Atlanta USCIS-AILA Liaison Meeting Responses for January 29, 2010

OLD BUSINESS

1. Members are reporting that they have been receiving discretionary denials on adjustment of status applications due to various criminal offenses that do not per se make a person inadmissible. The denials are made after the initial interviews, and state that the denial is made after weighing all equities, including hardship to a qualifying relative; however, in most cases, the applicant has made no effort to show hardship, and was previously unaware that they would be required to do so. What is the USCIS policy regarding these discretionary denials? Can USCIS issue an I-72 in cases where they intend to deny an application on discretionary grounds to at least allow an applicant to show hardship?

   USCIS Initial Response: No. The regulations states that Officers have discretion when adjusting an alien to that of a lawful permanent resident. If an applicant has an extensive criminal history that does not make him/her inadmissible, we have the discretion to deny the applicant. We are not required to issue an I-72. Bertha Johnson will research this issue and will supply a replacement Response for this item.

   USCIS Subsequent Response: USCIS is still looking into this issue and will not provide a response at this time, as we are considering making several policy changes regarding this and related issues. USCIS has received examples of problematic discretionary denials and is aware that this is an issue that needs to be resolved. USCIS intends to provide an update on this issue prior to our next AILA liaison meeting.

   USCIS Most Recent Response: **No response is available yet on this issue.**

NEW BUSINESS

1. AILA members are reporting issues with having ISO's request files from other locations where applications are pending that require adjudication at the USCIS Atlanta office. Attorneys are being told that "they" need to tell ICE litigation (for example) to "release" the file in order for USCIS Atlanta to have it for processing/interview, etc. However, ICE attorneys firmly instruct (when the ISO's instruction is followed by an attorney) attorneys that they "have no business telling them what to do" with their files, and that USCIS can get the file simply by requesting it since ICE litigation is generally unable to place a special hold on the file. Are ISO's able to request a file from litigation? If so, it appears there may be a training issue, and that ISO's generally may require further instruction on procedure as it relates to file requests.

   USCIS Response: Yes and they do. This does not mean that ICE will send the files to USCIS. ICE should automatically send files for Court ordered adjustments back to USCIS.

AILA NOTE: If a specific attorney is being instructed to ask ICE litigation to send the file, this is against our instruction, and we should be notified as soon as possible through the AILA mailbox, and/or ask to speak to a supervisor.

AILA Liaison Committee Note: Please email such issues to the attention of Dustin Baxter at dbaxter@immigration.net.

2. When an I-485 is administratively closed by the Atlanta USCIS office due to, for example, lack of jurisdiction because removal proceedings are pending, we have several times been instructed that a letter to the local office is sufficient via our AILA liaison to reopen the application when the reason for the administrative closure has been resolved. AILA members have experienced mixed results with this method. In some cases a timely decision comes, while in other cases, the letter receives no response at all. Could the Service clarify (a) whether these letters are the preferred method for reopening an application that was administratively closed locally, (b) how these letters are treated when they are received, and (c) what is the best practice for us when the letter has not elicited any action for a significant period?

   USCIS Response: When we receive a request that an I-485 that had been administratively closed be reopened, the file is pulled and the case is assigned to an officer. The processing time depends on where the file is located at the time the request is made, and the officer's workload.

   AILA Liaison Committee Note: Please email such case inquiries and requests to the attention of Dustin Baxter at dbaxter@immigration.net.

3. AILA members are reporting improper administrative closure of I-485s. Regarding the administrative closure of an I-485, the regulations clearly state that an alien is not in proceedings until a NTA is filed with the Immigration Court. 8 CFR § 1239.1(a). Significantly, bond proceedings can and do take place without any NTA having been filed. 8 CFR § 1003.14(a). As such, a bond hearing does not constitute removal proceedings without an NTA being filed with the Court. Attorneys are reporting that I-485s have been administratively closed where an applicant had merely had a bond hearing before the Immigration Court, and no NTA was ever filed, or that applicants are being asked to prove a negative (that the applicant is not in removal proceedings). Can the Service offer any suggestions for us regarding how to demonstrate that removal proceedings have not in fact been initiated?

   USCIS Response: It would be helpful if the attorneys provided the A-number of the cases they feel USCIS improperly closed/denied in order to address the exact problem. It would not be fair to render a judgment without looking at the specific cases.

   AILA Liaison Committee Note: Please email such case information, with specifics, to the attention of Dustin Baxter at dbaxter@immigration.net.

4. Some AILA members are reporting delays with N-336s filed at the USCIS Atlanta office, in

that some files are stuck 3-6 months post interview (in some cases where the N-400 is eventually denied), followed by another 2-4 months for scheduling an N-336 interview. Given the fact that Natz re-files are only taking 90 days to interview, would it be possible for an attorney to bring a long pending N-336 to the attention of a supervisor (for example through an InfoPass), or an ISO, so that the N-336 can be adjudicated on the same day?

USCIS Response: No. I cannot promise that an application can be adjudicated on the same day. Please utilize the AILA mailbox to notify USCIS of a long pending N-336 or any other pending application.

AILA Liaison Committee Note: Please email such inquiries to the attention of Nellie Navidi at nnavidi@balglobal.com.

5. AILA members are reporting having received Natz denials citing deportability sections at INA 237 as a basis for denial (which is not a legal basis for USCIS to deny a Natz application as USCIS can only use the relevant potions from 316, 319, etc). An applicant, for example, may be deportable because he or she committed a CIMT – but still may be naturalized, for example if the crime was committed outside the statutory 3/5 years. This issue was addressed through the liaison meetings previously, and was corrected for some time, but has apparently made a return. Would it be possible to address this as a training issue with the adjudications officers?

   USCIS Response: Yes, CIS will address, but it would be helpful for AILA to identify specific cases that can be used as examples.

   AILA Liaison Committee Note: Please email examples of these cases to the attention of Dustin Baxter at dbaxter@immigration.net.

6. Given the changes in law regarding HIV/inadmissibility/waivers, how does USCIS want to be informed of the I-485's pending b/c of HIV waivers waiting for CDC approval? Is it preferable that AILA members use the liaison? InfoPass? Some other method?

   USCIS Response: If you have a case with a pending I-601 waiver because of HIV and you have not received any information, you can bring the case to our attention via the AILA mailbox.

   AILA Liaison Committee Note: Please email cases where this is an issue to the attention of Dustin Baxter at dbaxter@immigration.net.

7. AILA members are reporting that some officers are taking the position that for the 5 year good moral character period prior to applying for naturalization, you cannot have been CONVICTED of a CIMT during the immediate five years prior to applying, when, according to statute it is the DATE OF COMMISSION OF THE CIMT, not the conviction date. It is understood that USCIS has the discretion to go beyond the 5 year period, but officers are issuing denials based specifically stating that the conviction date by itself precluded approval because it was within the 5 year period. As this appears to be a training issue, would USCIS consider addressing this issue with adjudicating officers?

USCIS Response: It would be helpful if the attorneys provided the A-number of specific cases they feel were improperly closed/denied in order to address the exact problem.

AILA Liaison Committee Note: Please email specific case inquiries to the attention of Dustin Baxter at dbaxter@immigration.net.

8. AILA members report problems with decisions on I-130s being entered into the system where an individual is in removal proceedings. Decisions on I-130s are occasionally not issued following interviews due to the need for additional documents/system checks. When a decision is not issued on the spot, attorneys/clients are being told that a decision will be mailed; however, in many cases the file is shipped almost immediately to ICE litigation without a decision being made on an I-130, or without a decision being entered into the system. Often times once it is determined that the file was sent to ICE without a decision, the file is requested by USCIS, arrives at USCIS, and then is returned to ICE, again without a decision being made. This is especially problematic considering that Atlanta's Immigration Judges are stingy with continuances, and that approval notices are necessary to work with ICE for termination of removal proceedings. Particularly in cases where removal proceedings are pending, and files are being shuttled between ICE and USCIS, can USCIS institute a procedure of some sort where files do not leave USCIS with applications pending? If the policy already exists, would it be possible for USCIS to revisit the policy with its officers?

USCIS Response: When a decision is made on an I-130, the office will send out a written decision and update the appropriate system. If the case is back with the Office of Chief Counsel and you have not received a written decision, then submit the pertinent information through the AILA mailbox.

NOTE: Please *do not* send N-400 inquiries to DHS legal counsel. USCIS legal counsel is a resource for USCIS. If additional research or information is needed from USCIS legal counsel, this is strictly a determination to be made by the USCIS officer on the case. For any issues of law on a specific case, AILA attorneys should be only utilizing the AILA mailbox, where these issues can be tracked and documented and responded to in a timely manner. USCIS legal counsel is not instructed to respond directly to AILA attorneys on any particular case.

AILA Liaison Committee Note: Please email inquiries on these matters to the attention of Dustin Baxter at dbaxter@immigration.net.

9. AILA members report that some officers may be misinterpreting the March 9, 2005 Yates Memo regarding 245(i), grandfathering, and immediate relatives. According to the Memo, a spouse acquired after the filing of a petition that qualifies under 245(i) may still benefit from 245(i) as long as they are still married. Our understanding from the Memo is that the after-acquired spouse may just not *independently* benefit from 245(i), for example if the marital relationship was no longer intact, but as long as the qualifying relationship exists is entitled to adjust along with the original beneficiary of the 245(i) petition. Can CIS confirm this is their understanding regarding this Memo as well? (See attached)

A recent denial cited to the Yates Memo of March 9, 2005 when it stated:

"If a spouse or child relationship is established after the filing of a grandfathering petition and is in existence at the time the principal alien adjusts status, the spouse or child is not a grandfathered alien and may not independently **BENEFIT** from section 245(i). RATHER, THE SPOUSE OR CHILD MAY ONLY **BENEFIT** AS A DEPENDENT OF THE PRINCIPAL ALIEN. ACCORDINGLY, THE QUALIFYING RELATIONSHIP MUST CONTINUE TO EXIST AT THE TIME THE PRINCIPAL ALIEN ADJUSTS STATUS IN ORDER FOR THE SPOUSE OR CHILD TO **OBTAIN DERIVATIVE BENEFIT**."

However, the denial goes on to deny the application based on the following (which we believe to be an incorrect interpretation of the Memo):

"Since the spousal relationship was established after April 30, 2001 and is still in existence at the time your spouse (principal applicant) adjusts status, you do qualify as a dependent of the principal alien; HOWEVER YOU ARE NOT CONSIDERED A GRANDFATHERED ALIEN. You are therefore ineligible to adjust status to that of a permanent resident under section 245(i)"

We believe the decision is correct in noting that the applicant is not an independent beneficiary, however, our understanding is that this does not eliminate her ability to benefit under 245(i). We believe the Yates memo makes clear that after-acquired dependents are able to derive benefits from 254(i) as long as the relationship continues to exist. If USCIS agrees, we ask that information regarding this be passed along to officers. If USCIS disagrees, please provide the reasoning of the interpretation that appears to side-step the plain meaning of the wording in the Memo.

USCIS Response: This appears to be a specific case. It would be helpful if we could review the specific file. Please send an email through the AILA liaison mailbox including the A number.

AILA Liaison Committee Note: Please email specific case details where this is an issue to the attention of Dustin Baxter at dbaxter@immigration.net.

10. AILA members are reporting continuing issues with the "Off the Top" system. Among the issues most reported are: continued increased wait times (generally more than one hour, and occasionally more than three hours); files being placed in the wrong bucket; refusal by the window attendant to provide a supervisor when requested; officers passing up large files for smaller files when pulling files from the bucket; and a substantial decrease in the amount of decisions being issued at the time of the interview. These issues have been reported by AILA members to USCIS in many instances, but continue to persist. Can USCIS confirm that it is aware of ongoing issues, and discuss what is being done to address them? Is there any accountability regarding how many cases officers are adjudicating? How is the system working from USCIS's standpoint? How is the effectiveness of the system being evaluated by USCIS?

USCIS Response: USCIS is aware of interview delay issues, and will reduce the number of interviews per officer in March to allow each officer time to review the cases. USCIS is still refining the process to best implement the system.

11. Next meeting date: April 30, 2010.

USCIS NOTES: Regarding overlapping interview appointments: in addition to sending advance notification to the USCIS through the Liaison Committee, attorneys should speak to the duty supervisor at the window, and not to the clerk, to assure accommodation for the overlapping appointments.