MINUTES OF 10/17/01 AILA/INS BENEFITS
LIAISON MEETING

(These minutes have not been reviewed or approved by INS.)

Date: November 2001

Re: Minutes of AILA/INS Headquarters Adjudications Liaison Meeting
Tuesday, October 17, 2001, 2:00 p.m.
INS Headquarters, Immigration Services Division, 800 K Street, Washington, D.C.

For INS: William R. Yates, Deputy Executive Associate Commissioner for Field Operations, Immigration Services Division - PRESENT
Fujie Ohata, Director Service Center Operations
Joseph Cudahy, Deputy Director, Service Center Operations
Paul M. Pierre Jr., Branch Chief, Operations and Workflow

For AILA: INS Policy Benefits Liaison Committee
Fran Berger, Chair
James D. Acoba
Douglas Bristol - Absent
Warren R. Leiden
Ruth K. Oh
Theodore Ruthizer - Absent
Jay I. Solomon
Crystal Williams, AILA Director of Liaison & Information

Ex officio Committee Members:
Daryl R. Buffenstein, AILA General Counsel - Phone Participation
Sharryn E. Ross, Chair, ISD Liaison Committee
Paul Zulkie, AILA Second Vice President

On behalf of AILA, Committee Chair Fran Berger expressed thanks to the ISD and particularly acknowledged the Vermont Service Center for their proactive efforts in assisting members and their clients in resolving case problems and other issues in the aftermath of September 11, 2001 attack on the World Trade Center.

Deputy Executive Associate Commissioner for Field Operations Bill Yates welcomed the Committee. He began addressing the items presented by the Committee.

Item I: CONSISTENCY IN ADJUDICATION AT SERVICE CENTERS

This is a proposal to reduce inconsistent adjudications by ensuring careful monitoring and enforcement of INS Headquarters policy. We suggest establishing an effective mechanism for Headquarters to provide immediate guidance to field supervisors as the need arises.

THE PROBLEM

A recurring problem in the field of immigration law is the apparent inconsistency in decisions from Service Center to Service Center, and even within each Service Center from adjudications officer to adjudications officer. Due to the large numbers of district and sub-offices, the same can be said about inconsistencies in implementation of HQ policy throughout the field.

Inconsistent adjudications generate a multiplicity of severe consequences for attorneys, their clients, and the INS itself:

First, it tends to validate the public's perception that the system is arbitrary and, at best, random, and that there are no rules followed by the INS. This perception destroys the public's confidence in the INS and, with it, the respect that the public should have for it.

Second, inconsistencies make the law less certain and outcome of case filings less predictable. As a result, attorneys cannot advise their clients with any confidence that specific results can be expected or that certain benefits are available. Clients and their employers/employees cannot plan their businesses or circumstances in reliance upon the INS. The result in the short term is chaotic business planning and/or avoidance of the U.S. entirely in favor of competing business venues.

Third, in an environment in which this agency will be required to produce the equivalent of 2 million person/hours of work with funding to support not much more than half that, the INS can ill afford to generate the appeals and additional workload that inconsistency and unreliability promote.

EXAMPLES OF CURRENT INCONSISTENCIES AMONG SERVICE CENTERS:

1. **Documentation of ability to pay offered wage in I-140 cases.** California has been taking the position that, even if the petitioner has shown the ability to pay the offered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence" under 8 CFR section *204.5(g)(2),* an I-140 will be denied if the petitioner cannot show that it will continue to be able to pay the wage for a period into the future (such period not being specified). No other Service Center is taking

this view.

2. **Ability of contractor companies to petition for H-lB employees.** California has been taking the position that contractor companies are not employers and therefore must petition as agents, not employers. This position is unique to the CSC.

3. **Necessity for an event to qualify for O-1.** California has been taking the position that someone coming to the U.S. under O status, must be coming for an event" -- i.e., an activity that has a specific and natural beginning and end date —no matter what the field of endeavor. The term "event" is being interpreted in such cases in an overly narrow manner. No other Service Center takes this position.

4. **Exercise of discretion where H-lB nonimmigrant has been unemployed.** While this is an area largely unresolved by official policy, the issue has long been handled with a surprising amount of consistency among three of the four Service Centers. In general, all but Nebraska will exercise favorable discretion on a request for a change of employer when the H-lB nonimmigrant is not currently employed by the original petitioner if the period of unemployment has not been too long and the unemployment has been through no fault of the nonimmigrant. Some adjudicators in Nebraska, however, will not exercise discretion if there has been even a day of unemployment, and the NSC's management will not intervene in such a decision. The result seems more an exercise of whim than an exercise of discretion.

5. **Adjustment applications for physicians.** Nebraska has been denying adjustment of status applications from physicians filed under **8 CFR** section 245.18, which enables physicians with approved national interest waiver I-140s to immediately file a Form I-485, on the basis that the applicant must wait 3 or 5 years (depending of the fact scenario) before the adjustment application can be filed. Nebraska is alone in this position, which clearly is contrary to statute and regulations.

6. **Degree required for computer positions.** Vermont has been taking the position that degrees in fields that are considered common for systems analysts and software engineers, such as electrical engineering and mathematics, are not appropriate degrees for the positions. While other Service Centers may raise the issue in individual cases, the VSC differs in taking this position almost as a matter of law.

THE SOLUTION

To ensure consistent adjudications, Headquarters should exercise oversight and provide guidance when adjudicative inconsistencies and related problems are identified. A system is required to identify inconsistencies and address them through substantive guidance and managerial direction over decision-making.

THE RATIONALE

The Service has discretion in many areas of adjudications, but the public has a need and right to rely on consistency in decisions made by the Service. Inconsistencies, unnecessary RFE's, inappropriate Notices of Intent to Deny, time-wasting readjudications and appeals, and frequent AAO certifications detract from the Service's allocation of already limited resources and use of trained personnel. The outcome of decisions should not depend on whether petitioners and beneficiaries happen to have the misfortune of conducting business in or residing near a Service Center or field office that considers inappropriate or overly restrictive criteria in the adjudication of benefits.

INS PRECEDENT

This is not new ground. Shortly after the promulgation of the regulations implementing ImmAct '90, the INS and AILA engaged in an extensive dialogue that generated CO 204.23-C (7/30/92) issued by L. J. Weinig, then Acting Assistant Commissioner, which provided guidance by establishing uniform standards within certain evidence categories. Although enforcement of CO 204.23-C appears to have lapsed dramatically, the prior guidance is still INS policy and still useful.

A memorandum CO 214L-P (1/1 3/89) by James A. Puleo, then INS Assistant Commissioner for Adjudications, also previously confirmed the long-standing INS policy that INS is wasting its resources and is making improper decisions where adjudicators re-adjudicate" cases when dealing with the same beneficiary and petitioner for the same position (e.g., in I-129 extensions or I-140 reclassifications). According to the Puleo memorandum, clear error based on "fraud" or "gross error by INS" must exist before a ruling previously established can be reexamined.

In accordance with INS Headquarter's responses to issues raised by AILA at an INS HQ Adjudications Liaison Meeting on September 21, 1999, Headquarters agreed that the "fraud or gross error" standard should be applied to any readjudication of issues previously decided in approved petitions. Each AILA Liaison Committee was advised that it should take up the issue with the Service Center Directors.

However, the response given frequently by the Service Centers, when matters involve the implementation of "policy" that extends beyond simple "procedure", is that both AILA and the Service Centers must seek and then await further clarification from Headquarters.

RECOMMENDATION FOR IMPLEMENTATION

When problem areas are identified, Headquarters is urged to seek input from working groups to examine the extent in inconsistencies in adjudications and identify whether centralized guidance on policy would be instrumental in eliminating inconsistent handling in the field. The working groups could consist of INS adjudicators and supervisors, AILA members recognized for expertise in the area, and other experts from customer groups with interests in benefits procedures and policy and knowledge of how adjudications are actually operating in the field.

Discussion:

The six examples of inconsistencies in adjudication at service centers were addressed as follows:

1. Documentation of ability to pay offered wage in I-140 cases.

INS suggested that this should no longer be an issue. However, AILA observed that, although the language of recent RFE's has changed, the theme of "ability to pay" continues to be an obstacle to approval where employers do not show a profit, regardless of assets or capital. AILA will continue to forward specific case examples on this issue to the Director of Service Center Operations.

2. Ability of contractor companies to petition for H-lB employees.

AILA was asked to forward specific case examples on this issue to the Director of Service Center Operations.

3. Necessity for an event to qualify for O-1.

This problem seems to have subsided, with the exception of a few recent problem cases that were brought to AILA's attention. AILA will forward specific case examples to the Director of Service Center Operations.

4. Exercise of discretion where H-lB nonimmigrant has been unemployed.

INS indicated that this relates to an ongoing debate and raises the risks related to a "bright line" test. ISD will hold further discussions with the Service Centers on this topic.

5. Adjustment applications for physicians.

Both INS and AILA agreed that a recent HQ memo has resolved this issue.

6. Degree required for computer positions.

AILA was invited to submit expert opinions through liaison to establish appropriate related degrees, in lieu of offering material on a case by case basis.

General Discussion: INS and AILA agree that we should not see readjudication of L-1 and H-1B petitions, especially extensions, where petitions were previously approved for the same beneficiary and same position and the facts have not changed. AILA will provide examples of cases in which such readjudications have occurred. INS will follow up to ensure that processing guidance is being followed. Note: INS soon will be adding more than 1,000 new staff positions at the Service Centers. The plan is to have first-line supervisors review some decisions. RFE problems are likely to continue as a result of training challenges. As to RFEs, INS will emphasize the need for the exercise of discretion, using "common sense", without establishing bright line tests. AILA should continue to provide specific case examples of problem RFEs and verify that members are submitting complete petitions.

Item II: EFFECT OF TRAVEL ON A PENDING REQUEST FOR CHANGE OF STATUS

THE PROBLEM

The problem of the effect of departures from the United States on change of nonimmigrant status ("c/s") requests continues to be a serious problem that calls for a more workable solution. AILA has reviewed various INS policy letters, memoranda and statements holding that extensions are no longer deemed abandoned as a result of a nonimmigrant's departure from the U.S. while the extension request is pending and we ask the Service to implement a similar policy for change of status cases.

THE RATIONALE

In an October 1999 letter from the INS to AILA member Norman Plotkin, Tom Simmons (then the Branch Chief, Business and Trade Services) advised that an "alien's departure and admission to the United States has no bearing on the validity period of the petition filed...". In effect, the INS was acknowledging that foreign nationals must often travel abroad during the pendency of various petitions, which may include requests for extensions of stay, and INS recognized that the approval of a petition from a new H-1 B employer including a request for an extension of stay would not be affected by a departure while the petition is pending. In this 1999 policy letter, as well as in other written pronouncements over the past several years, the Service has moved away from what was sometimes referred to as "The Last Action Rule". As confirmed by Bill Yates at AILA's June 2001 Annual Conference, an extension of stay accompanying a pending nonimmigrant petition is no longer considered abandoned by travel abroad, regardless of the timing of the travel or the date of approval of the new petition.

The Service has also recognized that not all departures result in an abandonment of a request for a change of status. For example, in an April 1995 letter to Attorneys Naomi Schorr and Mark Koestler, Jacqueline Bednarz advised that an F-1 nonimmigrant could leave the United States, return in F-1 status, and at a later time automatically assume H-1B status based on a previously approved change of status request granted prior to the nonimmigrant's departure. In making such a policy determination, INS recognized that it would serve the interest of neither the Service, the nonimmigrant nor the employer to require the nonimmigrant leave the United States and make a new entry in order to acquire the same status that the INS had previously granted, prior to the nonimmigrant's departure from the United States.

Our comparison of the relevant INS regulations on requests for extension of stay and change of status reveals that the applicable regulations for both are silent as to the effect of travel where either a request for extension of stay or change of status is pending. For this reason, the same policy and legal arguments should prevail in determining the effect of a departure in both circumstances.

The current INS policy that treats departures while a change of status request is pending as an abandonment of the request substantially interferes with travel and commerce and creates expenses and burdens on both employers and their foreign national employees. These nonimmigrants, who are attempting to maintain lawful status, often must travel during the lengthy periods involved in H and other nonimmigrant adjudications. Moreover, this INS policy, which was most recently reaffirmed in a June 18, 2001 memorandum from Thomas Cook, creates great confusion with INS record-keeping by throwing into doubt the actual status of a nonimmigrant who travels abroad during the pendency of change of status request, unbeknownst to the INS Adjudications Officers at the Service Centers.

THE SOLUTION

For all these reasons, AILA once again recommends that INS treat departures while a change of status request is pending exactly as it treats departures while an extension of stay request is pending – i.e., as events without any immigration consequences on the relief previously requested. For simplicity sake, provided the nonimmigrant is readmitted in the same nonimmigrant category held at the time of departure from the U.S., we suggest that the travel should have no effect on the adjudication of a pending change of status request and the departure will not result in an abandonment of the request for change of status. As an example, assume that on October 1, 2001, an F-1 student with optional practical training (OPT) files an I-129 petition for H-1B classification with a requested start date of December 1, 2001 and the petition includes a change of status request. During the month of November 2001, the F-1 travels abroad on a two week business trip. The F-1 returns on November 20, 2001 resuming his F-1 OPT status. Shortly thereafter the previously filed request for a change of status to H-1B is granted with a December 1, 2001 start date. In such a case, it would make perfect sense for the nonimmigrant to be able to assume H-1B status effective December 1, 2001 without any further action/filings, regardless of the fact that he traveled abroad while the petition was pending and it should make no difference when the change of status request is approved (i.e., before, during, or after the departure from the United States).

Therefore, we ask your reconsideration of this issue at this time.

> *Discussion: AILA emphasized that travel concerns arising from petitions filed with pending change of status requests are largely the result of adjudications delays at the*

Service Centers, which are not expected to improve in the near future. AILA requested guidance from Headquarters that would treat travel with a pending petition that includes a change of status request the same as travel with a pending petition that includes an extension request. AILA seeks a result that would avoid a finding of abandonment as to the change of status request and the corresponding need to file a new petition where a nonimmigrant properly re-enters the U.S. in the same status she held at the time of departure. This would have limited application as it would only be available in the situation where a nonimmigrant could lawfully re-enter in the same status held at the time of departure.

AILA also raised a related problem of I-94 validity dates. The problem arises where a nonimmigrant, most commonly an H-1B, travels with a new petition approval notice and a visa that was issued based on an earlier petition approval. The H-1B is often issued an I-94 valid only to the visa validity date. The problem also arises where an H-1B worker is not issued a visa for the full validity period of a new petition approval due to reciprocity issues. Where the I-94 is not marked to reflect the full validity period of the petition approval and the problem is not noticed until some time later, it can be difficult, or even impossible, to have the I-94 corrected. AILA reported inconsistencies in the way District Offices and ports of entry deal with requests for corrected I-94's in the situations described above.

INS indicated that a nonimmigrant would not be considered to be out of status or to be accruing unlawful presence, even where the I-94 has expired and has not been corrected, if an unexpired I-797 for the nonimmigrant's current employer had been issued by INS covering the full period of stay.

Item III: TRAVEL ABROAD WITH I-485 PENDING IN VIEW OF FRONTLOGS

THE PROBLEM

We are experiencing an ongoing problem regarding travel abroad by H and L visa holders for whom I-485 adjustment applications are pending but receipt notices have not been issued by the Service Centers.

THE RATIONALE

The problem is acute at Service Centers due to the severe "frontlogs" that continue to persist in the mailrooms, largely stemming from the LIFE Act filings in April 2001. The CSC's "JIT Report", which now includes receipt notices, recently indicated about a 12 week delay in issuing receipt notices for I-485s.

The regulation at 8 CFR 245.2(a)(ii)(C) was adopted to facilitate the travel of I-485 applicants who are H and L visa holders by permitting them to travel abroad without advance parole. The regulation protects these I-485 applicants from a finding that they have abandoned their applications for adjustment of status, where they are in possession of the I-485s receipt notices on their return to the U.S. While the requirement of the receipt notice did not make a great deal of sense to some of us, the regulation offered a workable solution at a time when receipt notices were issued in a timely manner. This is no longer the case.

Prior to the effective date of the regulation referenced above, advance parole was required for I-485 applicants in order to prevent a finding of abandonment resulting from travel abroad. When processing time for advance parole applications lengthened, travel abroad with valid H or L visas and I-485 receipt notice became the “fix”. We now face the same processing delays with receipt notices that we had in the past with advance parole applications. The problem is only compounded when a Service Center indicates a receipt was mailed but it was never received and the Service Center says duplicate receipt notices cannot be issued. Additionally, while some District Offices permit adjustment of status applicants to file emergency advance parole applications in the District, District Office processing of such applications will generally require an “A” number and I-485 receipt notice together with proof of the emergency. Of course, an applicant with a receipt notice and a valid H or L visa would not need emergency advance parole in the District Office.

In summary, our clients who must travel abroad while I-485s are pending face major issues if they have not received their I-485 receipt notices. Our concern is whether they risk a finding that they abandoned their I-485 applications if they travel without the filing receipt. Such a result was clearly not the intent of the current regulation. However, the question has arisen in the I-485 context.

THE SOLUTION

In view of the delays and other difficulties relating to the issuance/receipt of I-485 receipt notices, we request the issuance of guidance to the field confirming that there will be no finding of abandonment of I-485 applications against H and L visa holders who travel abroad without I-485 receipt notices while their applications for adjustment of status are pending.

Discussion: AILA recommended guidance from Headquarters to ensure that I-485 applications will not be deemed abandoned if H or L visa holders travel without the I-485 filing receipt, in view of the substantial delays in obtaining receipts and the inability or unwillingness of Service Centers and District offices to produce duplicate receipts where receipts were lost or never received. In the alternative, AILA asks that Headquarters urge the District Offices to expedite the processing of advance parole applications to facilitate traveling by H and L nonimmigrants where no receipt has been issued within a reasonable period of time. INS agreed to look into this matter.

An additional issue of "first in first out" processing of I-485 applications was raised as it continues to be a problem. Some older cases from 1999 and 2000 still have not been adjudicated, but cases filed after January 2001 have been approved. The inability to obtain fingerprinting appointments appears a chronic problem for the old cases. Specific case delays should be brought to the attention of liaison for resolution.

INS advised that bar codes used in the SWIP audits will make it easier for HQ to see age of applications in the District offices. New software will be able to generate aging reports at the Service Centers.

Item IV: FILING I-485s or I-129s WITH DOS 2 12(e) WAIVER RECOMMENDATION LETTERS

THE PROBLEM

Persons in J status who are subject to the 2-year home residency requirement are required to obtain a waiver of the requirement before a change of status to another nonimmigrant status or an adjustment of status to permanent residence can be adjudicated. Although waivers require the recommendation of the Department of State, once DOS renders a favorable recommendation, waivers are routinely granted.

Lately, some Service Centers have been requiring petitioners or applicants to submit evidence of INS approval of the waiver prior to approval of a change of status. This results in needless delay in the process and considerable administrative inefficiency.

THE RATIONALE

A 1998 memorandum to the field from Jacqueline Bednarz, writing for Paul Virtue, instructed the field to accept jurisdiction over Section 212(e) waiver applications submitted jointly with Section 245 adjustment applications. (Copy enclosed.) Clearly, the idea behind this memo was to encourage administrative efficiency. This is a sensible approach, and one that should apply equally to I-129 petitions. There is no reason to adjudicate a waiver request separately from the petition, needlessly adding months to what has already become an unacceptably lengthy process. And, with the advent of premium processing, the option of premium processing system is negated when the employer must nevertheless wait months to file the petition while waiting for the same agency to adjudicate a routine waiver request.

THE SOLUTION

Allow the adjudication of 212(e) waiver requests concurrently with the adjudication of a change or adjustment of status.

> *Discussion: AILA indicated that some Service Centers will not adjudicate the DOS recommended 212(e) waiver without receipt of an I-129 petition. However, the DOS recommendation may be forwarded to a Service Center that is not the same Service Center where the petition is filed. Some Service Centers will not adjudicate a nonimmigrant petition that includes a request for a change of status unless the waiver has been adjudicated prior to receipt of the petition filing, even if the DOS recommendation is at the Service Center or submitted with the petition. Since most of the DOS waiver recommendations are approved by INS, AILA suggested that it would be reasonable to adjudicate the petition and change of status request where INS has received a favorable DOS recommendation on the waiver. INS agrees to look at this issue.*

Item V: INFORMATIONAL ITEMS

1. Please advise as to status of I-140/I-485 combined filing regulation.

   Discussion: INS indicated that the regulations are currently under review at DOJ. INS anticipates implementation this fiscal year.

2. Please advise as to status of AC21 regulations. Will the regulations address other issues such as the visa waiver bill's corporate reorganization provisions? Travel with pending petitions with extensions of stay requested?

   Discussion: INS stated that the regulations are still at INS. In view of the recent confirmation of the new Commissioner and emergency issues, it is not at all clear

how close the AC21 regulations are to being forwarded to DOJ.

3. Please advise as to the status of your efforts to extend the validity of EAD cards to two years.

Discussion:INS indicated that the regulation has been drafted and is believed to be at the Commissioner's office for review, not yet at DOJ. The regulation would permit local variations in EAD validity periods (up to two years) related to processing times at Service Centers and District Offices.

4. Can you advise as to how premium processing is working from the INS perspective? Procedurally? Financially?

Discussion: AILA reported that members are generally pleased with the Premium Processing Program. The e-mail system works but there are problems with the phone system. Phones do not always recognize case file numbers. Generally, supervisors are responsive. There is a perception that RFEs are common on L's filed at NSC.

AILA suggested that INS consider expanding Premium Processing to include the Motions to Reopen on petitions processed through the program to avoid delays in the mailroom.

INS indicated that there will be a vendor survey on customer satisfaction. The vendor will contact users, such as AILA members, for feedback.

$21 million was received from Premium Processing filings as of September 30, 2001, which was in the projected range.

INS stated that it expects that the Premium Processing Program will no longer be necessary in a few years as backlogs are reduced.

5. Have you seen progress in your efforts to develop best practices at the Service Centers?

INS is developing national Standard Operating Procedures ("SOPs"), form by form.

6. Please confirm the implementation of the policy that no new I-140 petition is required where there is a change of a corporate name only.

Discussion: INS confirmd that no new I-140 petition is required in such cases.

7. Please advise as to the most current data on H-lB number usage for the fiscal year ending September 30, 2001.

Discussion: The cap was not reached. The count was not available at the time of the meeting.

8. K fiancées continue to face a hardship resulting from the delays in EAD processing. Will you consider issuing employment authorization at the port of entry or on a walk-in basis in the District Offices in order that they may accept employment during the initial 90-day period following admission?

INS agreed to review the problem.

ADDITIONAL ITEM

9. Mr. Yates indicated that we can expect two (2) forms to be made available for filing electronically next year. One form will be from the business line and one from the family line.