor's Occupational Outlook Quarterly (Summer 1994), in an article discussing physical therapy assistants and aides, finds no requirement of a baccalaureate degree in any field of study for employment as a physical therapy aide. In view of the foregoing, the petition may not be approved.

PRIVATE CONSULTANT, NOT AUTHORIZED TO GRANT COLLEGE CREDIT

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OLIVE DATA BASE: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 - present for all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

ISSUE:

The overarching issue to be discussed here is whether the beneficiary is qualified to perform

services in a specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) of the Act defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

[Choose Appropriate Statement:]

The beneficiary does not appear to have any university studies.

Or

The record indicates that the beneficiary studied for approximately [Choose approximate amount of education acquired by the beneficiary, e.g.: one semester, one year, two years, three years,...etc.] in a post-secondary setting, but does not establish that the beneficiary holds a foreign degree equivalent to a United States baccalaureate or higher degree in the field of [Insert Field Of Education: e.g., ...Accounting...Market Research Analysis...Computer Analysis....etc.] as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be

immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

> **4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.**

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).

In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by **one or more** of the following: (Emphasis added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant

certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as follows:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Further, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Also, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Choose Appropriate Statement for Foreign Education Evaluation:

[Optional Statement #1:] Also, the petitioner did not show that degree equivalency was being sought for the beneficiary based on an evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.

Or

[Optional Statement #2:] Although the petitioner submitted an evaluation from a foreign educational credentials evaluator to show that degree equivalency was being sought for the beneficiary based on the beneficiary's foreign education, training, and/or experience, foreign educational credentials evaluators may only evaluate an individual's foreign educational credentials - not training or work experience. Foreign education credentials evaluators do not have the authority to grant college-level credit for training and/or experience in the

specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to [Insert the Amount of College Credit Earned, e.g. one semester, one year, two years, three years...Etc.] from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Since the foreign educational credentials evaluation indicated that the beneficiary had less than a baccalaureate level of education in a field of study required by the proffered position, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), and (4) above.

[End Optional Statements for Foreign Education Evaluation]

The petitioner submitted an evaluation of training and/or experience from a private educational evaluation service that was completed by a consultant who asserts to having the authority to grant college level credit at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience to show degree equivalency for the beneficiary.

Although the petitioner has submitted a letter from [Insert name of the College or University: _____] that claims that [Insert Evaluator's Name: Dr. or Professor.....] has the authority to grant the college-level credit for various [Choose One or Both:...graduate and...Or...undergraduate...] degree programs in the Division of [Insert Field Of Study: e.g., ...Business and Accounting...Computer Science...Electronics...ETC.], the evaluation was not done on behalf of [Insert Name of the College or University]; it was done for a private educational credentials consulting firm. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). As such, the [Insert Name of Private Consultant Firm: e.g.,...Morningside...Global Education Group...etc....] evaluation carries no weight in these proceedings. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm. 1988).

[Optional Statement:] Even if USCIS had accepted the evaluation, it would be viewed as

problematic. The evidence provided by [Insert Name of the College or University] is very specific as to the areas in which [Insert The Evaluator's Name: Dr...or....Professor .....] can grant college-level credit for training and/or experience in the field of [Insert Field of Study: e.g., ...Business Administration:..Accounting:..Computer Science...Electronics...ETC.]. Those areas are for credit for [Choose One or Add Your Own:...co-op and/or internship programs...the waiver of courses offered by the college...substitution of courses by independent study project...waiver of a computer skill course for students if a student's training/work experience is adequate...etc.....]. These specific areas do not appear to cover the granting of extensive college-level credits based on work experience.

[Optional Statement:] Furthermore, the evaluator has not provided sufficient evidence to establish his/her credentials to determine educational equivalency to a bachelor's degree in the particular field of study required for entry into the occupation. The evaluator holds a bachelor's degree in [ ]. However, the particular field of study required to perform the duties of the proffered position is [ ], or a related field.

Since the burden of proof to establish eligibility for the benefit sought rests with petitioner who seeks to accord beneficiary's classification, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972)

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him or her to practice a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214(h)(4)(iii)(D)(1), (2), (3), or (4). As such, the only category remaining under which the beneficiary might possibly qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Evaluation of experience by USCIS

When the petitioner fails to establish that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1), the USCIS may make its own independent assessment of the beneficiary's credentials.

In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, the USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) as previously shown above.

Sample Analysis Item #1:

Letters of Work Experience - Inadequate

The petitioner submitted employment experience letters from the beneficiary's former employers. However, the evidentiary weight of these employment letters is minimal, at best.

Generally, the beneficiary's employment experience letters provide only the beneficiary's job title with dates to establish the duration of the beneficiary's employment. The letters do not provide sufficient details regarding the nature or size of the enterprises where the beneficiary claims to have been employed.

Additionally, the letters do not provide sufficient detail concerning the duties, responsibilities, or supervisory role the beneficiary had while working for these past employers.

Further, the writers of these letters have not provided sufficient evidence to show that the beneficiary's work experience included the theoretical and practical application of complex specialized knowledge required by the specialty occupation or that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Merely stating that the beneficiary has such work experience is not sufficient to satisfy this requirement.

[Optional Statement:] Also, the record provides insufficient evidence to establish that the author(s) of the letter(s) actually worked with the beneficiary during the time of the claimed employment.

[Optional Statement:] Additionally, it should be noted that the employment experience letters provided by the petitioner are written on plain paper rather than on the claimed former employer's company letterhead stationery. As such, it is not possible to determine whether these letters were actually written by the claimed employers.

Sample Analysis Item #2:

Certificates of Technical Skill - Inadequate

The petitioner has submitted certificates of technical skill level issued to the beneficiary by [Organization;] for [Skill:]. However, these certificates alone are insufficient to establish the duration and academic level of the training courses attended.

Sample Analysis Item #3:

Inadequate Evaluation - Transcripts not Included in Record

The evaluation provided is insufficient to establish the claimed equivalency in the specific specialty because the record does not include complete transcripts of courses or supplemental information with regard to the beneficiary's training courses, to determine the duration of such courses and the academic level of the same courses.

Sample Analysis Item #4:

Inadequate Evaluation - A Resume Alone is Insufficient

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae alone is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and is insufficient to establish equivalency in the claimed specific specialty.

End Analysis

Without supplemental information, it is not possible to determine how the evaluator reached his/her conclusion that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

> **(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;**

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

[Optional Statement #1] The previously mentioned letters from former employers, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

[Optional Statement #2 – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized

authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

> **(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;**

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;**

The petitioner did not submit sufficient evidence to establish that there has ever been any published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iv) Licensure or registration to practice the specialty occupation in a foreign country; or**

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

> **(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.**

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

[Optional Statement – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis

for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of the specialty occupation through equivalency to completion of a United States baccalaureate or higher degree in the specialty occupation based on education, training and/or employment experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D). Therefore, the beneficiary is ineligible for classification as an alien employed in a specialty occupation.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

FOREIGN EDUCATION EVALUATION, UNRELATED FIELD

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

OLIVE DATA BASE: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 - present for all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

ISSUE:

The overarching issue to be discussed here is whether the beneficiary is qualified to perform

services in the specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) of the Act defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C) the beneficiary must meet one of the following criteria:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (2) Hold a foreign degree determined to be equivalent to a United States

baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

Although it appears that the beneficiary has studied for approximately four or more years in a post-secondary setting, he or she does not hold a foreign degree equivalent to a United States baccalaureate or higher degree in the field of [Insert Field of Education: e.g., ...Accounting...Market Research Analysis...Computer Analysis.... etc.] as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).
In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)((4)) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by **one or more** of the following: (Emphasis added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
>
> (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated

for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

Also, the petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Additionally, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Further, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by the USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner is attempting to show that degree equivalency is being sought for the beneficiary based, in whole or in part, on an evaluation of the beneficiary's training and experience from a foreign educational credentials evaluator.

The petitioner seeks to employ the beneficiary as a [Insert Position Title, e.g.,...systems analyst...].

Since the proffered position is a [Insert Position Title, e.g.,...systems analyst....] the beneficiary must possess a baccalaureate degree or higher, or its equivalent, in the appropriate field of study such as [Insert Field of Study, e.g., ...computer science or management information systems....] as shown in the Department of Labor's Occupational Outlook Handbook (OOH)

The evaluation of the beneficiary's foreign education, prepared by a foreign educational credentials evaluator claims that the beneficiary has the equivalent of a bachelor's degree in [Insert Field of Study, e.g. computer science Or management information systems, etc.] as a result of education, training, and/or employment experience.

However, foreign educational credentials evaluators may only evaluate an individual's

foreign educational credentials - not training or work experience. Foreign educational credentials evaluators are not qualified to prepare evaluations based on the beneficiary's training and/or work experience as they do not have, "...the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;...." as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

On the other hand, a foreign educational credentials evaluator is qualified to provide an evaluation of the beneficiary's foreign education pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3) which authorizes, "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials."

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to a bachelor's degree in [Insert the unrelated degree earned, e.g. French...English...Literature...History...Art Appreciation...etc.] from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the education evaluated is not in a field of study related to the specific education required for the beneficiary to perform the duties of the proffered position. Additionally, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Subsequent to the filing of the petition, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R.214.2(h)(4)(iii)(D)(1), (2), and (4) above.

In its response, the petitioner did not provide the requested evidence.

[Or...Optional Statement:] In its response, the petitioner asserts that the beneficiary's foreign credentials evaluation should be accepted by USCIS pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3), as they are from a reliable credentials evaluation service.

NOTE TO ADJUDICATOR: If the petitioner did provide an evaluation from a college official or someone who claims to be – use one of those denial formats.

The USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of

Sea, Inc., 19 I. & N. 817 (Comm. 1988). The evaluation will, accordingly, be given little weight.

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him or her to practice a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary's education in an "unrelated field" and work experience are equivalent to completion of a United States baccalaureate or higher degree in the claimed specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category remaining under which the beneficiary might possibly qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Evaluation of experience by USCIS

When the petitioner fails to establish that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1) - (4), the USCIS may make its own independent assessment of the beneficiary's credentials.

In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, the USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) shown above.

Sample Analysis Item #1:

Letters of Work Experience - Inadequate

The petitioner submitted employment experience letters from the beneficiary's former employers. However, the evidentiary weight of these employment letters is minimal, at best.

Generally, the beneficiary's employment experience letters provide only the beneficiary's job title with dates to establish the duration of the beneficiary's employment. The letters do not provide sufficient details regarding the nature or size of the enterprises where the beneficiary claims to have been employed.

Additionally, the letters do not provide sufficient detail concerning the duties, responsibilities, or supervisory role the beneficiary had while working for these past employers.

Further, the writers of these letters have not provided sufficient evidence to show that the beneficiary's work experience included the theoretical and practical application of complex

specialized knowledge required by the specialty occupation or that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Merely stating that the beneficiary has such work experience is not sufficient to satisfy this requirement.

[Optional Statement:] Additionally, the record provides insufficient evidence to establish that the author(s) of the employment letter(s) actually worked with the beneficiary during the time of the claimed employment.

[Optional Statement:] Moreover, it should be noted that the employment experience letters provided by the petitioner are written on plain paper rather than on the claimed former employer's company letterhead stationery. As such, it is not possible to determine whether these letters were actually written by the claimed employers.

Sample Analysis Item #2

Certificates of Technical Skill - Inadequate

The petitioner has submitted certificates of technical skill level issued to the beneficiary by [Organization:] for [Skill:]. However, these certificates alone are insufficient to establish the duration and academic level of the training courses attended in order to obtain the certificates in the particular technical skill.

Sample Analysis Item #3

Inadequate Evaluation – Transcripts not included in Record

The evaluation provided is insufficient to establish the claimed equivalency in the specific specialty because the record does not include complete transcripts of courses or supplemental information with regard to the beneficiary's training courses, to determine the duration of such courses and the academic level of the same courses.

Sample Analysis Item #4

Inadequate Evaluation - A Resume alone is Insufficient

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae, alone, is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and is insufficient to establish equivalency in the claimed specific specialty.

End Analysis

Without supplemental information, it is not possible for the USCIS to determine that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

> **(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation.**

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

[Optional Statement #1] The previously mentioned letters from former employers, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

[Optional Statement #2 – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R.214.2(h)(4)(ii).

> **(ii) Membership in a recognized foreign or United States association or society in the specialty occupation.**

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers.**

The petitioner did not submit sufficient evidence to establish that there has ever been any published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

(iv) Licensure or registration to practice the specialty occupation in a foreign country.

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

[Optional Statement – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of the specialty occupation through equivalency to completion of a United States baccalaureate or higher degree in the specialty occupation based on education, training and/or employment experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D). Therefore, the beneficiary is ineligible for classification as a specialty occupation worker, and, therefore, the petition may not be approved.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

FOREIGN EDUCATION EVALUATION, NO EQUIVALENCY

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

OLIVE DATA BASE: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 – present for all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

ISSUE:

The overarching issue to be discussed here is whether the beneficiary is qualified to perform

services in a specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(l) of the Act defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (2) Hold a foreign degree determined to be equivalent to a United States

baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The record indicates that the beneficiary studied for approximately [Choose approximate amount of education acquired by the beneficiary, e.g.: one semester, one year, two years, three years,...etc.] in a post-secondary setting, but does not establish that the beneficiary holds a foreign degree equivalent to a United States baccalaureate or higher degree in the field of [Insert Field of Education: e.g., ...Accounting...Market Research Analysis...Computer Analysis.... etc.] as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise

> **in the specialty through progressively responsible positions directly related to the specialty.**

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).
In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)((4)) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by **one or more** of the following: (Underlining added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
>
> (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes

of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any

research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

Also, the petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Additionally, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Further, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner is attempting to show that degree equivalency is being sought for the beneficiary based, in whole or in part, on an evaluation of the beneficiary's training and experience from a foreign educational credentials evaluator.

The petitioner seeks to employ the beneficiary as a [Insert Position Title].

The evaluation of the beneficiary's foreign education, prepared by a foreign educational credentials evaluator claims that the beneficiary has the equivalent of a bachelor's degree in the specific field of study required by the specialty occupation as a result of education, training, and/or employment experience.

However, foreign educational credentials evaluators may only evaluate an individual's foreign educational credentials - not training or work experience. Foreign educational credentials evaluators are not qualified to prepare evaluations based on the beneficiary's training and/or work experience as they do not have, "...the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work

experience:...." as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

On the other hand, a foreign educational credentials evaluator is qualified to provide an evaluation of the beneficiary's foreign education pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3) which authorizes, "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials."

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to [Insert the amount of college credit earned, e.g. one semester, one year, two years, three years...etc.] from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Subsequent to the filing of the petition, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), and (4) above.

In its response, the petitioner did not provide the requested evidence.

[Or...Optional Statement:] In its response, the petitioner asserts that the beneficiary's foreign credentials evaluation should be accepted by USCIS pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3), as they are from a reliable credentials evaluation service.

Note To Adjudicator: If the petitioner did provide an evaluation from a college official or someone who claims to be – go to one of those denial formats.

The USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm. 1988). The evaluation will, accordingly, be given minimal weight.

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license,

[Optional Statement:] Additionally, the record provides insufficient evidence to establish that the author(s) of the employment letter(s) actually worked with the beneficiary during the time of the claimed employment.

[Optional Statement:] Moreover, it should be noted that the employment experience letters provided by the petitioner are written on plain paper rather than on the claimed former employer's company letterhead stationery. As such, it is not possible to determine whether these letters were actually written by the claimed employers.

Sample Analysis Item #2:

Certificates of Technical Skill - Inadequate

The petitioner has submitted certificates of technical skill level issued to the beneficiary by [Organization] for [Skill]. However, these certificates alone are insufficient to establish the duration and academic level of the training courses attended in order to obtain the certificates in the particular technical skill.

Sample Analysis Item #3:

Inadequate Evaluation – Transcripts not included in Record

The evaluation provided is insufficient to establish the claimed equivalency in the specific specialty because the record does not include complete transcripts of courses or supplemental information with regard to the beneficiary's training courses, to determine the duration of such courses and the academic level of the same courses.

Sample Analysis Item #4:

Inadequate Evaluation – A Resume alone is insufficient

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae, alone, is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and is insufficient to establish equivalency in the claimed specific specialty.

End Analysis

Without supplemental information, it is not possible for the USCIS to determine that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

> **(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation.**

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation other than the previously mentioned letters from former employers, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i).

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

[Optional Statement #1] The previously mentioned letters from former employers, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

[Optional Statement #2 – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R.214.2(h)(4)(ii).

> **(ii) Membership in a recognized foreign or United States association or society in the specialty occupation.**

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

> **(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers.**

The petitioner did not submit sufficient evidence to establish that there has ever been any

published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

(iv) Licensure or registration to practice the specialty occupation in a foreign country.

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

[Optional Statement – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of the specialty occupation through equivalency to completion of a United States baccalaureate or higher degree in the specialty occupation based on education, training and/or employment experience pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D). Consequently, the beneficiary is ineligible for classification as an alien employed in a specialty occupation.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

EVALUATIONS ARE ADVISORY ONLY!

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

NOTE TO ADJUDICATORS: All of the analyses in this denial have been included in the "Phrases&Analysis" folder – each in its own separate document.

OLIVE DATA BASE: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 - present of all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

INTRODUCTION:

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It

seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

The record indicates that the beneficiary had more than [Number] years of employment experience at the time of the filing of the petition. A credentials evaluator has determined that the beneficiary's education background and employment experience are equivalent to a bachelor's degree in [field of study] awarded by regionally accredited academic colleges and universities in the United States.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(l) of the Act defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)((4)) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by **one or more** of the following: (Underlining added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

8 C.F.R. 214.2(h)(4)(ii) states:

Recognized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to

render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm. 1988). In addition, it was concluded in Sea that experience which is substituted for a portion of education must include the theoretical and practical application of specialized knowledge required at the professional level of the occupation. Ordinary experience alone cannot be equated with a college degree.

SAMPLE ANALYSIS 1 of 7: Evaluation less than what OOH says is required.

Here, the evaluation of the beneficiary's foreign credentials as the equivalent of a baccalaureate degree in business administration is based on employment experience and educational background. A review of the Department of Labor's Occupational Outlook Handbook, however, finds that the graduate education is normally required for the proffered position.

SAMPLE ANALYSIS 2 of 7: Evaluation in different field than what OOH says is required.

The evaluator did not conclude that the beneficiary has graduate education in one of the disciplines listed by the Occupational Outlook Handbook.

SAMPLE ANALYSIS 3 of 7: Conclusory Evaluation - No authorization to issue college credit.

The record does not contain any corroborating evidence to support the evaluator's finding, such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

SAMPLE ANALYSIS 4 of 7: Evaluator's credentials in a field other than the one being

evaluated.

The evaluator has not submitted evidence setting for his/her credentials to determine educational equivalency to a bachelor's degree in this particular field of endeavor. The evaluator holds a bachelor's degree in education and a master's degree in educational administration. He/she does not appear to have any education or experience in culinary arts, hotel, and restaurant management, or a related field.

SAMPLE ANALYSIS 5 of 7: Limited authorization to issue college credit.

Although the evaluator states that he/she has the authority and responsibility for the evaluation and granting of college-level credit for all international transfer students, he/she does not specify that he/she is authorized to grant college-level credit for training and/or work experience in the field, nor does he/she indicate that his/her college has a program for granting such credit. Accordingly, the evaluation is accorded little weight.

SAMPLE ANALYSIS 6 of 7: Conclusory Evaluation - No basis for education and experience evaluation.

Here, the evaluation of the beneficiary's foreign credentials is based on education and employment experience. The evaluator has not demonstrated specifically how the evaluation was made nor the basis for making it (including copies of the relevant portions of any research materials used). Neither the petitioner nor the evaluator has demonstrated that the beneficiary's experience was experience in a specialty occupation. In addition, the evaluator has not shown how the various aspects of the beneficiary's employment experience satisfy the course work requirements of a baccalaureate degree in business administration. Accordingly, the evaluation is accorded little weight.

The beneficiary is not a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes him to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform services in a specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. INA 291. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

SAMPLE ANALYSIS 7 of 7: Evaluation based on degree in unrelated field plus experience.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

It is noted that the Evaluation Report prepared by the Foundation for International Services, Inc. (FIS) and submitted with the initial filing of the petition does not met the standards of the regulations for determining equivalency. The Evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in computer science as a result of her education, professional training and employment experience. FIS is not qualified to prepare an evaluation of this sort as it does not: "[H]ave the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

FIS is qualified to provide an evaluation of the beneficiary's foreign degree pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3): "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials." In the evaluation, FIS determined that the beneficiary's foreign degree is equivalent to a bachelor's degree in French and literature from an accredited college or university in the United States. This part of the evaluation is accepted, but USCIS does not accept the assessment of the beneficiary's work experience and other training as FIS is not qualified to make that assessment.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three letters in addition to the Evaluation (which has already been discussed and will not be addressed any further). The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy

where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

COLLEGE OFFICIAL - NOT AUTHORIZED

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

OLIVE DATA BASE: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 - present for all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

ISSUE:

The overarching issue to be discussed here is whether the beneficiary is qualified to perform

services in the specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien . . .who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1). . .with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1). . . .

Section 214(i)(l) of the Act defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(2) of the Act outlines the fundamental requirements to qualify to perform a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4) (iii)(C) the beneficiary must meet one of the following criteria:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (2) Hold a foreign degree determined to be equivalent to a United States

baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States college or university.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

[Choose Appropriate Statement:]

The beneficiary does not appear to have any university studies.

[Or...]

The record indicates that the beneficiary studied for approximately [Choose approximate amount of education acquired by the beneficiary, e.g.: one semester, one year, two years, three years,...etc.] in a post-secondary setting, but does not establish that the beneficiary holds a foreign degree equivalent to a United States baccalaureate or higher degree in the field of [Insert Field of Education: e.g., ...Accounting...Market Research Analysis...Computer Analysis.... etc.] as required by the proffered position described by the petitioner.

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

> **4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.**

The petitioner is attempting to show that the beneficiary possesses education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. This is the only criterion that the beneficiary could possibly meet.

The second issue to be discussed is whether the beneficiary qualifies under 8 C.F.R. 214.2(h)(4)(iii)(D).

In considering whether the beneficiary qualifies under this category by virtue of his or her education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> For purposes of paragraph (h)(4)(iii)(C)((4)) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by **one or more** of the following: (Emphasis added)
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have

achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" as follows:

...a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

The petitioner did not show that degree equivalency was being sought for the beneficiary based on the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program ("CLEP"), or Program on Non-collegiate Sponsored Instruction ("PONSI").

Further, the petitioner did not show that degree equivalency was being sought for the beneficiary based on evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Also, the petitioner is not showing that degree equivalency was being sought for the beneficiary based on a determination by the USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Choose appropriate statement for foreign education evaluation:

[Optional Statement #1:] Also, the petitioner did not show that degree equivalency was being sought for the beneficiary based on an evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.

Or

[Optional Statement #2:] Although the petitioner submitted an evaluation from a foreign educational credentials evaluator to show that degree equivalency was being sought for the beneficiary based on the beneficiary's foreign education, training, and/or experience, foreign educational credentials evaluators may only evaluate an individual's foreign educational credentials - not training or work experience. Foreign education credentials evaluators do not have, the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such

credit based on an individual's training and/or work experience as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

In the evaluation, the foreign educational credentials evaluator determined that the beneficiary's foreign education is equivalent to [Insert the Amount of college credit earned, e.g. one semester, one year, two years, three years...etc.] from an accredited college or university in the United States. This part of the evaluation, that is, the evaluation of the beneficiary's foreign education, is accepted.

However, the USCIS does not accept the assessment of the beneficiary's work experience and other training because, as previously stated, foreign education credentials evaluators are not qualified to make that assessment. Furthermore, foreign educational credentials evaluators are not considered as recognized authorities for the purpose of qualifying aliens under recognition of expertise.

Since the foreign educational credentials evaluation indicated that the beneficiary had less than a baccalaureate level of education in a field of study required by the proffered position, the USCIS requested that the petitioner provide additional evidence to show degree equivalency based on the beneficiary's training and/or work experience as provided in 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), and (4) above.

[End Optional Statements for Foreign Education Evaluation]

The petitioner submitted an evaluation from an official who, it is claimed, has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience to show degree equivalency for the beneficiary.

In support of the evaluation, the petitioner submitted a letter from [Insert name of the official, his or her title, and the educational institution he or she claims to represent] that makes only general statements that all of the institution's professors are authorized to grant college credit; that the institution is accredited; and that the institution has a program for granting college-level credit for training and/or employment experience to show degree equivalency for the beneficiary.

That letter, dated [insert date letter was written and indicate how old the letter is at the time of filing..., or almost one year, two years, three years.....] old at the time the present petition was filed, is insufficient to establish that the evaluator is currently employed by the claimed institution.

The letter is not from the college Registrar or Dean of Admissions and does not clearly identify the particular evaluator as a college official with authorization to grant college level credit for training and/or experience, nor does it clearly substantiate the evaluator's

employment with the institution.

Further, the evidence does not clearly substantiate claims that the institution has a program for granting college-level credit for training and/or employment experience with copies of pertinent pages from the institution's college catalog describing the program.

[Optional Statement:] Also, internet searches of the evaluator's claimed college or university website do not confirm a program for granting college-level credit for training and/or employment experience.

Additionally, the letter, alone, is insufficient to establish that the institution is accredited.

[Optional Statement:] Furthermore, the evaluator has not provided sufficient evidence to establish his/her credentials to determine educational equivalency to a bachelor's degree in the particular field of study required for entry into the occupation. The evaluator holds a bachelor's degree in [ ]. However, the particular field of study required to perform the duties of the proffered position is [ ], or a related field.

Although the evaluator states that he/she has the authority and responsibility for the evaluating and granting of college-level credit for all international transfer students, he/she has not established that [Choose Appropriate Phrases:...he/she is authorized to grant college-level credit for training and/or work experience in the specific field of study required, as a minimum, for entry into the occupation; ...that his/her college is accredited;...and that the college has a program for granting such credit. ...] Consequently, the evaluation is accorded little weight.

Since the burden of proof to establish eligibility for the benefit sought rests with petitioner who seeks to accord beneficiary's classification, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972)

As such, the record fails to establish that the beneficiary is a member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study. Further, the record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him or her to practice a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary's education, training, and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214(h)(4)(iii)(D)(1), (2), (3), or (4). As such, the only category remaining under which the beneficiary might possibly qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Evaluation of Experience by USCIS

When the petitioner fails to establish that the beneficiary's training and work experience qualifies as the equivalent of a baccalaureate level of education or higher pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1), the USCIS may make its own independent assessment of the beneficiary's credentials.

In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, the USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) as previously shown above.

Sample Analysis Item #1:

Letters of Work Experience - Inadequate

The petitioner submitted employment experience letters from the beneficiary's former employers. However, the evidentiary weight of these employment letters is minimal, at best.

Generally, the beneficiary's employment experience letters provide only the beneficiary's job title with dates to establish the duration of the beneficiary's employment. The letters do not provide sufficient details regarding the nature or size of the enterprises where the beneficiary claims to have been employed.

Additionally, the letters do not provide sufficient detail concerning the duties, responsibilities, or supervisory role the beneficiary had while working for these past employers.

Further, the writers of these letters have not provided sufficient evidence to show that the beneficiary's work experience included the theoretical and practical application of complex specialized knowledge required by the specialty occupation or that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Merely stating that the beneficiary has such work experience is not sufficient to satisfy this requirement.

[Optional Statement:] Also, the record provides insufficient evidence to establish that the author(s) of the letter(s) actually worked with the beneficiary during the time of the claimed employment.

[Optional Statement:] Additionally, it should be noted that the employment experience letters provided by the petitioner are written on plain paper rather than on the claimed former employer's company letterhead stationery. As such, it is not possible to determine whether these letters were actually written by the claimed employers.

Sample Analysis Item #2:

Certificates of Technical Skill - Inadequate

The petitioner has submitted certificates of technical skill level issued to the beneficiary by [Organization] for [Skill]. However, these certificates alone are insufficient to establish the duration and academic level of the training courses attended.

Sample Analysis Item #3:

Inadequate Evaluation – Transcripts not Included in Record

The evaluation provided is insufficient to establish the claimed equivalency in the specific specialty because the record does not include complete transcripts of courses or supplemental information with regard to the beneficiary's training courses, to determine the duration of such courses and the academic level of the same courses.

Sample Analysis Item #4:

Inadequate Evaluation – A Resume Alone is Insufficient

An acceptable evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. A resume or curriculum vitae alone is insufficient to satisfy equivalency of a baccalaureate level of education based on training and/or experience. In this case, it appears that the evaluation is based, to a large extent, on a copy of the beneficiary's resume and fails to establish equivalency in the claimed specific specialty.

End Analysis

The record does not establish how the evaluator came to the conclusion that the beneficiary has the equivalent of a bachelor's degree or higher in the specialty occupation. Moreover, without the supplemental information, the petitioner has not established that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in the claimed specialty occupation.

No Recognition of Expertise

In addition to establishing equivalency, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation shown in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v), as follows:

(i) Recognition of expertise in the specialty occupation by at least two

recognized authorities in the same specialty occupation;

The petitioner did not submit sufficient evidence to support the beneficiary's eligibility under this regulation.

[Optional Statement #1] The previously mentioned letters from former employers, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i), were found inadequate.

[Optional Statement #2 – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

The petitioner did not submit any evidence to establish that the beneficiary is the member of any organizations whose usual requirement for entry is a baccalaureate degree in a specialized field of study to establish his/her recognition of expertise in the field of study required by the proffered position.

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

The petitioner did not submit sufficient evidence to establish that there has ever been any published material by or about the beneficiary to establish his/her recognition of expertise in the field of study required by the proffered position.

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

The petitioner did not submit any evidence to establish that the beneficiary is licensed or registered to practice in the proffered position.

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any evidence from a recognized authority who has determined that the beneficiary's achievements in the field of the specialty occupation are significant.

[Optional Statement – Use if petitioner claims foreign education evaluator is an expert but the record does not show the evaluator is a "Recognized Authority"] The evaluation provided by the foreign educational credentials evaluator is not sufficient to establish recognition of expertise because, as previously stated, they are not considered recognized authorities for the purpose of qualifying under recognition of expertise. In this case the evaluator does not hold a degree in the field related to the proffered position. Also, the record does not establish the evaluator's qualifications as an expert, his or her experience giving such opinions that have been accepted as authoritative and by whom, and the basis for conclusions supported by copies of citations of any research material as required in 8 C.F.R. 214.2(h)(4)(ii).

As such, the petitioner has not established that the beneficiary qualifies to perform the services of a specialty occupation through training or employment experience under 8 C.F.R. 214.2(h)(4)(iii)(D)(5) and is ineligible for classification as an alien employed in a specialty occupation.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

PART 1
EXPERIENTIAL EVALUATION OR COMBINATION EXPERIENTIAL/ACADEMIC EVALUATION USING AN EVALUATOR

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

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NOTE TO ADJUDICATORS: This is only the first half of a complete "Equivalency" denial analysis. If the petitioner does not establish equivalency under any of the following four criteria, then proceed to the second half of the denial in which a determination of equivalency is made by the USCIS. Please see format in this folder: "Part 2 Exp Eval by USCIS".

FYI: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 – present for of all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder in this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the beneficiary as an alien employed in a specialty occupation under 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The issue to be discussed is whether the beneficiary is qualified to perform the duties of the proffered position. i.e. whether he meets any of the criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(C).

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

INA 214(i)(2) outlines the fundamental requirements of a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position;

or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. **Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.**

The beneficiary does not hold a degree from a United States college or university.

2. **Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.**

The beneficiary studied for two years in a post-secondary setting, but does not hold a foreign degree equivalent to a United States baccalaureate.

3. **Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.**

This occupation does not require a State license, registration, or certification.

4. **Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.**

This is the only criterion that the beneficiary could possibly meet. In considering whether the beneficiary qualifies under this category by virtue of his education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> [E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It

seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

SAMPLE ANALYSIS 1of 8:

- No evidence evaluator has authority to issue college-level credit based on alien's experience.
- Credentials evaluation services may only evaluate foreign educational credentials, not training or work experience.

- No evidence that letter from American Institute of Certified Public Accountants is a nationally recognized professional association or society for accountants.

The petitioner seeks to qualify the beneficiary by establishing that the beneficiary meets the requirements of 8 C.F.R. 214.2(h)(4)(iii)(C)(4). In support of this assertion, the petitioner submitted an evaluation from Jack E. Hoover of the Foundation for International Services, Inc. Mr. Hoover states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration with a specialization in accounting from an accredited college or university in the United States. Mr. Hoover bases his opinion on an evaluation from Dr. Gary L. Karns, a professor at Seattle Pacific University for 21 years, formerly serving as Associate Dean of the School of Business and Economics, and as the Director of Graduate Programs. The record does not establish that Dr. Karns is presently employed by Seattle Pacific University. Dr. Karns opines that the beneficiary has the equivalent of a Bachelor's degree in Business Administration, specializing in accounting, from a university in the United States. Both equivalency evaluations are based solely on the beneficiary's prior work experience.

The record does not, however, establish that either evaluator is qualified to render an opinion on degree equivalence based upon the beneficiary's work experience. There is no proof in the record that either evaluator possesses authority to grant college-level credit in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). Counsel further asserts that the evaluations should be accepted by USCIS pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3), as they are from a reliable credentials evaluation service. Credentials evaluation services may only evaluate an individuals **foreign educational credentials**, however, not training or work experience.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). The evaluations will, accordingly, be given little weight.

In addition to the experiential evaluations submitted, the petitioner submitted evidence that the beneficiary is a member of the American Institute of Certified Public Accountants (AICPA). The record fails to establish that the AICPA is a nationally-recognized professional association or society for accountants. The record is silent as to what qualifications an individual must possess to obtain membership with that organization. As such, the petitioner has also failed to qualify the beneficiary pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(4).

SAMPLE ANALYSIS 2 of 8:

- No record of transcripts to show how evaluation done.

- No evidence evaluator has authority to issue college-level credit based on alien's experience.

In its initial petition, the petitioner submitted copies of the beneficiary's high school diploma and certificates for training courses that she attended in Australia in travel consultants, hotel/motel reception, and front office procedures. The petitioner also submitted an educational equivalency document from American Evaluation Institute, Long Beach, California. Dr. Mathew Clark, directing evaluator, stated that, based upon her transcripts and certificates, the beneficiary had attained the equivalent of a bachelor of science degree in business administration from an accredited U.S. university.

Upon review of the record, the educational equivalency document from American Evaluation Institute is inadequate documentary evidence on two grounds. First, the record is devoid of any transcripts of courses or any supplemental information with regard to the beneficiary's training courses, such as the duration of such courses and the academic level of the same courses. Without such supplemental information, it is not possible to determine how the evaluator reached his conclusion that the beneficiary had the equivalent of a U.S. university degree in business administration.

Second, there is no evidence on the record that the evaluator from American Evaluation Institute has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for grant such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). Accordingly, the educational equivalency document from American Evaluation Institute that was submitted by petitioner with the original petition is given no weight. Without such an evaluation, the petitioner has not satisfied the regulatory criterion outlined in 8 C.F.R. 214.2(h)(4)(iii)(C)(2). The remaining criteria are not applicable to the instant petition.

SAMPLE ANALYSIS 3 of 8:

- Evaluation based on degree in unrelated field plus experience.
- There is no evidence that the evaluator has authority to issue college-level credit based on alien's experience.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems as noted in the Department of Labor's Occupational Outlook Handbook.

It is noted that the Evaluation Report prepared by the Foundation for International Services, Inc. (FIS) and submitted with the initial filing of the petition does not met the standards of the regulations for determining equivalency. The evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in computer science as a result of her education, professional training and employment experience. FIS is not qualified to prepare an evaluation of this sort as it does not: "[H]ave the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

FIS is qualified to provide an evaluation of the beneficiary's foreign degree pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3): "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials." In the evaluation, FIS determined that the beneficiary's foreign degree is equivalent to a bachelor's degree in French and literature from an accredited college or university in the United States. This part of the evaluation is accepted, but USCIS does not accept the assessment of the beneficiary's work experience and other training as FIS is not qualified to make that assessment.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4).

SAMPLE ANALYSIS 4 of 8: Evaluation useless without copy of degree or transcripts.

The petitioner is a rehabilitation care provider. It employs 89 people and has a gross annual income of $3.5 million. It seeks to temporarily employ the beneficiary as an

accountant.

The first issue to be considered is whether the beneficiary meets any of the criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(C). As the proffered position is an accountant, the beneficiary must possess a baccalaureate degree, or its equivalent, in accounting or a related field.

Counsel asserts that the educational evaluation on the record established the beneficiary's qualifications. Counsel also refers to an employment certificate and the beneficiary's resume, as well as letters from two former colleagues of the beneficiary's, and finally a letter written by a certified public accountant (CPA) who states that the beneficiary's accounting skills and qualifications are equal to those of a U.S. CPA.

It is noted that the evaluation report prepared by Morningside Evaluations and Consulting does not meet the regulatory standards for determining equivalency. The evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in accounting as a result of his education, professional training and employment experience.

Morningside determined that the beneficiary's foreign degree is the equivalent to a bachelor's degree from an accredited college or university in the United States. Given that the record does not contain a copy of the beneficiary's diploma, and the copy of his college transcript does not indicate that he graduated, this evaluation is unsupported by the record and cannot be given any weight. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS 5 of 8: Evaluator okay and college okay, but request by a private evaluation service not okay.

Although the petitioner has submitted a letter from Mercy College that establishes that Dr. Jelen does have the authority to grant the college-level credit for various graduate and undergraduate degree programs in the Division of Business and Accounting, Dr. Jelen's evaluation was not done on behalf of Mercy College; it was done for a private educational credentials consulting firm. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). Thus, the Morningside evaluation carries no weight in these proceedings. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS 6 of 8: Evaluator okay, but no evidence of what evaluator looked at.

In reviewing the materials submitted to the record with regard to the beneficiary's qualifications, Dr. Parker appears to have the authority to grant college-level credit for

candidates' foreign educational credentials, training and/or employment experience at Ohio State University. However, his analysis of the beneficiary's employment history and level of job responsibilities is not persuasive. For example, the record is not clear as to how Dr. Parker arrived at his description of the beneficiary's job responsibilities and level of responsibility at either Ebbe Jensen or Soren Hvalso in Denmark. Upon a review of the record, no other materials are on the record with regard to the job duties of the beneficiary's previous employment, other than the beneficiary's curriculum vitae that simply lists his job titles and periods of employment with those companies.

SAMPLE ANALYSIS 7 of 8:

- Evaluator okay, but evaluation does not explain how much college credit given.
- Evaluation does not discuss alien's experience letters.
- Experience letters from different employers are identical.
- Experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";
- Letter, dated September 3, 20002, from Alice J. Kaylor, Associated Academic Dean, Saint Vincent College, who concludes that, based on his educational and employment history, the beneficiary has attained the equivalent of a Bachelor of Science degree with a major in marketing from a regionally accredited U.S. college or university;
- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and
- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns first to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(1) - an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. The record contains a letter from Alice J. Kaylor, Associate Dean of Saint Vincent College, who concludes, in part, as follows:

> Based upon my review of his educational and employment history, it is my [judgment] that [the beneficiary] has attained the equivalent of a Bachelor of Science with a major in Marketing from a regionally accredited college or university in the United States. My assessment has been made through an application of the three-for-one work experience for college formula where his employment yields more than three years of equivalent education . . .

Ms. Kaylor does not provide specifics in her evaluation regarding how much credit she granted for the beneficiary's college studies. Nor does Ms. Kaylor discuss the employment letters in any detail. Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the foregoing, Ms. Kaylor's opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the evaluation is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 8 of 8: Evaluator says alien has equivalent of a degree from a "non-

accredited" college or university in the U.S.

The petitioner is an apparel manufacturer that seeks to employ the beneficiary as a software engineer.

The record contains an evaluation from Education International, Inc. concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.S. institution. The evaluator also concludes that the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution. As such, the evaluator does not find that the beneficiary holds the equivalent of a computer-related degree from an accredited U.S. institution. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

The record contains the following documentation relating to the beneficiary's qualifications:

- Memorandum to counsel, dated October 23, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that the beneficiary "may" hold the equivalent of at least a bachelor's degree or higher in computer studies;
- Memorandum to counsel, dated October 30, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that it was still not clear where the beneficiary stood with respect to attaining a master's degree;
- Statement of Evaluation, dated December 5, 2001, from Joel B. Slocum from Education International, Inc., concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.s. institution, and the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution;
- Various documents demonstrating that the beneficiary completed Master's level computer-related courses at Aalborg University;
- Copies of a bachelor's degree in computer science, transcript, and related documents issued to the beneficiary by the Americanos College;
- Microsoft Examinations Score Report, dated March 28, 1999, reflecting that the beneficiary passed the examination on Networking Essentials;
- Letter, dated August 28, 1998, from Soren Haugaard of Bosch Telecom Danmark

A/S, who states, in part, that the beneficiary was employed from July 1 through August 31, 1998 "In a student job . . . as supervisor . . . with analysis of software modules written in ansi C . . . . "; and

- Letter, dated December 4, 1998, from an associate professor of Aalborg University, who states, in part, that the beneficiary was employed as a student assistant from September 1998 until June 1999, "working in a team with another student and successfully completing the development of a web-application prototype."

Counsel states, in part, that the record contains a letter from the International Student Coordinator of Aalborg University maintaining that, in order to enroll in the master's program at Aalborg University, the beneficiary had to submit evidence of a "B.Sc in electronic engineering or computer science from a recognized university . . . ." Counsel concludes that, as the evaluator from Education International, Inc., recognized Aalborg as an accredited institution, then the Americanos College must also be accredited, because Aalborg University accepted the beneficiary's credits from that institution. Counsel's assertion is noted. The record, however, does not include any corroborating evidence, such as a statement from the evaluator of Education International, Inc. explaining why he concluded that Americanos College was a non-accredited institution and conceding that such assessment was made in error, as asserted by counsel.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988).

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

NOTE TO ADJUDICATORS: Please note that this is only the first half of the analysis. The second half of the analysis involves an evaluation by USCIS. Please see file in this folder: "Experiential Eval done by USCIS".

PART 1
EXPERIENTIAL EVALUATION
OR COMBINATION EXPERIENTIAL/ACADEMIC EVALUATION
USING AN EVALUATOR

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

NOTE TO ADJUDICATORS: This is only the first half of a complete "Equivalency" denial analysis. If the petitioner does not establish equivalency under any of the following four criteria, then proceed to the second half of the denial in which a determination of equivalency is made by the USCIS. Please see format in this folder: "Part 2 Exp Eval by USCIS".

FYI: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 – present for of all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary. Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

The petitioner filed Form I-129, Petition for a nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the beneficiary as an alien employed in a specialty occupation under 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The overarching issue to be discussed is whether the beneficiary is qualified to perform the duties of the proffered position. i.e. whether he meets any of the criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(C).

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

INA 214(i)(2) outlines the fundamental requirements of a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether s/he meets any of the criteria listed above in 8 C.F.R. 214.2(h)(4)(iii)(C)(1)-(3).

1. **Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.**

The beneficiary does not hold a degree from a United States college or university.

2. **Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.**

The beneficiary studied for two years in a post-secondary setting, but does not hold a foreign degree equivalent to a United States baccalaureate.

3. **Hold an unrestricted State license, registration, or certification which authorized him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.**

This occupation does not require a State license, registration, or certification.

4. **Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.**

This is the only criterion that the beneficiary could possibly meet. In considering whether the beneficiary qualifies under this category by virtue of his education, practical experience and/or specialized training, 8 C.F.R. 214.2(h)(4)(iii)(D) states:

> [E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:
>
> (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
>
> (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

See individual "Word" documents in this folder for examples of ANALYSES. Block, Copy, Paste, and Edit appropriate text here.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

NOTE TO ADJUDICATORS: Please note that this is only the first half of the analysis. The second half of the analysis involves an evaluation by USCIS. Please see file in this folder: "Experiential Eval done by USCIS".

SAMPLE ANALYSIS 8 of 8:

- Evaluator says alien has equivalent of a degree from a "non-accredited" college or university in the U.S.

The petitioner is an apparel manufacturer that seeks to employ the beneficiary as a software engineer.

The record contains an evaluation from Education International, Inc. concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.S. institution. The evaluator also concludes that the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution. As such, the evaluator does not find that the beneficiary holds the equivalent of a computer-related degree from an accredited U.S. institution. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

The record contains the following documentation relating to the beneficiary's qualifications:

- Memorandum to counsel, dated October 23, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that the beneficiary "may" hold the equivalent of at least a bachelor's degree or higher in computer studies;

- Memorandum to counsel, dated October 30, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that it was still not clear where the beneficiary stood with respect to attaining a master's degree;

- Statement of Evaluation, dated December 5, 2001, from Joel B. Slocum from Education International, Inc., concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.S. institution, and the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution;

- Various documents demonstrating that the beneficiary completed Master's level computer-related courses at Aalborg University;

- Copies of a bachelor's degree in computer science, transcript, and related documents issued to the beneficiary by the Americanos College;

- Microsoft Examinations Score Report, dated March 28, 1999, reflecting that the beneficiary passed the examination on Networking Essentials;

- Letter, dated August 28, 1998, from Soren Haugaard of Bosch Telecom Danmark A/S, who states, in part, that the beneficiary was employed from July 1 through August 31, 1998 "In a student job . . . as supervisor . . . with analysis of software

modules written in ansi C . . . . "; and

- Letter, dated December 4, 1998, from an associate professor of Aalborg University, who states, in part, that the beneficiary was employed as a student assistant from September 1998 until June 1999, "working in a team with another student and successfully completing the development of a web-application prototype."

Counsel states, in part, that the record contains a letter from the International Student Coordinator of Aalborg University maintaining that, in order to enroll in the master's program at Aalborg University, the beneficiary had to submit evidence of a "B.Sc in electronic engineering or computer science from a recognized university . . . ." Counsel concludes that, as the evaluator from Education International, Inc., recognized Aalborg as an accredited institution, then the Americanos College must also be accredited, because Aalborg University accepted the beneficiary's credits from that institution. Counsel's assertion is noted. The record, however, does not include any corroborating evidence, such as a statement from the evaluator of Education International, Inc. explaining why he concluded that Americanos College was a non-accredited institution and conceding that such assessment was made in error, as asserted by counsel.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988).

SAMPLE ANALYSIS 4 of 8:

- Evaluation useless without copy of degree or transcripts.

The petitioner is a rehabilitation care provider. It employs 89 people and has a gross annual income of $3.5 million. It seeks to temporarily employ the beneficiary as an accountant.

The first issue to be considered is whether the beneficiary meets any of the criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(C). As the proffered position is an accountant, the beneficiary must possess a baccalaureate degree, or its equivalent, in accounting or a related field.

Counsel asserts that the educational evaluation on the record established the beneficiary's qualifications. Counsel also refers to an employment certificate and the beneficiary's resume, as well as letters from two former colleagues of the beneficiary's, and finally a letter written by a certified public accountant (CPA) who states that the beneficiary's accounting skills and qualifications are equal to those of a U.S. CPA.

It is noted that the evaluation report prepared by Morningside Evaluations and Consulting does not meet the regulatory standards for determining equivalency. The evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in accounting as a result of his education, professional training and employment experience.

Morningside determined that the beneficiary's foreign degree is the equivalent to a bachelor's degree from an accredited college or university in the United States. Given that the record does not contain a copy of the beneficiary's diploma, and the copy of his college transcript does not indicate that he graduated, this evaluation is unsupported by the record and cannot be given any weight. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS 5 of 8:

- Evaluator okay and college okay, but request by a private evaluation service not okay.

Although the petitioner has submitted a letter from Mercy College that establishes that Dr. Jelen does have the authority to grant the college-level credit for various graduate and undergraduate degree programs in the Division of Business and Accounting, Dr. Jelen's evaluation was not done on behalf of Mercy College; it was done for a private educational credentials consulting firm. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). Thus, the Morningside evaluation carries no weight in these proceedings. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS 7 of 8:

- Evaluator okay, but evaluation does not explain how much college credit given;
- evaluation does not discuss alien's experience letters;
- experience letters from different employers are identical;
- experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";
- Letter, dated September 3, 20002, from Alice J. Kaylor, Associated Academic Dean, Saint Vincent College, who concludes that, based on his educational and employment history, the beneficiary has attained the equivalent of a Bachelor of Science degree with a major in marketing from a regionally accredited U.S. college or university;
- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and
- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns first to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(1) - an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. The record contains a letter from Alice J. Kaylor, Associate Dean of Saint Vincent College, who concludes, in part, as follows:

> Based upon my review of his educational and employment history, it is my [judgment] that [the beneficiary] has attained the equivalent of a Bachelor of Science with a major in Marketing from a regionally accredited college or university in the United States. My assessment has been made through an application of the three-for-one work experience for college formula where his employment yields more than three years of equivalent education . . .

Ms. Kaylor does not provide specifics in her evaluation regarding how much credit she granted for the beneficiary's college studies. Nor does Ms. Kaylor discuss the employment letters in any detail. Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the foregoing, Ms. Kaylor's opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the evaluation is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 1of 8:

- No evidence evaluator has authority to issue college-level credit based on alien's experience.
- Credentials evaluation services may only evaluate foreign educational credentials, not training or work experience.
- No evidence that letter from American Institute of Certified Public Accountants is a nationally recognized professional association or society for accountants.

The petitioner seeks to qualify the beneficiary by establishing that the beneficiary meets the requirements of 8 C.F.R. 214.2(h)(4)(iii)(C)(4). In support of this assertion, the petitioner submitted an evaluation from Jack E. Hoover of the Foundation for International Services, Inc. Mr. Hoover states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration with a specialization in accounting from an accredited college or university in the United States. Mr. Hoover bases his opinion on an evaluation from Dr. Gary L. Karns, a professor at Seattle Pacific University for 21 years, formerly serving as Associate Dean of the School of Business and Economics, and as the Director of Graduate Programs. The record does not establish that Dr. Karns is presently employed by Seattle Pacific University. Dr. Karns opines that the beneficiary has the equivalent of a Bachelor's degree in Business Administration, specializing in accounting, from a university in the United States. Both equivalency evaluations are based solely on the beneficiary's prior work experience.

The record does not, however, establish that either evaluator is qualified to render an opinion on degree equivalence based upon the beneficiary's work experience. There is no proof in the record that either evaluator possesses authority to grant college-level credit in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). Counsel further asserts that the evaluations should be accepted by USCIS pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3), as they are from a reliable credentials evaluation service. Credentials evaluation services may only evaluate an individuals **foreign educational credentials**, however, not training or work experience.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). The evaluations will, accordingly, be given little weight.

In addition to the experiential evaluations submitted, the petitioner submitted evidence that the beneficiary is a member of the American Institute of Certified Public Accountants (AICPA). The record fails to establish that the AICPA is a nationally-recognized professional association or society for accountants. The record is silent as to what qualifications an individual must possess to obtain membership with that organization. As such, the petitioner has also failed to qualify the beneficiary pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(4).

SAMPLE ANALYSIS 2 of 8:

- No record of transcripts to show how evaluation done.
- No evidence evaluator has authority to issue college-level credit based on alien's experience.

In its initial petition, the petitioner submitted copies of the beneficiary's high school diploma and certificates for training courses that she attended in Australia in travel consultants, hotel/motel reception, and front office procedures. The petitioner also submitted an educational equivalency document from American Evaluation Institute, Long Beach, California. Dr. Mathew Clark, directing evaluator, stated that, based upon her transcripts and certificates, the beneficiary had attained the equivalent of a bachelor of science degree in business administration from an accredited U.S. university.

Upon review of the record, the educational equivalency document from American Evaluation Institute is inadequate documentary evidence on two grounds. First, the record is devoid of any transcripts of courses or any supplemental information with regard to the beneficiary's training courses, such as the duration of such courses and the academic level of the same courses. Without such supplemental information, it is not possible to determine how the evaluator reached his conclusion that the beneficiary had the equivalent of a U.S. university degree in business administration.

Second, there is no evidence on the record that the evaluator from American Evaluation Institute has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for grant such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). Accordingly, the educational equivalency document from American Evaluation Institute that was submitted by petitioner with the original petition is given no weight. Without such an evaluation, the petitioner has not satisfied the regulatory criterion outlined in 8 C.F.R. 214.2(h)(4)(iii)(C)(2). The remaining criteria are not applicable to the instant petition.

SAMPLE ANALYSIS 6 of 8:

- Evaluator okay, but no evidence of what evaluator looked at.

In reviewing the materials submitted to the record with regard to the beneficiary's qualifications, Dr. Parker appears to have the authority to grant college-level credit for candidates' foreign educational credentials, training and/or employment experience at Ohio State University. However, his analysis of the beneficiary's employment history and level of job responsibilities is not persuasive. For example, the record is not clear as to how Dr. Parker arrived at his description of the beneficiary's job responsibilities and level of responsibility at either Ebbe Jensen or Soren Hvalso in Denmark. Upon a review of the record, no other materials are on the record with regard to the job duties of the beneficiary's previous employment, other than the beneficiary's curriculum vitae that simply lists his job titles and periods of employment with those companies.

SAMPLE ANALYSIS 3 of 8:

- Evaluation based on degree in unrelated field plus experience.
- There is no evidence that the evaluator has authority to issue college-level credit based on alien's experience.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems as noted in the Department of Labor's Occupational Outlook Handbook.

It is noted that the Evaluation Report prepared by the Foundation for International Services, Inc. (FIS) and submitted with the initial filing of the petition does not met the standards of the regulations for determining equivalency. The evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in computer science as a result of her education, professional training and employment experience. FIS is not qualified to prepare an evaluation of this sort as it does not: "[H]ave the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

FIS is qualified to provide an evaluation of the beneficiary's foreign degree pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3): "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials." In the evaluation, FIS determined that the beneficiary's foreign degree is equivalent to a bachelor's degree in French and literature from an accredited college or university in the United States. This part of the evaluation is accepted, but USCIS does not accept the assessment of the beneficiary's work experience and other training as FIS is not qualified to make that assessment.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4).

PART 2
EXPERIENTIAL EVALUATION
OR COMBINATION EXPERIENTIAL/ACADEMIC EVALUATION
DONE BY USCIS

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

NOTE TO ADJUDICATORS: This format is not a complete denial in itself.

This is only Part 2 of a complete "Equivalency" denial analysis. See "Part 1Exp Eval by Evaluatr" for the first half of the analysis that involves an evaluation under any of four criteria. This format is used when the petitioner did not establish equivalency based on any of the other four possible evidentiary requirements, which include the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

ISSUE:

Although the petitioner has also failed to qualify the beneficiary pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(4), under 8 C.F.R. 214.2(h)(4)(iii)(D)(5), USCIS may make its own independent assessment of the beneficiary's credentials. In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, USCIS is guided by the regulations at 8

C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v).

RULE:

8 C.F.R. 214.2(h)(4)(iii)(D)(5) provides:

> A determination by the Service that the equivalent of the degree is required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
>
> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
>
> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" thusly:

> . . . a person or an organization with expertise in a particular field, special

skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

SAMPLE ANALYSIS 1 of 11: No recognition of expertise. No evidence of Virgo Award.

All of the beneficiary's employment experience letters provide the beneficiary's job title and some provide a time reference of the beneficiary's duration of employment with them; however, all of them do not provide any details concerning the duties, responsibilities, or supervisory role the beneficiary had while employed with this past employers.

In addition to letters from past employers, the beneficiary provided evidence of receiving the following: Virgo Award in Journalism in 1999; the Best All-Around Excellence in Reporting 2nd Place award from the Society of Professional Journalists; and Award of Achievement in Journalism or his "outstanding contribution in bringing the Filipino [illegible] into the new millennium of 2000" from Reflections XII held at the Omni Hotel in Los Angeles, California.

A search of the Internet provided no information about the Virgo Award. A search of the Internet also provided no information about the Reflections XII award. Thus, the beneficiary also fails to present conclusive evidence that he has recognized expertise in the specialty occupation. USCIS does not have enough information about the Virgo Award, Society of Professional Journalists, or Reflections XII associations who gave awards to the beneficiary to make a determination if they are "recognized authorities" as that term is used in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) or (v). A "recognized authority" for purposes of these regulatory provisions is defined at 8 C.F.R. 214.2(h)(ii) as follows:

> Recognized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:
>
> (1) The writer's qualifications as an expert;
>
> (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
>
> (3) How the conclusions were reached; and
>
> (4) The basis for the conclusions supported by copies or citations of any research material used.

The record does not contain any evidence that the award associations are recognized authorities under 8 C.F.R. 214.2(h)(4)(ii).

The beneficiary also provided information about his memberships in professional associations in his sworn affidavit which is a reference to eligibility at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(ii). He stated that he is a current member and Board Director of the Philippine National Press Club of America, an affiliate of the National Press Club in Washington, D.C. He also stated that he was a member of the Society of Professional Journalists from 1992 through 1996. The beneficiary also asserted that he was a member of the Airport Press Corps in the past. However, the record does not contain any documentary evidence proving the beneficiary is a member of these associations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm'r 1972) (Since the burden of proof to establish eligibility for the benefits sought rests with petitioner who seeks to accord beneficiaries' classification, the contention that petitioner need only go "on record" with unsupported statements is rejected).

Thus, there is insufficient evidence that proves the beneficiary qualifies to perform the services of a specialty occupation through training or employment experience under §214.2(h)(4)(iii)(D)(5).

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS 2 of 11: Not enough Experience:

Since the beneficiary does not appear to have any university studies, she would need to

possess twelve years of work experience to meet the equivalency ration outlined in this regulation. In addition, the petitioner would have to establish that the beneficiary's work experience also fulfills the criteria outlined in the regulations as to progressively responsible work.

The letter from ID Tours, the beneficiary's former employer, only documents four years and eight months of work experience. In addition, while the ID Tours letter details the beneficiary's two promotions within the company, and the additional letters submitted by the petitioner speak to the quality of the beneficiary's work, the beneficiary's experience does not appear adequate to meet the regulatory criteria outlined in 8 C.F.R. 214.2(h)(4)(iii)(D)(5). Without more persuasive testimony, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS 3 of 11: Letters of Recognition of Expertise in the specialty occupation were not from recognized authorities in the same specialty occupation.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three expert letters from alleged recognized authorities in the same specialty occupation. The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a

Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

SAMPLE ANALYSIS 4 of 11: Letters of Experience not detailed.

The documentation recounting the beneficiary's work experience consisted of statements from the following: Julian Perez, President of Marketing Advertisement S.A.; Anibal Romero of Marketing Power; Maximiliano Lopez, President of Strategic Marketing; and Maria Chejtman, Insurance Agent and Consultant.

Those statements noted the beneficiary's years of service and described generally her areas of responsibility. They are, however, insufficient in detail to determine that: the work experience included the theoretical and practical application of specialized knowledge required by the proffered position; the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty. Without more persuasive testimony, USCIS cannot determine that the beneficiary is qualified to perform the duties of the specialty occupation.

SAMPLE ANALYSIS 5 of 11:

- Alien has a degree, but not related to the offered position.
- Transcript unclear whether alien completed three- or four-year study.
- Evaluations are conclusory without discussion of documents reviewed.

- Equivalency letters reach different conclusions.

The beneficiary's bachelor's degree is not related to the field of marketing. The university transcript is unclear as to whether the beneficiary completed a three or four-year course of study. The evaluation letters provided do not specify how the evaluators arrived at their differing conclusions. One letter states that the beneficiary's university studies are equal to a U.S. bachelor's degree, and another letter evaluates her education as equal to three years of study towards a U.S. bachelor's degree. It cannot be determined how many years of studies she lacks in order to reach the equivalent of U.S. degree. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 820 (Comm'r 1988).

In addition, the two letters from the beneficiary's former employers do not contain enough detail to determine who many years of experience the beneficiary has in marketing management, and whether this experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in marketing. Finally, the record lacks the required showing of the beneficiary's expertise in travel marketing management. The record contains only one letter from a member of the travel industry written on the beneficiary's behalf, and the writer is not shown to be a recognized authority in the specialty of marketing management. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation.

SAMPLE ANALYSIS 6 of 11:

- Letters of Experience not detailed.

- Not clear whether alien worked part-time or full-time.

- Not clear that alien's experience gained while working with peers, supervisors, or subordinates who have a degree or equivalent in the specialty.

The record does not contain enough information for USCIS to determine that the beneficiary has acquired the equivalent of the degree required by the specialty through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience provided for in 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

The evidence establishing the beneficiary's work experience lacks sufficient detail to establish that the beneficiary has the equivalent of a bachelor's degree in dance. For

example, the petitioner states that the beneficiary was a member of the Official Ballet Folklorico from 1973 - 1981. The record reflects that in that capacity, the beneficiary performed each Sunday, and participated in national and international tours. It is not possible from this general description, to determine the amount of time actually worked in this capacity during the dates listed, or that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty. Likewise, the petitioner listed many workshops and teaching assignments completed by the beneficiary. The record does not indicate, once again, the amount of time specifically spent in some of these endeavors, simply stating that an event was accomplished in a particular month, or listing no length of a particular event. Per regulation, USCIS must be able to determine that the beneficiary has the equivalent of 3 years of specialized training and/or work experience for each year of college-level training the beneficiary lacks in the particular specialty. The training and work experience evidence provided are insufficient to allow this analysis.

It is clear from the record that the beneficiary is highly respected as a performer, director, and instructor in the offered specialty. That fact alone is insufficient, however, to find that the beneficiary has the equivalent of a baccalaureate in the field. The petitioner must establish one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(C). This, it has failed to do.

SAMPLE ANALYSIS 7 of 11:

- Expert okay.

- Experience letters from different employers are identical.

- Experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";

- Credentials evaluation, dated September 4, 2002, indicating that the beneficiary completed the equivalent of 51 U.S. semester hours at an accredited U.S. university;

- Evaluation, dated October 4, 2002, from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who concludes that, based on his

education and professional experience, the beneficiary has attained the equivalent of a U.S. bachelor's degree in business administration with a major in marketing;

- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and

- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) - a determination by USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record includes an evaluation from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who finds that the beneficiary's 51 credits of college coursework counts toward almost two years of a four-year college degree in liberal arts. Dr. Spotts concludes that the beneficiary's educational background and eleven years of work experience as a marketing and sales consultant are equivalent to a U.S. bachelor's degree in business administration with a major in marketing. Dr. Spotts bases his conclusion on the beneficiary's transcripts and the Certificate of Experience written by the CEO of Longturn Aquarium Co., Ltd.

Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the

foregoing, Dr. Spotts' expert opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the expert opinion is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 8 of 11:

- Alien has a foreign degree, but has submitted no evaluation equating it to a U.S. Degree.

  -USCIS conducts its own evaluation in this situation.

- Letters of experience not detailed.

The petitioner is an engineering and architectural firm that seeks to employ the beneficiary as an architectural designer.

The record contains, in part, the following documents relating to the beneficiary: (1) a certificate from the Republic of the Philippines Eulogio "Amang" Rodriguez Institute of Science and Technology, Nagtahan, Sampaloc, Manila, which certifies that the beneficiary holds a bachelor of science degree in architecture; (2) a certificate of attendance in "computer Aided Design and Drafting"; and (3) two employment verification letters.

The petitioner stated that a candidate must hold a bachelor's degree in architecture. However, the beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. Although the beneficiary possess a foreign degree, it has not been determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

Because no evidence in the record equates the beneficiary's credentials to a United States baccalaureate or higher degree pursuant to the first four criteria set forth in 8 C.F.R. 214.2(h)(4)(iii)(D), USCIS must, therefore, determine an alien's qualifications pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(5); three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has

recognition of expertise in the specialty evidenced by at least one type of documentation set out at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v).

Based upon the evidence in the record pertaining to the beneficiary and previously described, USCIS cannot determine whether this documentation establishes equivalence to a baccalaureate degree in architecture.

USCIS now considers the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. As described by each employer, the beneficiary's duties did not seem to involve the theoretical and practical knowledge of architecture. One letter merely certifies the beneficiary's employment as a supervisor from December 1995 to November 1998. Although the second letter states that for two years the beneficiary had prepared working drawings, renderings, and perspectives, neither of the letters specifically describes the beneficiary's daily activities or his level of responsibility. Thus, USCIS cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in this case is architecture. Furthermore, neither employer indicates that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

Finally, there is no evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 9 of 11:

- Alien's Letters of Experience on plain paper, not stationary.
- No evidence of specialty occupation type duties.

USCIS takes note of the fact that these employment letters are all written on plain paper rather than on company letterhead stationery. Therefore, it is not possible to determine whether these letters were actually written by the managers claimed. Furthermore, the writers of these letters have not provided any evidence to show that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation or that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Therefore, the employment letters are accorded little weight.

All of the beneficiary's employment experience letters provide the beneficiary's job title and some provide a time reference of the beneficiary's duration of employment with them; however, all of them do not provide any details concerning the duties, responsibilities, or supervisory role the beneficiary had while employed with this past employers.

SAMPLE ANALYSIS 10 of 11: Discrediting Certificates of Technical Skill.

The petitioner submitted multiple certificates of technical skill level issued to the beneficiary by [redacted]. The fact that an individual may have attained certification in a particular job is not sufficient in itself to qualify the job as a specialty occupation. Certification can be obtained in a wide variety of jobs that would not qualify as specialty occupations such as automobile mechanic, dental assistant, medical transcriptionist, and automotive body repairer.

SAMPLE ANALYSIS 11 of 11:

- Recognition of Expertise.
- Letter from management association too broad including managers from all industries.
- Letter explains no criteria for membership.

The petitioner is a health facility that seeks to employ the beneficiary as an administrator. The petitioner's March 1, 2002 letter indicates that a candidate should possess a bachelor's degree in nursing, physical therapy, psychology, dentistry, or other related medical courses.

The record contains a letter certifying the beneficiary's membership in Management Association of the Philippines (MAP).

There is insufficient evidence that the beneficiary has recognition of expertise. USCIS finds that the letter from MAP does not establish that the beneficiary is a member of a recognized foreign or United States association or society in the specialty occupation. MAP's letter explained that it is a professional organization representing a cross-section of managers, executives, administrators, and other business professionals who hold management positions in the Philippines. The letter never claimed that MAP has criteria for membership; MAP's letter, however, explained that it serves a broad cross-section of professionals. Thus, MAP does not exclusively represent the specialty occupation of medical and health services managers.

CONCLUSION:

As such, the evidence is insufficient to establish that the beneficiary's past employment experience qualifies as a baccalaureate or higher degree or its equivalent as guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Therefore, the beneficiary is ineligible for classification as a specialty occupation worker.

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

PART 2.
EXPERIENTIAL EVALUATION
OR COMBINATION EXPERIENTIAL/ACADEMIC EVALUATION
DONE BY USCIS

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

NOTE TO ADJUDICATORS: This format is not a complete denial in itself.

This is only Part 2 of a complete "Equivalency" denial analysis. See "Part 1Exp Eval by Evaluatr" for the first half of the analysis that involves an evaluation under any of four criteria. This format is used when the petitioner did not establish equivalency based on any of the other four possible evidentiary requirements, which include the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

FYI: The CSC has been granted access to the OLIVE database from the Department of State. The OLIVE database is a useful tool in detecting fraudulent Indian engineering degrees. The OLIVE database is for the state of Andhra Pradesh and has data from 1993 – present for of all engineering students who have graduated from the state.

For more information go to the Adjudicative Tools folder within this directory.

DO NOT go straight to a denial if the OLIVE database fails to show the beneficiary.

Because this is third party information an intent-to-deny (ITD) or a request for evidence (RFE), allowing the beneficiary to rebut this information is required. Appropriate language in the RFE or ITD may include the following:

> An inquiry with the United States Department of State fails to reveal a record that the beneficiary, [Insert full name], ever attended [insert college or university name].

Important: NEVER reference the OLIVE database (or any in-house sources of information, e.g., Choicepoint) in an ITD or RFE. Merely indicating that the DOS inquiry (or in the case of Choicepoint – a search of public records) is the source of the third party information should suffice.

ISSUE:

Although the petitioner has also failed to qualify the beneficiary pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(4), under 8 C.F.R. 214.2(h)(4)(iii)(D)(5), USCIS may make its own independent assessment of the beneficiary's credentials. In its independent assessment of the beneficiary's past employment experience for equivalency to the attainment of a baccalaureate or higher degree or its equivalent, USCIS is guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v).

RULE:

8 C.F.R. 214.2(h)(4)(iii)(D)(5) provides:

> A determination by the Service that the equivalent of the degree is required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the

specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Further, 8 C.F.R. 214.2(h)(4)(ii) defines a "recognized authority" thusly:

. . . a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(1) The writer's qualifications as an expert;

(2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(3) How the conclusions were reached; and

(4) The basis for the conclusions supported by copies or citations of any research material used.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

See individual "Word" documents in this folder for examples of ANALYSES. Block, Copy, Paste, and Edit appropriate text here.

CONCLUSION:

As such, the evidence is insufficient to establish that the beneficiary's past employment experience qualifies as a baccalaureate or higher degree or its equivalent as guided by the regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Therefore, the beneficiary is ineligible for classification as a specialty occupation worker.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

SAMPLE ANALYSIS 10 of 11:

- Discrediting Certificates of Technical Skill:

The petitioner submitted multiple certificates of technical skill level issued to the beneficiary by [redacted]. The fact that an individual may have attained certification in a particular job is not sufficient in itself to qualify the job as a specialty occupation. Certification can be obtained in a wide variety of jobs that would not qualify as specialty occupations such as automobile mechanic, dental assistant, medical transcriptionist, and automotive body repairer.

SAMPLE ANALYSIS 5 of 11:

- Alien has a degree, but not related to the offered position.
- Transcript unclear whether alien completed three- or four-year study.
- Evaluations are conclusory without discussion of documents reviewed.
- Equivalency letters reach different conclusions.

The beneficiary's bachelor's degree is not related to the field of marketing. The university transcript is unclear as to whether the beneficiary completed a three or four-year course of study. The evaluation letters provided do not specify how the evaluators arrived at their differing conclusions. One letter states that the beneficiary's university studies are equal to a U.S. bachelor's degree, and another letter evaluates her education as equal to three years of study towards a U.S. bachelor's degree. It cannot be determined how many years of studies she lacks in order to reach the equivalent of U.S. degree. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 820 (Comm'r 1988).

In addition, the two letters from the beneficiary's former employers do not contain enough detail to determine who many years of experience the beneficiary has in marketing management, and whether this experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in marketing. Finally, the record lacks the required showing of the beneficiary's expertise in travel marketing management. The record contains only one letter from a member of the travel industry written on the beneficiary's behalf, and the writer is not shown to be a recognized authority in the specialty of marketing management. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation.

SAMPLE ANALYSIS 4 of 11:

- Letters of Experience not detailed.

The documentation recounting the beneficiary's work experience consisted of statements from the following: Julian Perez, President of Marketing Advertisement S.A.; Anibal Romero of Marketing Power; Maximiliano Lopez, President of Strategic Marketing; and Maria Chejtman, Insurance Agent and Consultant.

Those statements noted the beneficiary's years of service and described generally her areas of responsibility. They are, however, insufficient in detail to determine that: the work experience included the theoretical and practical application of specialized knowledge required by the proffered position; the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty. Without more persuasive testimony, USCIS cannot determine that the beneficiary is qualified to perform the duties of the specialty occupation.

SAMPLE ANALYSIS 7 of 11:

- Expert okay.
- Experience letters from different employers are identical.
- Experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";
- Credentials evaluation, dated September 4, 2002, indicating that the beneficiary completed the equivalent of 51 U.S. semester hours at an accredited U.S. university;
- Evaluation, dated October 4, 2002, from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who concludes that, based on his education and professional experience, the beneficiary has attained the equivalent of a U.S. bachelor's degree in business administration with a major in marketing;
- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and
- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) - a determination by USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record includes an evaluation from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who finds that the beneficiary's 51 credits of college coursework counts toward almost two years of a four-year college degree in liberal arts. Dr. Spotts concludes that the beneficiary's educational background and eleven years of work experience as a marketing and sales consultant are equivalent to a U.S. bachelor's degree in business administration with a major in marketing. Dr. Spotts bases his conclusion on the beneficiary's transcripts and the Certificate of Experience written by the

CEO of Longturn Aquarium Co., Ltd.

Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the foregoing, Dr. Spotts' expert opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the expert opinion is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 11 of 11:

- Recognition of Expertise.
- Letter from management association too broad including managers from all industries.
- Letter explains no criteria for membership.

The petitioner is a health facility that seeks to employ the beneficiary as an administrator. The petitioner's March 1, 2002 letter indicates that a candidate should possess a bachelor's degree in nursing, physical therapy, psychology, dentistry, or other related medical courses.

The record contains a letter certifying the beneficiary's membership in Management Association of the Philippines (MAP).

There is insufficient evidence that the beneficiary has recognition of expertise. USCIS finds that the letter from MAP does not establish that the beneficiary is a member of a recognized foreign or United States association or society in the specialty occupation. MAP's letter explained that it is a professional organization representing a cross-section of managers, executives, administrators, and other business professionals who hold management positions in the Philippines. The letter never claimed that MAP has criteria for membership; MAP's letter, however, explained that it servies a broad cross-section of professionals. Thus, MAP does not exclusively represent the specialty occupation of medical and health services managers.

SAMPLE ANALYSIS 3 of 11:

- Letters of Recognition of Expertise in the specialty occupation were not from recognized authorities in the same specialty occupation.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three expert letters from alleged recognized authorities in the same specialty occupation. The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program Director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

SAMPLE ANALYSIS 8 of 11:

- Alien has a foreign degree, but has submitted no evaluation equating it to a U.S. Degree.

  -USCIS conducts its own evaluation in this situation.

- Letters of experience not detailed.

The petitioner is an engineering and architectural firm that seeks to employ the beneficiary as an architectural designer.

The record contains, in part, the following documents relating to the beneficiary: (1) a certificate from the Republic of the Philippines Eulogio "Amang" Rodriguez Institute of Science and Technology, Nagtahan, Sampaloc, Manila, which certifies that the beneficiary holds a bachelor of science degree in architecture; (2) a certificate of attendance in "computer Aided Design and Drafting"; and (3) two employment verification letters.

The petitioner stated that a candidate must hold a bachelor's degree in architecture. However, the beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. Although the beneficiary possess a foreign degree, it has not been determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

Because no evidence in the record equates the beneficiary's credentials to a United States baccalaureate or higher degree pursuant to the first four criteria set forth in 8 C.F.R. 214.2(h)(4)(iii)(D), USCIS must, therefore, determine an alien's qualifications pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(5); three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation set out at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v).

Based upon the evidence in the record pertaining to the beneficiary and previously described, USCIS cannot determine whether this documentation establishes equivalence to a baccalaureate degree in architecture.

USCIS now considers the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. As described by each employer, the beneficiary's duties did not seem to involve the theoretical and practical knowledge of architecture. One letter merely certifies the beneficiary's employment as a supervisor from December 1995 to November 1998. Although the second letter states that for two years the beneficiary had prepared working drawings, renderings, and perspectives, neither of the letters specifically describes the beneficiary's daily

activities or his level of responsibility. Thus, USCIS cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in this case is architecture. Furthermore, neither employer indicates that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

Finally, there is no evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS 1 of 11:

- No recognition of expertise.
- No evidence of Virgo Award.

All of the beneficiary's employment experience letters provide the beneficiary's job title and some provide a time reference of the beneficiary's duration of employment with them; however, all of them do not provide any details concerning the duties, responsibilities, or supervisory role the beneficiary had while employed with this past employers.

In addition to letters from past employers, the beneficiary provided evidence of receiving the following: Virgo Award in Journalism in 1999; the Best All-Around Excellence in Reporting 2nd Place award from the Society of Professional Journalists; and Award of Achievement in Journalism or his "outstanding contribution in bringing the Filipino [illegible] into the new millennium of 2000" from Reflections XII held at the Omni Hotel in Los Angeles, California.

A search of the Internet provided no information about the Virgo Award. A search of the Internet also provided no information about the Reflections XII award. Thus, the beneficiary also fails to present conclusive evidence that he has recognized expertise in the specialty occupation. USCIS does not have enough information about the Virgo Award, Society of Professional Journalists, or Reflections XII associations who gave awards to the beneficiary to make a determination if they are "recognized authorities" as that term is used in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) or (v). A "recognized authority" for purposes of these regulatory provisions is defined at 8 C.F.R. 214.2(h)(ii) as follows:

> Recognized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:
>
> (1) The writer's qualifications as an expert;
>
> (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
>
> (3) How the conclusions were reached; and
>
> (4) The basis for the conclusions supported by copies or citations of any research material used.

The record does not contain any evidence that the award associations are recognized authorities under 8 C.F.R. 214.2(h)(ii).

The beneficiary also provided information about his memberships in professional associations in his sworn affidavit which is a reference to eligibility at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(ii). He stated that he is a current member and Board Director of the Philippine National Press Club of America, an affiliate of the National Press Club in

Washington, D.C. He also stated that he was a member of the Society of Professional Journalists from 1992 through 1996. The beneficiary also asserted that he was a member of the Airport Press Corps in the past. However, the record does not contain any documentary evidence proving the beneficiary is a member of these associations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm'r 1972) (Since the burden of proof to establish eligibility for the benefits sought rests with petitioner who seeks to accord beneficiaries' classification, the contention that petitioner need only go "on record" with unsupported statements is rejected).

Thus, there is insufficient evidence that proves the beneficiary qualifies to perform the services of a specialty occupation through training or employment experience under §214.2(h)(4)(iii)(D)(5).

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS 2 of 11:

- Not enough Experience:

Since the beneficiary does not appear to have any university studies, she would need to possess twelve years of work experience to meet the equivalency ration outlined in this regulation. In addition, the petitioner would have to establish that the beneficiary's work experience also fulfills the criteria outlined in the regulations as to progressively responsible work.

The letter from ID Tours, the beneficiary's former employer, only documents four years and eight months of work experience. In addition, while the ID Tours letter details the beneficiary's two promotions within the company, and the additional letters submitted by the petitioner speak to the quality of the beneficiary's work, the beneficiary's experience does not appear adequate to meet the regulatory criteria outlined in 8 C.F.R. 214.2(h)(4)(iii)(D)(5). Without more persuasive testimony, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS 6 of 11:

- Letters of Experience not detailed.
- Not clear whether alien worked part-time or full-time.
- Not clear that alien's experience gained while working with peers, supervisors, or subordinates who have a degree or equivalent in the specialty.

The record does not contain enough information for USCIS to determine that the beneficiary has acquired the equivalent of the degree required by the specialty through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience provided for in 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

The evidence establishing the beneficiary's work experience lacks sufficient detail to establish that the beneficiary has the equivalent of a bachelor's degree in dance. For example, the petitioner states that the beneficiary was a member of the Official Ballet Folklorico from 1973 - 1981. The record reflects that in that capacity, the beneficiary performed each Sunday, and participated in national and international tours. It is not possible from this general description, to determine the amount of time actually worked in this capacity during the dates listed, or that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty. Likewise, the petitioner listed many workshops and teaching assignments completed by the beneficiary. The record does not indicate, once again, the amount of time specifically spent in some of these endeavors, simply stating that an event was accomplished in a particular month, or listing no length of a particular event. Per regulation, USCIS must be able to determine that the beneficiary has the equivalent of 3 years of specialized training and/or work experience for each year of college-level training the beneficiary lacks in the particular specialty. The training and work experience evidence provided are insufficient to allow this analysis.

It is clear from the record that the beneficiary is highly respected as a performer, Director, and instructor in the offered specialty. That fact alone is insufficient, however, to find that the beneficiary has the equivalent of a baccalaureate in the field. The petitioner must establish one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(C). This, it has failed to do.

SAMPLE ANALYSIS:

- Evaluator's credentials in a field other than the one being evaluated.

The evaluator has not submitted evidence setting for his/her credentials to determine educational equivalency to a bachelor's degree in this particular field of endeavor. The evaluator holds a bachelor's degree in [Insert field of study: e.g., ...education and a master's degree in educational administration.] He/she does not appear to have any education or experience in [Insert required education: e.g., ...culinary arts, hotel, and restaurant management, or a related field.]

SAMPLE ANALYSIS:

- Expert opinions are advisory only.

While a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), USCIS maintains discretion to use as advisory opinions statements submitted as expert testimony. Matter of Caron International, 19 I. & N. Dec. 791 (Comm'r 1988).

SAMPLE ANALYSIS:

- Limited authorization to issue college credit.

Although the evaluator states that he/she has the authority and responsibility for the evaluation and granting of college-level credit for all international transfer students, the record does not establish that he/she is authorized to grant college-level credit for training and/or work experience in the field, nor does it indicate that his/her college has a program for granting such credit. Accordingly, the evaluation is accorded little weight.

SAMPLE ANALYSIS:

- Evaluation based on degree in unrelated field plus experience.
- No evidence evaluator has authority to issue college-level credit based on alien's experience

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

It is noted that the Evaluation Report prepared by the Foundation for International Services, Inc. (FIS) and submitted with the initial filing of the petition does not met the standards of the regulations for determining equivalency. The Evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in computer science as a result of her education, professional training and employment experience. FIS is not qualified to prepare an evaluation of this sort as it does not: "[H]ave the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" as required by the regulation. 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

FIS is qualified to provide an evaluation of the beneficiary's foreign degree pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3): "An evaluation of education by a reliable credentials evaluation service which specialized in evaluating foreign educational credentials." In the evaluation, FIS determined that the beneficiary's foreign degree is equivalent to a bachelor's degree in French and literature from an accredited college or university in the United States. This part of the evaluation is accepted, but USCIS does not accept the assessment of the beneficiary's work experience and other training as FIS is not qualified to make that assessment.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three letters in addition to the Evaluation (which has already been discussed and will not be addressed any further). The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program Director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in

Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

SAMPLE ANALYSIS:

- Evaluator okay;
- college okay; BUT
- Evaluator performed the evaluation on behalf of a private evaluation service - not okay.

Although the petitioner has submitted a letter from Mercy College that establishes that Dr. Jelen does have the authority to grant the college-level credit for various graduate and undergraduate degree programs in the Division of Business and Accounting, Dr. Jelen's evaluation was not done on behalf of Mercy College; it was done for a private educational credentials consulting firm. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. 214.2(h)(4)(iii)(D)(3). Thus, the Morningside evaluation carries no weight in these proceedings. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS:

- Evaluation in different field than what OOH says is required.

The evaluator did not conclude that the beneficiary has graduate education in one of the disciplines listed by the Occupational Outlook Handbook.

SAMPLE ANALYSIS 1:

- Evaluation less than what OOH says is required.

Here, the evaluation of the beneficiary's foreign credentials as the equivalent of a baccalaureate degree in business administration is based on employment experience and educational background. A review of the Department of Labor's Occupational Outlook Handbook, however, finds that the graduate education is normally required for the proffered position.

SAMPLE ANALYSIS:

- Evaluator okay, but evaluation does not explain how much college credit given;
- evaluation does not discuss alien's experience letters;
- experience letters from different employers are identical;
- experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";
- Letter, dated September 3, 20002, from Alice J. Kaylor, Associated Academic Dean, Saint Vincent College, who concludes that, based on his educational and employment history, the beneficiary has attained the equivalent of a Bachelor of Science degree with a major in marketing from a regionally accredited U.S. college or university;
- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and
- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns first to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(1) - an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. The record contains a letter from Alice J. Kaylor, Associate Dean of Saint Vincent College, who concludes, in part, as follows:

> Based upon my review of his educational and employment history, it is my [judgment] that [the beneficiary] has attained the equivalent of a Bachelor of Science with a major in Marketing from a regionally accredited college or university in the United States. My assessment has been made through an application of the three-for-one work experience for college formula where his employment yields more than three years of equivalent education . . .

Ms. Kaylor does not provide specifics in her evaluation regarding how much credit she granted for the beneficiary's college studies. Nor does Ms. Kaylor discuss the employment letters in any detail. Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the foregoing, Ms. Kaylor's opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the evaluation is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS:

- Evaluator okay - but no evidence of what evaluator looked at.

In reviewing the materials submitted to the record with regard to the beneficiary's qualifications, [Insert Evaluator's Name & Title] appears to have the authority to grant college-level credit for candidates' foreign educational credentials, training and/or employment experience at [Insert Name of College or Univ where the Evaluator is Employed].

However, the analysis of the beneficiary's employment history and level of job responsibilities is not persuasive. For example, the record is not clear as to how [Insert Evaluator's Name & Title] arrived at his or her description of the beneficiary's job responsibilities and level of responsibility at [List Names and Locations of Businesses where the Beneficiary was employed].

Upon a review of the record, no other materials are on the record with regard to the job duties of the beneficiary's previous employment, other than the beneficiary's curriculum vitae that simply lists his job titles and periods of employment with those companies.

SAMPLE ANALYSIS:

- Not enough work experience.

Since the beneficiary does not appear to have any university studies, she would need to possess twelve years of work experience to meet the equivalency ration outlined in this regulation. In addition, the petitioner would have to establish that the beneficiary's work experience also fulfills the criteria outlined in the regulations as to progressively responsible work.

The letter from ID Tours, the beneficiary's former employer, only documents four years and eight months of work experience. In addition, while the ID Tours letter details the beneficiary's two promotions within the company, and the additional letters submitted by the petitioner speak to the quality of the beneficiary's work, the beneficiary's experience does not appear adequate to meet the regulatory criteria outlined in 8 C.F.R. 214.2(h)(4)(iii)(D)(5). Without more persuasive testimony, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS:

- Letters of experience not detailed;
- not clear whether alien worked part-time or full-time;
- not clear that alien's experience gained while working with peers, supervisors, or subordinates who have a degree or equivalent in the specialty

The record does not contain enough information for USCIS to determine that the beneficiary has acquired the equivalent of the degree required by the specialty through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience provided for in 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

The evidence establishing the beneficiary's work experience lacks sufficient detail to establish that the beneficiary has the equivalent of a bachelor's degree in dance. For example, the petitioner states that the beneficiary was a member of the Official Ballet Folklorico from 1973 - 1981. The record reflects that in that capacity, the beneficiary performed each Sunday, and participated in national and international tours. It is not possible from this general description, to determine the amount of time actually worked in this capacity during the dates listed, or that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty. Likewise, the petitioner listed many workshops and teaching assignments completed by the beneficiary. The record does not indicate, once again, the amount of time specifically spent in some of these endeavors, simply stating that an event was accomplished in a particular month, or listing no length of a particular event. Per regulation, USCIS must be able to determine that the beneficiary has the equivalent of 3 years of specialized training and/or work experience for each year of college-level training the beneficiary lacks in the particular specialty. The training and work experience evidence provided are insufficient to allow this analysis.

It is clear from the record that the beneficiary is highly respected as a performer, Director, and instructor in the offered specialty. That fact alone is insufficient, however, to find that the beneficiary has the equivalent of a baccalaureate in the field. The petitioner must establish one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(C). This, it has failed to do.

SAMPLE ANALYSIS:

- Letters of experience not detailed.

The documentation recounting the beneficiary's work experience consisted of statements from the following: [Insert names and titles of persons making statements: e.g, ____Julian Perez, President of Marketing Advertisement S.A.; Anibal Romero of Marketing Power; Maximiliano Lopez, President of Strategic Marketing; and Maria Chejtman, Insurance Agent and Consultant. ...etc.]

Those statements noted the beneficiary's years of service and described generally his or her areas of responsibility. They are, however, insufficient in detail to determine that: the work experience included the theoretical and practical application of specialized knowledge required by the proffered position; the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty. Without more persuasive testimony, USCIS cannot determine that the beneficiary is qualified to perform the duties of the specialty occupation

SAMPLE ANALYSIS:

- Alien's letters of experience on plain paper, not stationary;
- no evidence of specialty occupation-type duties.

USCIS takes note of the fact that these employment letters are all written on plain paper rather than on company letterhead stationery. Therefore, it is not possible to determine whether these letters were actually written by the managers claimed. Furthermore, the writers of these letters have not provided any evidence to show that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation or that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Therefore, the employment letters are accorded little weight.

All of the beneficiary's employment experience letters provide the beneficiary's job title and some provide a time reference of the beneficiary's duration of employment with them; however, all of them do not provide any details concerning the duties, responsibilities, or supervisory role the beneficiary had while employed with this past employers.

SAMPLE ANALYSIS:

- Expert okay;
- experience letters from different employers are identical; and
- experience letters overlap in time as concurrent full-time employment without explanation.

The petitioner sells multimedia products. It seeks to employ the beneficiary as a market research analyst.

The record contains the following documentation relating to the beneficiary's qualifications:

- Beneficiary's college transcripts from a Filipino university reflecting five semesters and one summer of studies that included the following accounting course: "Fundamentals of Management Accounting";
- Credentials evaluation, dated September 4, 2002, indicating that the beneficiary completed the equivalent of 51 U.S. semester hours at an accredited U.S. university;
- Evaluation, dated October 4, 2002, from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who concludes that, based on his education and professional experience, the beneficiary has attained the equivalent of a U.S. bachelor's degree in business administration with a major in marketing;
- Certificate of Experience, dated July 9, 2002, from the CEO of the Taiwanese business, Longturn Aquarium Co., Ltd. who states that the beneficiary was employed from May 1, 1990 to August 31, 2001, as a marketing and sales consultant; and
- Certificate of Experience, dated August 8, 2002, from the president of the Filipino business Asia United Bank, who states, that the beneficiary was employed from May 1, 1999 to December 30, 2000, as a senior manager/ marketing representative.

USCIS turns to the criterion at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) - a determination by USCIS that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record includes an evaluation from Harlan Spotts, Ph.D., Associate Professor of Marketing, Western New England College, who finds that the beneficiary's 51 credits of college coursework counts toward almost two years of a four-year college degree in liberal arts. Dr. Spotts concludes that the beneficiary's educational background and eleven years of work experience as a marketing and sales consultant are equivalent to a U.S. bachelor's degree in business administration with a major in marketing. Dr. Spotts bases his conclusion on the beneficiary's transcripts and the Certificate of Experience written by the

CEO of Longturn Aquarium Co., Ltd.

Upon review of the employment letters, it appears that the beneficiary was concurrently employed by the Filipino business, Asia United Bank, and the Taiwanese business, Longturn Aquarium Co., Ltd. At the Filipino business, his position was described as that of a senior manager/marketing representative, while at the Taiwanese business, his position was described as that of a marketing and sales consultant. The petitioner has provided no details regarding how this concurrent employment was accomplished, such as an hourly breakdown of the duties performed at the Filipino and Taiwanese businesses.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988). Furthermore, it is noted that much of the text in both employment letters is identical. Thus, USCIS must question whether the opinions expressed in each letter are the views of each author. In view of the foregoing, Dr. Spotts' expert opinion is accorded little weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I. & N. Dec 791 (Comm'r 1988).

In view of the foregoing, the expert opinion is accorded little weight. As such, the record contains insufficient evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS:

- Conclusory evaluation;
- No authorization to issue college credit.

The record does not contain any corroborating evidence to support the evaluator's finding, such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

SAMPLE ANALYSIS:

- Evaluator says alien has equivalent of a degree from a "non-accredited" college or university in the U.S.

The petitioner is an apparel manufacturer that seeks to employ the beneficiary as a software engineer.

The record contains an evaluation from Education International, Inc. concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.S. institution. The evaluator also concludes that the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution. As such, the evaluator does not find that the beneficiary holds the equivalent of a computer-related degree from an accredited U.S. institution. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

The record contains the following documentation relating to the beneficiary's qualifications:

- Memorandum to counsel, dated October 23, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that the beneficiary "may" hold the equivalent of at least a bachelor's degree or higher in computer studies;

- Memorandum to counsel, dated October 30, 2001, from Joel B. Slocum from Education International, Inc., requesting additional information and indicating that it was still not clear where the beneficiary stood with respect to attaining a master's degree;

- Statement of Evaluation, dated December 5, 2001, from Joel B. Slocum from Education International, Inc., concluding that the beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a "non-accredited" U.S. institution, and the beneficiary completed approximately 60 percent of the equivalent of a master's degree, specializing in computer studies, from an accredited U.S. institution;

- Various documents demonstrating that the beneficiary completed Master's level computer-related courses at Aalborg University;

- Copies of a bachelor's degree in computer science, transcript, and related documents issued to the beneficiary by the Americanos College;

- Microsoft Examinations Score Report, dated March 28, 1999, reflecting that the beneficiary passed the examination on Networking Essentials;

- Letter, dated August 28, 1998, from Soren Haugaard of Bosch Telecom Danmark A/S, who states, in part, that the beneficiary was employed from July 1 through August 31, 1998 "In a student job . . . as supervisor . . . with analysis of software

modules written in ansi C . . . . "; and

- Letter, dated December 4, 1998, from an associate professor of Aalborg University, who states, in part, that the beneficiary was employed as a student assistant from September 1998 until June 1999, "working in a team with another student and successfully completing the development of a web-application prototype."

Counsel states, in part, that the record contains a letter from the International Student Coordinator of Aalborg University maintaining that, in order to enroll in the master's program at Aalborg University, the beneficiary had to submit evidence of a "B.Sc in electronic engineering or computer science from a recognized university...." Counsel concludes that, as the evaluator from Education International, Inc., recognized Aalborg as an accredited institution, then the Americanos College must also be accredited, because Aalborg University accepted the beneficiary's credits from that institution. Counsel's assertion is noted. The record, however, does not include any corroborating evidence, such as a statement from the evaluator of Education International, Inc. explaining why he concluded that Americanos College was a non-accredited institution and conceding that such assessment was made in error, as asserted by counsel.

Doubt cast on any aspect of the petitioner's proof may, of course lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I. & N. Dec. 582, 591-2 (BIA 1988).

SAMPLE ANALYSIS:

- Evaluation is useless without a copy of the alien's degree or transcripts.

The petitioner is a rehabilitation care provider. It employs 89 people and has a gross annual income of $3.5 million. It seeks to temporarily employ the beneficiary as an accountant.

The first issue to be considered is whether the beneficiary meets any of the criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(C). As the proffered position is an accountant, the beneficiary must possess a baccalaureate degree, or its equivalent, in accounting or a related field.

Counsel asserts that the educational evaluation on the record established the beneficiary's qualifications. Counsel also refers to an employment certificate and the beneficiary's resume, as well as letters from two former colleagues of the beneficiary's, and finally a letter written by a certified public accountant (CPA) who states that the beneficiary's accounting skills and qualifications are equal to those of a U.S. CPA.

It is noted that the evaluation report prepared by Morningside Evaluations and Consulting does not meet the regulatory standards for determining equivalency. The evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in accounting as a result of his education, professional training and employment experience.

Morningside determined that the beneficiary's foreign degree is the equivalent to a bachelor's degree from an accredited college or university in the United States. Given that the record does not contain a copy of the beneficiary's diploma, and the copy of his college transcript does not indicate that he graduated, this evaluation is unsupported by the record and cannot be given any weight. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. Dec. 817 (Comm'r 1988).

SAMPLE ANALYSIS:

- Evaluation less than what OOH says is required.

Here, the evaluation of the beneficiary's foreign credentials as the equivalent of a baccalaureate degree in business administration is based on employment experience and educational background. A review of the Department of Labor's Occupational Outlook Handbook, however, finds that the graduate education is normally required for the proffered position.

SAMPLE ANALYSIS:

- Evaluation in different field than what OOH says is required.

The evaluator did not conclude that the beneficiary has graduate education in one of the disciplines listed by the Occupational Outlook Handbook.

SAMPLE ANALYSIS:

- No record of transcripts to show how evaluation done;
- No evidence evaluator has authority to issue college-level credit based on alien's experience.

In its initial petition, the petitioner submitted copies of the beneficiary's high school diploma and certificates for training courses that she attended in Australia in travel consultants, hotel/motel reception, and front office procedures. The petitioner also submitted an educational equivalency document from American Evaluation Institute, Long Beach, California. Dr. Mathew Clark, directing evaluator, stated that, based upon her transcripts and certificates, the beneficiary had attained the equivalent of a bachelor of science degree in business administration from an accredited U.S. university.

Upon review of the record, the educational equivalency document from American Evaluation Institute is inadequate documentary evidence on two grounds. First, the record is devoid of any transcripts of courses or any supplemental information with regard to the beneficiary's training courses, such as the duration of such courses and the academic level of the same courses. Without such supplemental information, it is not possible to determine how the evaluator reached his conclusion that the beneficiary had the equivalent of a U.S. university degree in business administration.

Second, there is no evidence on the record that the evaluator from American Evaluation Institute has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for grant such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). Accordingly, the educational equivalency document from American Evaluation Institute that was submitted by petitioner with the original petition is given no weight. Without such an evaluation, the petitioner has not satisfied the regulatory criterion outlined in 8 C.F.R. 214.2(h)(4)(iii)(C)(2). The remaining criteria are not applicable to the instant petition.

SAMPLE ANALYSIS:

- Alien has a foreign degree, but has submitted no evaluation equating it to a U.S. degree.
- USCIS conducts its own evaluation in this situation.
- Letters of experience not detailed.

The petitioner is an engineering and architectural firm that seeks to employ the beneficiary as an architectural designer.

The record contains, in part, the following documents relating to the beneficiary: (1) a certificate from the Republic of the Philippines Eulogio "Amang" Rodriguez Institute of Science and Technology, Nagtahan, Sampaloc, Manila, which certifies that the beneficiary holds a bachelor of science degree in architecture; (2) a certificate of attendance in "computer Aided Design and Drafting"; and (3) two employment verification letters.

The petitioner stated that a candidate must hold a bachelor's degree in architecture. However, the beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. Although the beneficiary possess a foreign degree, it has not been determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. 214.2(h)(4)(iii)(C)(4).

Because no evidence in the record equates the beneficiary's credentials to a United States baccalaureate or higher degree pursuant to the first four criteria set forth in 8 C.F.R. 214.2(h)(4)(iii)(D), USCIS must, therefore, determine an alien's qualifications pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(5); three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation set out at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v).

Based upon the evidence in the record pertaining to the beneficiary and previously described, USCIS cannot determine whether this documentation establishes equivalence to a baccalaureate degree in architecture.

USCIS now considers the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. As described by each employer, the beneficiary's duties did not seem to involve the theoretical and practical knowledge of architecture. One letter merely certifies the beneficiary's employment as a supervisor from December 1995 to November 1998. Although the second letter states that for two years the beneficiary had prepared working drawings, renderings, and perspectives, neither of the letters specifically describes the beneficiary's daily

activities or his level of responsibility. Thus, USCIS cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in this case is architecture. Furthermore, neither employer indicates that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

Finally, there is no evidence that the beneficiary has recognition of expertise.

SAMPLE ANALYSIS:

- No recognition of expertise;
- No evidence that alien is a member of associations; or
- No evidence that alien is a recipient of awards as claimed.

All of the beneficiary's employment experience letters provide the beneficiary's job title and some provide a time reference of the beneficiary's duration of employment with them; however, all of them do not provide any details concerning the duties, responsibilities, or supervisory role the beneficiary had while employed with this past employers.

In addition to letters from past employers, the beneficiary provided evidence of receiving the following: Virgo Award in Journalism in 1999; the Best All-Around Excellence in Reporting 2nd Place award from the Society of Professional Journalists; and Award of Achievement in Journalism or his "outstanding contribution in bringing the Filipino [illegible] into the new millennium of 2000" from Reflections XII held at the Omni Hotel in Los Angeles, California.

A search of the Internet provided no information about the Virgo Award. A search of the Internet also provided no information about the Reflections XII award. Thus, the beneficiary also fails to present conclusive evidence that he has recognized expertise in the specialty occupation. USCIS does not have enough information about the Virgo Award, Society of Professional Journalists, or Reflections XII associations who gave awards to the beneficiary to make a determination if they are "recognized authorities" as that term is used in 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) or (v). A "recognized authority" for purposes of these regulatory provisions is defined at 8 C.F.R. 214.2(h)(ii) as follows:

> Recognized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:
>
> (1) The writer's qualifications as an expert;
>
> (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
>
> (3) How the conclusions were reached; and
>
> (4) The basis for the conclusions supported by copies or citations of any research material used.

The record does not contain any evidence that the award associations are recognized authorities under 8 C.F.R. 214.2(h)(ii).

The beneficiary also provided information about his memberships in professional associations in his sworn affidavit which is a reference to eligibility at 8 C.F.R.

214.2(h)(4)(iii)(D)(5)(ii). He stated that he is a current member and Board Director of the Philippine National Press Club of America, an affiliate of the National Press Club in Washington, D.C. He also stated that he was a member of the Society of Professional Journalists from 1992 through 1996. The beneficiary also asserted that he was a member of the Airport Press Corps in the past. However, the record does not contain any documentary evidence proving the beneficiary is a member of these associations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm'r 1972) (Since the burden of proof to establish eligibility for the benefits sought rests with petitioner who seeks to accord beneficiaries' classification, the contention that petitioner need only go "on record" with unsupported statements is rejected).

Thus, there is insufficient evidence that proves the beneficiary qualifies to perform the services of a specialty occupation through training or employment experience under §214.2(h)(4)(iii)(D)(5).

Under INA 291, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden.

SAMPLE ANALYSIS:

- Letters of recognition of expertise in the specialty occupation were not from recognized authorities in the same specialty occupation.

The petitioner is an import/export business. It employs 25 people and has a gross annual income of over $4,000,000. It seeks to temporarily employ the beneficiary as a systems analyst for a period of three years.

As the proffered position is a systems analyst, the beneficiary must possess a baccalaureate degree, or its equivalent, in computer science or management information systems.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

Counsel submitted three expert letters from alleged recognized authorities in the same specialty occupation. The first letter is from Jay Moon, CEO of Newmerica Technology, who holds a Master of Science Degree in Computer Information Systems. He stated that the beneficiary completed coursework to achieve her Microsoft Certified Network Engineer and Cisco Certified Network Associate ratings. He also stated the she is qualified for a "task where comprehensive network knowledge is required . . . . [S]he has an ability to do the task for network system analyst." Mr. Moon was the program Director of the facility where the beneficiary received her training.

The second letter is from Jong Wha Lee, a colleague for about one year at Tele-Com Art in Korea. Jong Wha Lee stated that she and the beneficiary worked at "computer educational programming but also at managing the company's computer system." Jong Wha Lee has a Bachelor's Degree in Computer Science from Seoul Seoil University.

The third letter is from Mee Hee Jeong, an administrator at the Narae Fine Art Academy where the beneficiary worked from July 1992 to February 1995 as a teacher in "computer education, taught basic knowledge of hardware and software, developed the academy operation and management program (for registration, attendance check, students' record filing and academy affairs etc.). She was in charge of computer system development and troubleshooting for the academy computers. " Mee Hee Jeong has a Bachelor's Degree in Applied Fine Arts.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentations referenced at 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i) - (v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. 214.2(h)(4)(iii)(D)(5)(i). This standard required "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation." The letter from Mr. Moon would qualify under this standard; however, the other two letters are not from "recognized authorities" and, therefore, cannot be used to document the beneficiary's experience.

SAMPLE ANALYSIS:

- No evidence evaluator has authority to issue college-level credit based on alien's experience;
- Credentials evaluation services may only evaluate foreign educational credentials, not training or work experience;
- No evidence that letter from American Institute of Certified Public Accountants is a nationally recognized professional association or society for accountants.

The petitioner seeks to qualify the beneficiary by establishing that the beneficiary meets the requirements of 8 C.F.R. 214.2(h)(4)(iii)(C)(4). In support of this assertion, the petitioner submitted an evaluation from Jack E. Hoover of the Foundation for International Services, Inc. Mr. Hoover states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration with a specialization in accounting from an accredited college or university in the United States. Mr. Hoover bases his opinion on an evaluation from Dr. Gary L. Karns, a professor at Seattle Pacific University for 21 years, formerly serving as Associate Dean of the School of Business and Economics, and as the Director of Graduate Programs. The record does not establish that Dr. Karns is presently employed by Seattle Pacific University. Dr. Karns opines that the beneficiary has the equivalent of a Bachelor's degree in Business Administration, specializing in accounting, from a university in the United States. Both equivalency evaluations are based solely on the beneficiary's prior work experience.

The record does not, however, establish that either evaluator is qualified to render an opinion on degree equivalence based upon the beneficiary's work experience. There is no proof in the record that either evaluator possesses authority to grant college-level credit in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). Counsel further asserts that the evaluations should be accepted by USCIS pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(3), as they are from a reliable credentials evaluation service. Credentials evaluation services may only evaluate an individuals **foreign educational credentials**, however, not training or work experience.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is any way questionable, it may be discounted or given less weight. Matter of Sea, Inc., 19 I. & N. 817 (Comm'r 1988). The evaluations will, accordingly, be given little weight.

In addition to the experiential evaluations submitted, the petitioner submitted evidence that the beneficiary is a member of the American Institute of Certified Public Accountants (AICPA). The record fails to establish that the AICPA is a nationally-recognized professional association or society for accountants. The record is silent as to what qualifications an individual must possess to obtain membership with that organization. As such, the petitioner has also failed to qualify the beneficiary pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(4).

SAMPLE ANALYSIS:

- Discrediting Certificates of Technical Skill

The petitioner submitted multiple certificates of technical skill level issued to the beneficiary by [redacted]. The fact that an individual may have attained certification in a particular job is not sufficient in itself to qualify the job as a specialty occupation. Certification can be obtained in a wide variety of jobs that would not qualify as specialty occupations such as automobile mechanic, dental assistant, medical transcriptionist, and automotive body repairer.