AILA/SCOPS Teleconference Agenda
August 14, 2013

H-1B Petitions

1. Please provide an update on the adjudication of cap-subject H-1B petitions

RESPONSE: USCIS has recently allocated more resources to the cap-subject H-1B petition workload. The Service Centers continue to work diligently to complete cap-subject H-1B filings before the beginning of the fiscal year.

2. There are a number of specialty occupations that fall within more than one SOC*ONET code, and the code listed on the LCA and the I-129 is usually consistent with the prevailing wage source. For clinical medical faculty, the Department of Labor generally uses the code for Health Specialties Occupations, Post-Secondary. However, a petition was recently denied for an Assistant Professor of Medicine because the SOC O*NET code did not include clinical responsibilities (WAC1315551099).

a. What is the legal basis for limiting the job duties of a specialty occupation to those included in the SOC O*NET descriptor?

b. How should employers resolve conflicts between the SOC O*NET code assigned by DOL and the one selected by the USCIS adjudicator?

RESPONSE:

INA 212(n)(1) requires that H-1B petitions be accompanied by a corresponding LCA, and DHS regulations at 8 CFR § 214.2(h)(4)(i)(B) mandate that prior to filing an H-1B petition, petitioners must obtain a certification that an LCA has been filed with the DOL in the occupation specialty in which the alien will be employed. Thus, in order determine whether an application meets the statutory and regulatory requirements for the H-1B classification, adjudicators must look to the SOC O*NET code descriptor on the certified LCA to ensure that the LCA directly relates to the petition. The SOC O*NET code on the certified LCA is selected by the petitioner or DOL. The petitioner has the burden of proof, based on a preponderance of the evidence, to demonstrate to USCIS that the SOC O*NET descriptor appropriately captures the thrust of the proffered position's duties.

When DOL assigns the SOC O*NET code, the petitioner must review the assigned code, and should determine whether there is a sufficient nexus between the proffered position's duties and those described by the SOC O*NET code. If the SOC O*NET code on the LCA does not reflect the proffered position's duties, the petitioner must address this discrepancy with DOL.

3. The Market Research Analyst (MRA) is a position that companies rely on to become competitive players in the marketplace. It entails, among other things, looking at data, determining factors that lead to profitability in a particular product, and then making recommendations as to product development or marketing to achieve profit goals. The required skills are often tailored to a particular use. For example, a MRA for a bank likely will need to have knowledge of retail banking, finance principles, etc. while a MRA for a biotech company will use knowledge of engineering principals, science, mathematics, etc.

Residential Finance Corporation versus U.S. Citizenship and Immigration Services (Case No. 2:12-cv-0008, March 12, 2012 S. District Ohio **,** establishes that because a different degree, or concentration within a degree, may be required for a position, it is one that entails the use of specialized knowledge and skills, and thus, that it is a specialty occupation.

H-1B petitions filed for MRAs appear to have a much higher rate of RFEs, and the verbatim language of these RFEs do not show or address how the detailed job descriptions provided in the application fail to establish that the position is a specialty occupation. Recent examples include WAC1216550382; WAC1308250100; WAC1312851417; EAC1313650710.

Has written guidance or other similar materials regarding the adjudication of MRA positions been issued within the past three years and will you identify the type of document, its date of issue, and provide a summary of it(s) contents?

RESPONSE: SCOPS appreciates that AILA has raised this issue, and we are aware that this is an ongoing concern. The overall issue of determining whether a position qualifies as a specialty occupation is currently under agency review. Each case is adjudicated on its own merits, and evaluated according to the regulations. Written guidance regarding adjudication of petitions for MRA positions has not been issued within the past three years.

4. H-1B petitions involving IT consulting firms also have a much higher rate of RFEs, and appear to request specific information and documentation without addressing the deficiencies in the submitted materials. For example, recent cases were denied because of the lack of statement of work (SOW) or master service agreements (MSA), however, these were cases in which the H-1B employee will be supervised by the petitioner's own onsite manager. The denials in these cases seem to assert that the petitioner should have provided a copy of the MSA and SOW as

exclusive evidence to demonstrate a proper employer-employee relationship. Based on the standard of preponderance of the evidence, USCIS should review the evidence in its entirety and should not require specific types of evidence without weighing other relevant evidence. Examples: WAC1311850120; WAC1310050325. Please comment on guidance or training with regards to petitions involving third party placements.

RESPONSE: Officers utilize the guidance provided in the January 8, 2010 memo, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitioner, Including Third-Party Site Placements." H-1B training for officers at both centers includes an overview of the memorandum and instructs officers to review the totality of the circumstances when determining whether the requisite employer-employee relationship will exist, including in cases where the beneficiary will be working off-site.

ELIS Submissions and Service Center Adjudications

5. There is some confusion on the protocol to follow up on cases filed via ELIS. For example, a case filed via ELIS that was given a receipt notice number beginning with "IOE," received an SMRT referral number indicating it was at CSC, but the denial notice was sent from VSC. As ELIS is set to expand to other case types, please comment on how best to track ELIS filed petitions.

RESPONSE: All cases filed in USCIS ELIS have a receipt number that begins with "IOE" regardless of where the case is adjudicated. Hard-copy notices related to an I-539 in USCIS ELIS have VSC's return address, even if the case is being adjudicated at CSC. Customers who wish to inquire as to the status of their case should call the 1-800 number, and the National Customer Service Center will assign the SRMT ticket to the appropriate service center.

6. For ELIS filed petitions, is the receipt notice number the number beginning with "IOE," or will it be assigned a different case number depending on the Service Center to which it is sent for adjudication?

RESPONSE: All cases filed in USCIS ELIS have a receipt number that begins with the letters "IOE." This case number will not change, regardless of where the case is ultimately adjudicated.

RFE Templates

7. During the August 8, 2012 AILA/SCOPS teleconference, USCIS stated that it is standardizing RFEs and many of the sections that appear to contain boilerplate information are "there for informational purposes, to provide a list of suggested evidence that may be submitted to resolve the issues." Please advise on instructions adjudicators are given regarding revising the

lists of suggested evidence from the templates on an RFE before it is sent out, and on clarifying how those suggested items relate to the materials included in the initial submission. For example can the adjudicator add suggested information or delete information contained in the model RFE template?

RESPONSE: Officers have been instructed that they can and should adapt RFEs to the unique evidentiary deficiencies of a particular case while also adhering to the following general guidelines, depending on the circumstances:

- Indicate what was submitted and what is lacking;
- Explain why certain initial evidence is insufficient;
- Suggest a variety of evidence that could be submitted to satisfy the statutory and regulatory requirements; and
- Give petitioners the opportunity to submit any evidence they feel would satisfy requirements – even evidence which is not suggested in the RFE.

Officers have also been instructed to determine whether each criterion (or subsection) of a template RFE has been met or is deficient and to not include that section in the RFE which is sent out if all elements within a section have been met. In addition, officers are advised that they should remove any criterion or evidence requirement that does not apply to the case in question.

Motions to Reopen

8. 8 CFR 103.5(a)(1)(ii) grants jurisdiction to review MTRs to the official who made the latest decision in the proceeding. For MTRs reviewed by the original adjudicating officer, would SCOPS consider instituting a practice in which decisions that are affirmed after an MTR are referred to an ACD or ADD for review?

RESPONSE: Thank you for your suggestion. SCOPS' needs to balance resources to ensure timely service and at this time it is not feasible to implement this type of review given the limited number of Assistant Center Directors (ACD) and the high volume of cases. These decisions are part of our Quality Assurance process and we will monitor to see if there is a need for enhanced random reviews.

I-130 Petitions

9. The direct filing instructions for Form I-130, Petition for Alien Relative, list the addresses to use when filing a stand-alone I-130 or when filing Form I-130 along with Form I-485, Application

to Register Permanent Residence or Adjust Status. The instructions do not provide the address to use when filing a Form I-130 if an employment based Form I-485 is already pending at one of the Service Centers. Please provide guidance on where to file Forms I-130 in these circumstances, and how to notify the Service Centers to transfer the I-485 to the local office. Under these circumstances, at what stage and to which office should the petitioner's I-864 be submitted?

RESPONSE: A petitioner who already has a pending employment-based I-485 should file the I-130 as a standalone case, according to the instructions on the USCIS website. After the petitioner has received the I-130 approval notice, they should contact the USCIS National Customer Service Center (NCSC) at 1-800-375-5283 to have the pending I-485 transferred to the National Benefit Center (NBC) to be processed with the approved I-130. The NBC will contact the I-485 applicant in regards to any missing document(s), including the I-864.

10. On September 26, 2012, the Ninth Circuit Court of Appeals held that the plain language of INA §203(h)(3) unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries, including F3 and F4 derivative beneficiaries. *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir., 2012). The Supreme Court recently granted the petition for writ of certiorari asking the Court to review the Ninth Circuit's decision.

AILA members have filed I-130s based on *De Osorio v. Mayorkas*, making clear in the cover letter and application that the applicant is eligible for an earlier priority dates. However, the receipt notices they have received for the I-130s show only the later priority dates. In addition, AILA has received reports that affected I-130s filed after the 9/26/12 decision are still pending, past the posted processing times.

Has USCIS put these I-130s on hold until the Supreme Court issues a definitive ruling? Are the Service Centers tracking cases that will be impacted by the Suprem Court's decision in *De Osorio v. Mayorkas*? In the interim, when filing new I-130s that would be impacted by the decision, how should attorneys flag these cases?

RESPONSE: Formal guidance on this matter is in the USCIS clearance process. Because the mandate in *De Osorio v. Mayorkas* has been stayed pending the Supreme Court's ruling, USCIS remains bound by the precedent decision *Matter of Wang* (25 I&N Dec. 28 (BIA 2009). In *Wang,* the BIA concurred with the USCIS interpretation of priority date retention. USCIS will not withhold adjudication of I-130s, since the priority date does not affect the merits of the petition. Pursuant to *Wang,* any petitioner's request for an earlier priority date cannot be granted at this time unless the earlier petition was filed by the same petitioner for the same beneficiary. In the event that the Supreme Court rules in such a way that any priority date

assigned by USCIS needs to be re-visited, the petitioner may request that USCIS reconsider the priority date.