PROVIDED BY
The leading immigration law publisher
ILW.COM
http://www.ilw.com

Office of Communications
U.S. Citizenship and Immigration Services
Community Relations

Question & Answer

September 25, 2007

USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, SEPTEMBER 25, 2007
Answers to AILA Questions

I. Short and Long-Term Business Processing Initiatives

A. General Processing/Procedural Issues

1. The announcement by the Department of State of employment-based visa availability in all categories but EB-3 "Other Worker" with Visa Bulletin 107 resulted in the filing of an unprecedented number of adjustment of status applications.
   i. How many adjustment of status applications were received from July 2, 2007 through August 17, 2007? How many were received at the NSC? At the TSC? At the CSC? At the VSC?
   ii. Many of the adjustment applications submitted pursuant to Visa Bulletin 107 are for beneficiaries from countries for which there will be severe retrogression of visa availability. Can you discuss plans USCIS has developed or is in the process of developing to manage and process these applications going forward?

2. USCIS anticipated a significant increase in receipt of N-400 applications immediately prior to the effective date of the new filing fees. How many were received in the time period following the announcement of the fee increase through July 30, 2007? What systems have been developed to process these applications?

   Response: In general, receipts this fiscal year have been higher than projections. That's been particularly true for naturalization.

   On top of already high receipts, we saw a dramatic additional increase in July. There were two principal reasons for this added surge. One was the Department of State July visa bulletin, which created an opportunity for hundreds of thousands to apply for permanent residence. While we continue to receipt the work we recently received, we project that we received over 320,000 adjustment applications due to the July visa bulletin. We also received a significant volume of concurrently filed petitions to sponsor the adjustment applicant as an immigrant worker, and over 400,000 applications for ancillary benefits such as employment authorization and travel authorization based on the filing of the adjustment application, for a total of almost 800,000 applications.

   We are working to ensure that all applications are processed as quickly and efficiently as possible. We have expanded hours, added shifts, allocated overtime for both our contract and Government employees, and realigned resources to resolve the receipting delay. To speed the receipting process, the contractor has been instructed to key those data fields required to process remittances, the remaining data fields will be keyed after all receipting is completed.

   We are also taking great care to ensure that cases are processed based on the date the application was postmarked to ensure proper processing. We are also prioritizing certain work to ensure we meet certain legal obligations. A critical target is to ensure that all applications to adjust status (I-485) are receipted to allow processing of any EAD application within 90 days of filing. We

anticipate resolving the receipting delay of adjustment-of-status applications in October 2007. We expect to handle all associated EAD applications within the required timeframe.

The second reason for the large surge in demand was to beat the July 30th increase in prices. This surge crossed many products. But none seemed to increase more than naturalization, where customer efforts to file before price increases came on top of already high demand. We project we received over 500,000 applications for naturalization in July and August, compared to a projected average of about 70,000 per month. It will similarly take us some time to receipt all of these applications.

It will take several months, if not more, to fully analyze the operational impact of this influx of work on our goals.

3. The DORA program was recently expanded beyond Dallas to include El Paso and Oklahoma City. From USCIS' perspective, what are the major benefits of the DORA program? Is USCIS considering expanding the DORA program beyond the current three locations?

   Response: Federal Register Notice published September 21, 2006, that expanded the District Office Rapid Adjudication (DORA) Pilot Program also set September 21, 2007 as the termination date for the pilot; and after careful consideration USCIS decided to not extend the DORA Pilot Program and ended the program on September 21, 2007.

   The DORA processing model's reliance on same-day interviews at the time of filing presented inherent vulnerabilities that were not offset by gains in efficiency or customer services. The DORA pilot did however demonstrate the value in screening applications at an early stage and as a result, USCIS has expanded its' screening activities at the National Benefits Center. USCIS continues to pursue opportunities for greater up-front application review at NBC and the USCIS Lockbox.

4. The SIMS program was initiated on July 5, 2007. At this early date, is the Service able to see improvements in processing of I-600, I-600A, N-600 and N-600K applications?

   Response: The SIMS pilot was deployed to 2 domestic and 3 international locations, and has been operational for more than two months. We are in the process of gathering performance measures to assess the affect SIMS is having on the adjudication process for Adoptions cases. While initial results seem positive, they are too early to quantify.

5. Have any additional efforts been made to expand the use of lock boxes?

   Response: Yes. USCIS is in active discussions with the Department of the Treasury's Financial Management Service (FMS) regarding our expansion plans. FMS has designated a bank to be its agent for this purpose and we are currently developing transition plans. Once those plans are solidified, we will gladly inform our customers of those details.

6. Is there a timeline in place to permit the widespread use of credit cards for payment of filing fees?

   Response: Our plans for the expanded use of electronic payments will be finalized as we complete our lockbox expansion planning.

7. Have discussions continued on privatizing certain functions, such as administration of the N-400 civics exam and rendering of degree equivalency determinations?

Response: USCIS is looking into how it can best apply contract resources to assist in administration of the naturalization test. While we are interested in the ideas of relying more on certain private credentialing evaluation, that is not a priority at this time.

B. Bi-Specialization and Direct Filing

1. Bi-Specialization has been in place for approximately 18 months. How would USCIS assess its success in achieving its stated goals of increased efficiency and adjudication consistency? What lessons have been learned?
2. Will bi-specialization and direct filing be expanded to include other application types, such as the N-400?
3. Please discuss current thoughts on re-engineering the H-1B cap filing and receipting processes.

Response: Bi-specialization was an initial effort to improve our ability to focus and process certain kinds of cases. As receipting is centralized through the lockbox and associated e-filing services, USCIS anticipates moving beyond bi-specialization where appropriate in order to further improve the focus of case processing and customer relationships.

USCIS is in early discussions and development of plans to make the H-1B process more efficient and, at this time, it is premature to make any public statements.

II. Customer Relations

A. Website - USCIS is increasingly reliant on its website as the key medium to inform the public of updates and changes. AILA notes many improvements made to USCIS' website since our last meeting in March 2007 and the addition of a number of inter-operable features, including the case status and address change features. AILA also notes the ongoing efforts by USCIS to employ focus groups and other systems to bring the views of website users into the development process. AILA additionally wishes to recognize the responsiveness of the webmaster to inquiries from members of the public, as well as the webmaster's responsiveness to suggestions from AILA.

1. Please describe any upcoming updates and enhancements to the USCIS website.

Response:

- We expect by the end of September/early October to have republished our inventory of press releases and other media release material by topical listings.
- We are currently planning on launching a Spanish-language website (covering primarily benefit-related content) late this calendar year or very early in 2008.
- We have issued an RFP to convert the INA, 8 CFR, Adjudicator's Field Manual, and other legal materials out of the current format into something that is more readily searchable and linkable. This will be a longer-term effort that we do not expect to see results from for at least six months.

2. Is there a timeline in place for ICE to turn over complete control of the CRIS (online case status) system to USCIS?

Response: CRIS will be migrated to the USCIS data center. However, a timetable has not yet been set.

3. Is a standardized procedure for updating an attorney of record or accredited representative's change of address through the website being contemplated by USCIS?

Response: As part of the Transformation Program, USCIS will be moving to an account based customer management approach to managing and processing benefit information. As part of the account based system, applicants and representatives (lawyers or BIA-accredited representatives appearing on behalf of individuals and/or employers) will be issued a unique account number that will link all information about the applicant and/or representative. This approach will provide for the ability for representatives to update their information via the internet. USCIS will begin developing this capability as part of the first increment of the Transformation effort.

4. Are there any plans to integrate the stand alone AR-11 database with the Service Management Request Tool in the near future?

   Response: We are in the process of finalizing the interface between the change of address online input tool and the AR-11 database to use feed on-line change of address updates to the AR-11 database.

B. **Expansion of Premium Processing -** Has USCIS come to a decision on when it will be able to reinstate premium processing for I-140 petitions?

Response: Premium Processing Service for Form I-140, Immigrant Petition for Alien Worker, will remain suspended until the front log of cases awaiting data entry is resolved and USCIS is able to process the petitions within 15 days consistent with existing policies and procedures.

1. Is USCIS currently contemplating including premium processing of I-140 petitions filed under the EB-1-3 preference category?

   Response: Not at this time.

2. AILA respectfully requests that USCIS expand the premium processing program to include E-3 and H-1B1 nonimmigrant visa categories. Although direct filing of E-3 and H-1B1 visa applications is permitted at US Embassies and Consulates abroad, it is not always feasible for petitioners and beneficiaries to make visa appointments in a timely and cost-effective manner for initial grants or for extensions of stay of E-3 or H-1B1 status. The unavailability of premium processing is particularly acute for E-3 nonimmigrants, as there is currently no provision for an E-3 nonimmigrant to continue to be employed by a petitioner once a timely filed E-3 extension of stay petition has been filed. The relevant regulation contained at 8 CFR 274a.12(b)(20) does not include E-3 nonimmigrants in the class of individuals permitted to continue to be employed once a timely extension of stay petition has been filed with USCIS and the current period of stay has expired.

   Response: USCIS continues to explore and evaluate ways in which the premium processing service program can be expanded and will consider the points raised by AILA as part of this analysis.

III. Regulations/Guidance/Policy

A. **Regulations -** Please provide an update on the status of regulations regarding the following: AC21, CSPA, T regulations for adjustment of status, EB-5, and religious workers.

Response: The comment period for the religious workers rule has closed and USCIS is in the process of reviewing the comments from the public received in response to the publication of the rule. The other rules have not yet been published. USCIS is now working on its regulatory agenda for FY 08.

B. Guidance

1. **245(k) guidance -** Please provide an update on the status of further guidance regarding the application of 245(k) of the Immigration and Nationality Act.

   Response: A memo addressing these issues has been drafted and is in the formal USCIS clearance process.

2. **Work Authorization Under VAWA -** What is the status of the memorandum that addresses I-765 processing for those eligible under VAWA 2005, including the issues related to work authorization for spouses of A and G nonimmigrants?

   Response: USCIS appreciates and is sensitive to the fact that the need for employment authorization in these circumstances can be great. As soon as VAWA 2005 was enacted, USCIS took necessary steps to create new classification codes for dependents of A, E(iii), G, and H nonimmigrants and modified our systems accordingly

   Guidance implementing this VAWA 2005 provision has been developed and circulated among USCIS components, which have raised several issues relating to the maintenance and termination of the dependent's status and the validity period for employment authorization granted under this provision. USCIS hopes to resolve these issues and finalize the guidance in the very near future.

3. ***Matter of Perez-Vargas* -** What is the status of the guidance being drafted by USCIS addressing the decision of the Fourth Circuit, *Perez-Vargas v. Gonzalez*, 478 F.3d 191 (4th Cir. 2007) vacating *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005)? At the March 2007 meeting, USCIS indicated that guidance on this issue would be formulated once all court action was completed. The Government's petition for rehearing was denied by the Fourth Circuit on April 30, 2007. In addition, the Sixth Circuit recently also rejected the BIA's precedent decision in *Matter of Perez-Vargas*, in *Matovski v. Gonzales,* 05-4534 (6th Cir. June 15, 2007).

   Response: The goal of the Department is to provide proper guidance and mechanisms, regardless of jurisdiction, for individuals to be have their 204(j) claims resolved when renewing an adjustment of status application in removal proceedings. Different options are being considered and we are hopeful we will be able to provide more detailed information in the future.

4. **VAWA and *Perez-Gonzalez* / I-212 Memo -** What is the status of the memorandum regarding changes to the March 31, 2006, field guidance related to I-212 adjudications for VAWA self-petitioners? Specifically, USCIS indicated that a memorandum would be disseminated addressing AILA's recommended changes and that the memorandum would include a citation and discussion of the VAWA waiver at INA § 212(a)(9)(C)(ii)-(iii) and would address the "Sense of Congress" language passed in VAWA 2005.

   Response: A memo addressing these issues has been drafted and is in the formal USCIS clearance process.

5. **Child Status Protection Act (CSPA) -** What is the status of the updated guidance on CSPA addressing the holding in *Matter of Rodolfo Avila-Perez*, 24 I&N Dec. 78 (BIA 2007)? USCIS indicated that this guidance would be issued prior to July 2007.

   Response: A memo addressing this issue has been drafted and is in the formal USCIS clearance process.

6. **TPS Renewal in Removal Proceedings: EAD Issuance -** At AILA's Spring 2007 Conference, USCIS indicated that a mini-working group had been formed between USCIS and ICE to address this issue. What were the results of the mini-working group? Has guidance been formulated on this issue and, if so, when will it be released?

   Response: In May 2007, USCIS prepared a general notice with the assistance of ICE that is provided to any TPS applicant in removal proceedings who mistakenly submits his or her I-821 Application for Temporary Protected Status to the USCIS Texas Service Center (TSC). When the TSC returns the erroneously submitted TPS application and EAD application (and any fees) to an applicant in proceedings, this general notice is included and informs the individual about the procedures for (a) filing his or her TPS application directly with the immigration court if he is seeking to *renew* his application following a previous USCIS denial or withdrawal of TPS, or (b) if the person has never sought TPS before and is eligible, filing the application with USCIS in accordance with the I-821 form instructions, plus any additional instructions in the most recent Federal Register Notice regarding TPS registration (or re-registration) procedures for the applicant's country. ICE OPLA also communicated in May 2007 with the ICE Offices of Chief Counsel to alert them to these particular cases where people are mistakenly submitting their TPS applications to the TSC post office box designated for other types of applications for relief from removal. ICE OPLA instructed its field offices to make sure the IJs in their areas know that aliens in proceedings should not be sending their TPS applications to the address on the *Pre Order Instructions*. EOIR has also worked through its HQ Office of the Chief Immigration Judge (OCIJ) to get that word out to the IJs.

   Applicants who have final EOIR orders that grant them TPS should file a Form I-765 to obtain an EAD in accordance with the form instructions. They should also include a copy of their final EOIR order (or BIA decision) that grants TPS.

C. Policy

1. I-360 Religious Worker Petitions

i. AILA respectfully requests USCIS to provide the latest statistics for the number of I-360 religious worker petitions pending site visits or other in-depth analyses?

Response: As of August 1, 2007, 4,263 I-129 and I-360 religious worker applications and petitions were awaiting site visits. The average time for processing time for site visits is 90 days.

ii. At our last meeting, USCIS indicated that it believed that the site surveys would lead to the development of more targeted and efficient criteria for future review. Can the Service provide an update on progress in this area?

Response: Thus far 17% of the Compliance Reviews failed verification. No change in policy has occurred yet as USCIS is still learning from the process of conducting site visits.

iii. In light of the sunset of the religious worker provisions in September 2008, have any other processes or procedures been put in place to assure processing of pending cases prior to the sunset of the law?

Response: Except for ministers, the special immigrant religious worker provisions will sunset on September 30, 2008. Congress has repeatedly extended this provision so whether Congress takes action will determine whether USCIS will need to establish any special processing procedures for pending cases.

iv. Is the Service taking any special measures to assure the adjudication of I-360 religious worker petitions where the R-1 beneficiary is nearing the end of his or her five-year limit of nonimmigrant stay? Concurrent filing in the I-360 context and an extension of R-1 status beyond the five-year limit is also not currently permitted under the statute. AILA is therefore concerned about the prejudice to cases where the five-year limit on R-1 status is reached due to the extended processing of I-360 petitions.

Response: USCIS' goal is to adjudicate I-360 petitions in a timely manner. A petitioner whose beneficiary is nearing the end of the five year limit may, however, request that adjudication of the petition be expedited. Whether USCIS grants the request for an expedited adjudication depends on the circumstances of the particular case.

v. What procedures are in place to ensure the timely completion of investigations (including site visits) and to ensure prompt adjudication of I-360 petitions upon completion of the investigations?

Response: Upon completion of a compliance review, FDNS returns its findings to the California Service Center for adjudication of the petition. Suspected fraud cases are referred to U.S. Immigration and Customs Enforcement (ICE) for investigation. USCIS cannot predict the time that ICE will take to complete the investigation. If ICE declines the investigation and the compliance review contains sufficient evidence of fraud, the I-360 will be denied. Notices of Intent to Deny are provided, where applicable.

2. EB-5 Investor Program

i. AILA seeks USCIS' views regarding the meaning of "investment" for EB-5 purposes. In particular, AILA believes that USCIS should distinguish the concept of "retained earnings" in a traditional C corporation from "capital account balance" in a partnership or limited liability company (LLC) format. AILA respectfully requests USCIS review and consider the arguments and recommendations on this issue in the attached **Addendum I** to this agenda.

Response: We appreciate the perspective. It is difficult to provide a blanket statement as to whether certain complex financial arrangements will be approved. However, in general USCIS believes a reinvestment of proceeds is not an infusion of new capital into a business.

ii. Does Congress' deletion of the establishment requirement in 2003 (which did away with the requirement that the alien entrepreneur personally establish the commercial enterprise) mean an EB-5 investor can purchase an existing business that was created after November 1990 (meaning the commercial enterprise is "new"), as long as job requirements are met, without having to restructure the commercial enterprise? Section 22.4(h) of the Adjudicator's Field Manual seems to suggest this interpretation.

Response: Yes, an alien may demonstrate that a new commercial enterprise has been established by proving that it was established after November 29, 1990. In such cases, the alien does not need to further restructure, reorganize, or expand the business in order to meet the requirements of 8 CFR, 204.6(h).

iii. If, for example, the principal EB-5 investor obtains conditional permanent resident (CPR) status on January 1, 2007 (with expiration date of January 1, 2009), but dependents follow to join and receive their CPR status on January 1, 2008 (one year later), will the dependents' CPR end on January 1, 2009 (the same date as Principal) or January 1, 2010? Also, if the dependents' CPR status ends on January 1, 2010, do they have to apply for I-829 conditions removal separately from the principal?

Response: Yes. Once the principal's conditional period is completed and he/she has conditions removed, any dependents who are conditional permanent residents do not need to remain in conditional status and may have their conditions removed. The principal's requirements and eligibility regarding his investment actions are controlling.

iv. If one dependent family member does not obtain CPR status at all, while the Principal and other family members obtain CPR status, can the family member, who never obtained CPR status, still be included in the Principal's I-829 condition removal?

Response: No, the dependent who did not adjust and become a conditional permanent resident may not have conditions removed. The dependent must adjust status and become conditional first before conditions can be removed. If the dependent adjusts status after the principal has had his conditions removed, then the dependent will not be conditional.

v. If a principal beneficiary has already obtained CPR and has also successfully removed the conditions and is now a lawful permanent resident (LPR), can a dependent beneficiary who never obtained CPR status follow to join as an LPR, after the principal obtains LPR status through an I-829?

Response: Yes.

vi. The USCIS EB-5 unit at HQ asked EB-5 regional centers in July 2006 to supply information on their current status and activities. When will a summary of those replies be available?

Response: There are currently no plans to provide a summary of the current activities of each approved regional center. However, a list of approved and operating regional centers will be made available in the near future.

vii. Inconsistencies in the issuing of receipts, stamping of passports, and adjudicating I-829 petitions leave 2-year conditional residents and their dependents without sufficient documentation to evidence authorization to travel, to work, to be eligible for drivers' licenses, etc… Can USCIS address this problem?

Response: We suggest conditional residents who believe they are not getting the documents to which they are entitled should follow standard procedures in place to make an inquiry. However, we would further appreciate AILA's providing some examples to illustrate the problem they perceive exists.

viii. Please supply the latest statistics on I-526 and I-829 petitions filed, approved and denied for FY 2006 and 2007.

Response: USCIS will publish such statistics as it completes FY07 reporting.

3. **I-485 Receipt Rule for H & L Nonimmigrants -** The regulation addressing the effect of departure without the prior grant of advance parole on an application for adjustment of status of an alien admitted in H or L status requires the alien to possess an original I-797 receipt for the I-485 application, or the application for adjustment of status will be treated as abandoned. 8 C.F.R §245.2(a)(4)(ii)(C); 64 Fed. Reg. 29,208. AILA questions the utility of this regulation and requests that USCIS rescind the regulation for the reasons set forth in the attached **Addendum IV** to this agenda.

   Response: The Department is currently considering regulatory action addressing this situation. It is too early to advise as to the ultimate outcome but this issue is being handled expeditiously.

4. **Humanitarian Parole -** On August 6, 2007, USCIS announced that it would now be responsible for administering the Humanitarian Parole Program, previously under the purview of ICE. The announcement states that humanitarian parole requests are now to be sent to the Parole and Humanitarian Assistance Branch. AILA respectfully requests any information USCIS can provide regarding the change in jurisdiction, including the reasoning behind the change within DHS and staffing changes. In addition, AILA requests public dissemination of any guidance related to the filing and adjudication of humanitarian parole requests.

   Response: Effective August 5, the USCIS International Operations Division within the Refugee, Asylum, and International Operations Directorate began to administer certain humanitarian programs formerly administered by ICE. The specific programs are:
   - the Humanitarian Parole Program[1],
   - the Moscow Refugee Parole Program, and
   - the Cuban Haitian Entrant Program (CHEP).

   In making this transfer, DHS sought to consolidate CHEP with the non-enforcement functions of the other two parole programs within the bureau of DHS that is focused on providing immigration services. Along with programmatic responsibility, USCIS gained the institutional knowledge/ expertise of Branch Chief Ken Leutbecker and four staff members.

   We are currently involved with streamlining the workflow processes for these programs to incorporate them into the USCIS workflow. As a first step an I-134 (Affidavit of Support) for the Moscow Refugee Parole Program (along with supporting documentation) will now be sent directly to the Embassy in Moscow for processing.

   For the time being, the filing procedures for the Humanitarian Parole Program will remain the same, however, USCIS does plan to announce a new filing address in the near future.

   Through grants and cooperative agreements, the Cuban Haitian Entrant Program (CHEP) provides transitional community-based refugee resettlement services to Cuban and Haitian

[1] The CIS Humanitarian Parole Program does not include aliens in removal proceedings who must still apply to ICE for parole authorization.

nationals paroled into the United States. Apart from the transfer of administrative responsibility to USCIS, no changes are being made to CHEP at this time.

Public dissemination of additional guidance will be forthcoming.

IV. Operations

A. **Request for Evidence and Notice of Intent to Deny Response Times -** Members are bringing to AILA's attention Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) with very short response times, such as allowing only thirty days within which to obtain foreign documents. Further exacerbating the problem is the delay between the date the examiner initiates the request and the date that the RFE or NOID is actually mailed and received. Members note that such delays are frequently one full week, and often longer. Because the regulations do not permit extensions of time within which to respond to RFEs and NOIDs, AILA requests that Headquarters reaffirm guidance on the issuance and processing of NFEs and NOIDs with respect to providing adequate response times.

Response: USCIS will remind offices that RFEs must be mailed timely to ensure that an applicant receives the full time allotted in order to respond. USCIS would appreciate examples of RFE's that provide an incorrect timeframe.