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Sent:	Friday, July 22, 2011 8:51 AM
To:	Sun, Catherina C; Laroe, Lisa A
Cc:	Tamanaha, Emisa T
Subject:	FW: 1 in 3 requirement for L

VSC/CSC:

Recently, OCC was consulted regarding the general requirement for intracompany transferees as outlined 8 CFR 214.2(l)(3)(iii), which states that a beneficiary must have worked for a qualifying organization abroad for one continuous year within the three years immediately preceding the filing of the petition. Specifically, OCC was asked what analysis officers should use for beneficiaries who are already in the United States in another NIV status specifically for the purpose of engaging in employment for the qualifying U.S. company and are now requesting initial L-1 status.

(b)(5)

Therefore, please follow the statute by counting back from the time of admission for the one year of experience gained within three years requirement.

Please contact me if you have any questions.

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Policy Guidance on the Interpretation of the L-1B Specialized Knowledge Classification

Office of Policy and Strategy

Service Center Operations

Office of Chief Counsel

Topics to be Covered

- Reason for "refresher" L-1B specialized knowledge training
- L-1B statutory and regulatory definitions of specialized knowledge
- L-1B visa classification and characteristics and evaluation
- Distinction between advanced and special knowledge
- Current USCIS policy on L-1B interpretation with case examples:
- Distinguished from O-1/EB-1 and EB-2 aliens
- Factors for Consideration
- "Key" personnel/process and "Essential Process"
- Standard and burden of proof with case examples and RFE/Denial reminders

Reasons for Refresher Training

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QUESTIONS?

I-129 L-1 Adjudication

September 2011

Training Matters Today

- General Information
- Individual L-1 Petition
- Qualifying Relationships
- Managerial and Executive Capacity
- Specialized Knowledge
- Blanket L-1 Petition
- New Offices
- Limitations on Stay
- Things to know

General Information

Sources of Information

- INA §§ 101(a)(15)(L), 101(a)(32) and 101(a)(44)
- INA § 214(c)
- 8 CFR §§ 214.1, 214.2(l), & 248
- *Interpretation of Specialized Knowledge*, Memorandum of James A. Puleo, Acting Exec. Assoc. Comm., INS (March 9, 1994)
- Form I-129 with L Supplement and Form I-129S

Definition of L-1

...an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge...

INA § 101(a)(15)(L); see also 8 CFR § 214.2(l)(1)(i)

L Classification

- L-1A classification is for managers and executives.
- L-1B classification is for specialized knowledge aliens.
- L-2 classification is for dependents (dependents use Form I-539).
- LZ is the designation given to an approved blanket petition. The Petitioner is referred to as a Blanket Petitioner, there is no individual beneficiary of an approved LZ.

L Classification

L-1A and L-1B are merely CLAIMS designations. When an intra-company transferee is admitted to the United States, the alien is admitted by CBP as an L-1, or, in the case of an extension of stay or change of status, is granted L-1 classification. Therefore, you will only see the classification "L-1" on the Forms I-94 issued to the alien.

30 day Processing Time

INA § 214(c)(2)(C) of the Act states that USCIS shall provide a process for reviewing and acting upon L-1 petitions within 30 days after the date a completed petition has been filed.

8 CFR § 214.2(l)(7) indicates that a Petitioner should be notified of petition approval within 30 days of the receipt of the completed petition by USCIS. If an RFE is issued, the 30-day processing time begins again after receipt of the requested information.

Fees

1. I-129 (L-1 and LZ) Petition filing fee: **$325.00.** Note that there is no filing fee for an I-129S, *Nonimmigrant Petition Based on Blanket L Petition*.

2. Fraud Prevention and Detection Fee: **$500.00.** This fee is required to be paid by Petitioners seeking the initial approval of an I-129 L-1 petition (including a change of status to L-1, or a petition for new concurrent L-1 employment). There are no exceptions or waivers available to the Fraud Prevention and Detection Fee. The Fraud Fee does not need be paid when a petition seeking blanket LZ approval is filed. See INA § 214(c)(12).

3. P.L. 111-230 fee: **$2,250.00.** Effective 8/13/2010, this law requires employers filing an L-1 petition prior to October 1, 2015, who are required to pay the $500 Fraud Prevention and Detection fee as detailed above, to pay an additional $2,250 if: (1) they employ 50 or more employees in the United States; and (2) more than 50% of those employees are in H-1B or L-1 status.

L-1 Processing Options

- Petitioners may file an I-129 L-1 petition (Individual L-1 Petition) through the normal procedure of filing with either the California Service Center (CSC) or Vermont Service Center (VSC). This process is known as an *individual petition.*

- Certain L-1 Petitioners may file using a Blanket L processing option. The blanket L processing option involves filing a Blanket LZ petition on Form I-129 with USCIS in order to qualify the Petitioner and filing a subsequent Form I-129S with either USCIS, DOS, or CBP in order to qualify the beneficiary.

- When a Petitioner is filing for Canadian Citizens under either of the above options, the Form I-129 or I-129S may be filed with CBP at a Port Of Entry (POE) on the Canadian-U.S. Land Border or a Pre-Clearance/Pre-Flight Inspection facilities (PFI) in Canada.

- Visa Exempt aliens (Canadian and certain aliens residing in the Caribbean) may file the I-129 or I-129S with the Service Center. If approved, they may seek admission to the United States without a visa by use of the approval notice.

Individual L-1 Petition

Where to File the I-129

- I-129 L-1 petitions are primarily filed at the CSC and VSC.

Where to File the I-129 (Continued)

- I-129 L-1 petitions filed on behalf of Canadian citizens may be filed with CBP at certain POEs on the U.S.-Canadian Land Border or at certain PFIs inside Canada in conjunction with an application for admission to the United States as an L-1 nonimmigrant. The petition will be adjudicated by a CBP Officer. If approved or denied, a copy will be forwarded to the USCIS Service Center for keying into CLAIMS and subsequent interfiling into the Blanket LZ petition. Additionally, if CBP cannot issue a formal denial notice to the alien, they may forward the petition to the CSC for final action. *Note that some USCIS Officers may be required to work petitions that were initially filed with CBP and others may be required to adjudicate EOS petitions for aliens initially approved by CBP.*

See 8 CFR § 214.2(l)(17)

Basic Requirements for an Individual L-1 Petition

1. A qualifying organization is filing the petition.

2. Beneficiary was employed abroad for one continuous year within prior three years in a managerial or executive capacity, or a position that involves specialized knowledge.

3. Proposed employment in the United States is in a capacity that is managerial, executive, or involves specialized knowledge.

- Note that in the case of a *New Office*, an office that has been open for less than one year, there are different requirements. New office petitions are discussed below

8 CFR § 214.2(l)(3)

Qualifying Organization Defined

See 8 CFR § 214.2(l)(1)(ii)(G)

- Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

  (1) Has a qualifying relationship between the U.S. entity and a foreign entity.

  (2) Is or will be doing business as an employer in the United States and in at least one other country for the duration of the alien's stay in the United States.

  (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Qualifying Organization
- does a qualifying relationship exist?

- The Petitioner can be either a foreign entity or a U.S. entity. However, the Petitioner must establish that a qualifying relationship exists between the U.S. entity and an entity in a foreign country. The qualifying relationships are:

  - Parent. 8 CFR § 214.2(l)(1)(ii)(I)

  - Branch. 8 CFR § 214.2(l)(1)(ii)(J)

  - Subsidiary. 8 CFR § 214.2(l)(1)(ii)(K)

  - Affiliate. 8 CFR § 214.2(l)(1)(ii)(L)

Employment Abroad

- The regulation indicates that a qualifying employee must have at least one continuous year of full-time employment abroad in a capacity that was managerial, executive, or involved specialized knowledge with a qualifying organization within the three years preceding the filing of the petition.

See 8 CFR § 214.2(l)(3)(iii) and (iv)

- This is referred to as the "1 in 3" rule.

Employment Abroad (Continued)

It is important to note that the 1 in 3 rule is a combination of two separate regulatory requirements which require two different but related analyses.

The Petitioner must submit sufficient documentation establishing that:

- The beneficiary was employed abroad for one continuous year out of the three years prior to admission. See 8 CFR § 214.2(l)(3)(iii).
- For the entire one year of continuous employment abroad, the beneficiary was performing in a capacity that was managerial, executive, or required specialized knowledge. See 8 CFR § 214.2(l)(3)(iv).

This is an important distinction to make as an employee who may have worked abroad for a continuous year (or more) fulfilling the first requirement, may still fail to qualify for the L-1 because the employee may have worked in a qualifying position for less than one year.

Employment Abroad (Continued)

- Both previous foreign employment and the prospective U.S. employment must be in one of the qualifying capacities.

- The prior foreign employment and proposed U.S. employment capacity do not have to be the same. For example, the one year of employment abroad could have been completed by the beneficiary in a specialized knowledge position, but the beneficiary can qualify for an L-1A position in the United States. See 8 CFR § 214.2(l)(3)(iv).

  Exception: A beneficiary coming to open or work at a new office in a managerial or executive capacity must have previous foreign employment experience in a managerial or executive capacity.
  See 8 CFR § 214.2(l)(3)(v)(B).

- Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement. See 8 CFR § 214.2(l)(1)(ii)(A).

Position in the United States

The Petitioner must submit sufficient documentation establishing that:

- The position in the United States is a capacity that is managerial, executive, or involves specialized knowledge.
- Generally, if the petitioner establishes that the beneficiary was performing qualifying employment abroad and the beneficiary will be transferring laterally to *the same position* in the United States, the Officer's review may not need to be as extensive as a situation where the beneficiary is transferring to the United States to occupy a different position, involving a different set of job duties. (This happens frequently as the regulation indicates that the employment in the United States need not be the same as the employment performed abroad.)

Is the Beneficiary Qualified to Fill the Position in the United States?

The regulation states that the employee need not be filling the same position in the United States that he/she occupied abroad. However, the regulation indicates that the employee must be qualified for the position in the United States.

Therefore, if the position in the United States appears to be substantially different than the one that the beneficiary occupied abroad, Officers should review the petition to ensure that the beneficiary's prior education, training and employment qualify him/her for the position in the United States.

See 8 CFR § 214.2(l)(3)(iv).

Validity Periods for Individual Petitions

- Petitions filed by established Petitioners may be approved for a period not to exceed three years initially.

- Petitions filed to establish a new business may be approved for a period not to exceed one year. (*New offices* discussed below.)

- Extensions (EOS) are granted in increments of up to two years.

Limitations on Stay

- Managers and executives (L-1A) may be employed in the United States for a maximum period of seven years.
- Specialized knowledge aliens (L-1B) may be employed in the United States for a maximum period of five years.
- Recapture time is permitted. Time spent by an L-1 outside of the United States will not be counted against the maximum period of authorized stay and may be recaptured by the alien if documentation is presented.
- L-1's are **not eligible** for extensions beyond the maximum period of stay when a labor certification or I-140 is filed on their behalf or remains pending for a specific period of time (unlike certain H-1B aliens under AC21).

Limitations on Stay (Continued)

- Time in H-1B status counts toward the maximum validity period of stay allowed as an L-1.
- Time in H-4 or L-2 status does not count towards the maximum validity period of stay allowed as an L-1.
- Example – An alien is admitted as an H-4 (dependent of an H-1B). After 2 years the alien finds a job and a petition is filed changing his status to H-1B. The alien remains an H-1B for five years. The employer then files a petition to COS the employee to L-1A. If approved, the alien can be granted a 2 year validity period in L-1A status as the maximum amount of time allowed in L-1A status is 7 years. (5 years as H-1B + 2 years as L-1A = 7 years.)

Limitations on Stay (Continued)

- An alien who has reached the maximum amount of time allowed in L-1A or L-1B status must depart the United States for at least one year (except for brief visits for business or pleasure) before an L-1 petition may be approved on his/her behalf. 8 CFR § 214.2(l)(12)(i)

- **Exceptions:** There is no limitation on period of stay for: (1) Aliens who do not reside continually in the United States and whose L employment is seasonal, intermittent or in an aggregate of six months or less per year, and (2) Aliens who reside abroad and commute to the United States to engage in part time employment.

8 CFR § 214.2(l)(12)(ii)

Qualifying Relationships

Qualifying Organization
- Does a qualifying relationship exist?

- The Petitioner can be either a foreign entity or a U.S. entity. However, the Petitioner must establish that a qualifying relationship exists between the U.S. entity and an entity in a foreign country. The qualifying relationships are:
  - Parent. 8 CFR § 214.2(l)(1)(ii)(I)
  - Branch. 8 CFR § 214.2(l)(1)(ii)(J)
  - Subsidiary. 8 CFR § 214.2(l)(1)(ii)(K)
  - Affiliate. 8 CFR § 214.2(l)(1)(ii)(L)

Parent

- Parent means a firm, corporation, or other legal entity which has subsidiaries. 8 CFR § 214.2(l)(1)(ii)(I)

- For a broader explanation of what constitutes a 'parent,' the definition of subsidiary at 8 CFR § 214.2(l)(1)(ii)(K) indicates that a parent company is an entity which owns and controls the operations of a subsidiary by:

  (1) Owning either directly or indirectly more than 50% of the subsidiary and controls the subsidiary.

  (2) Owns either directly or indirectly half of the subsidiary and controls the subsidiary.

  (3) Owns either directly or indirectly 50% of a joint venture and has equal control and veto power over the subsidiary.

  (4) Owns either directly or indirectly less than 50% of the entity but in fact controls the entity.

Branch

Branch means an operating division or office of the same organization housed in a different location. 8 CFR § 214.2(l)(1)(ii)(J)

- An "arm" of the parent organization.
- Not a separate entity.
- Part of the same organization housed in a different location.
- Registered as a foreign corporation operating in the United States.

Subsidiary

- Subsidiary means a firm, corporation, or other legal entity that is directly or indirectly owned and controlled by a parent. 8 CFR § 214.2(l)(1)(ii)(K)

  It must be established that the parent:

  (1) Owns either directly or indirectly more than 50% of the subsidiary and controls the subsidiary.

  (2) Owns either directly or indirectly half the subsidiary and controls the subsidiary.

  (3) Owns either directly or indirectly 50% of the subsidiary in a joint venture with another company and has equal control and veto power over the subsidiary.

  (4) Owns either directly or indirectly, less than 50% of the subsidiary but in fact controls the subsidiary.

Example

Subsidiary – More than 50%

Company A
Parent

Company B
Subsidiary
100% Owned

Example

Subsidiary – Exactly 50% and parent has control of the subsidiary

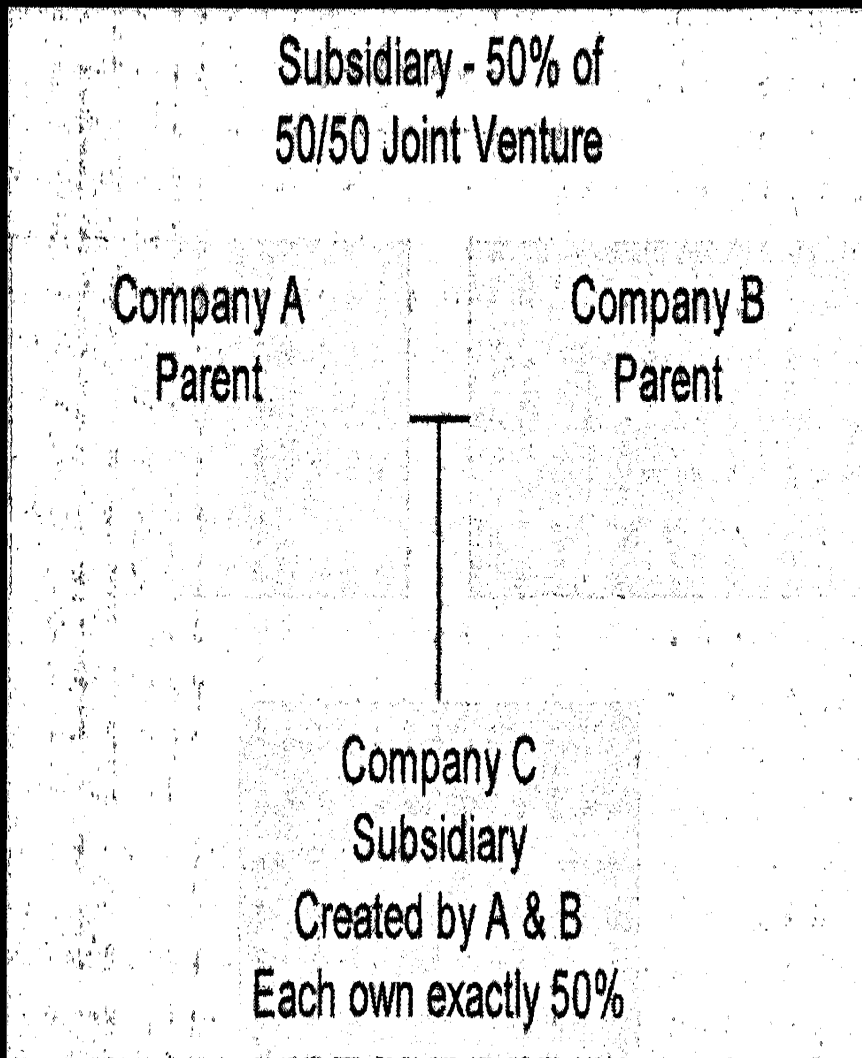
Company A
Parent

Company B
Subsidiary
50% Owned

Joint Venture as Subsidiary

- Joint venture: Parent owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity.
- Neither parent has sole control. They must agree to all controlled aspects. Thus, both have control. This is called "negative control".

Joint Venture – Two Parent Companies own 50% of a subsidiary



Joint Ventures – Two Parent Companies Own a Subsidiary

- An alien L-1 cannot be transferred through the joint venture.
- In the above chart:
  - An alien <u>can</u> be transferred from A to C or C to A.
  - An alien <u>can</u> be transferred from B to C or C to B.
  - But, an alien <u>cannot</u> be transferred from A to B or B to A.

Example – Parent Owns Less Than 50%

Subsidiary - Less than 50% yet still controls the entity

Company A
Parent

Company B
Subsidiary
but parent owns less than 50% yet still controls

Affiliate

- Affiliate means:

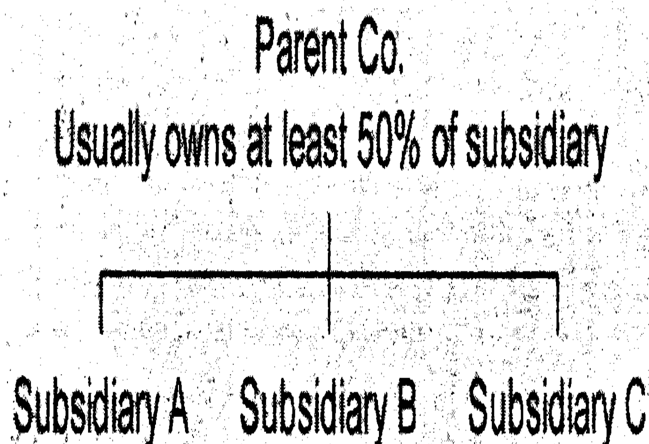
  (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or

  (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

8 CFR § 214.2(l)(1)(ii)(L)

A Note About Subsidiaries and Affiliates

Think of this as a parent/child relationship between a parent/subsidiary. An affiliate would be comparable to a sibling relationship. If this parent co. owns 100% of Subsidiary A and 75% of Subsidiary B, Subsidiaries A and B are affiliated.



Example – How two separate subsidiaries can be affiliates of each other

Parent Company A owns 100% of both subsidiaries B and C. Company A controls B and C. Companies B and C are affiliates.

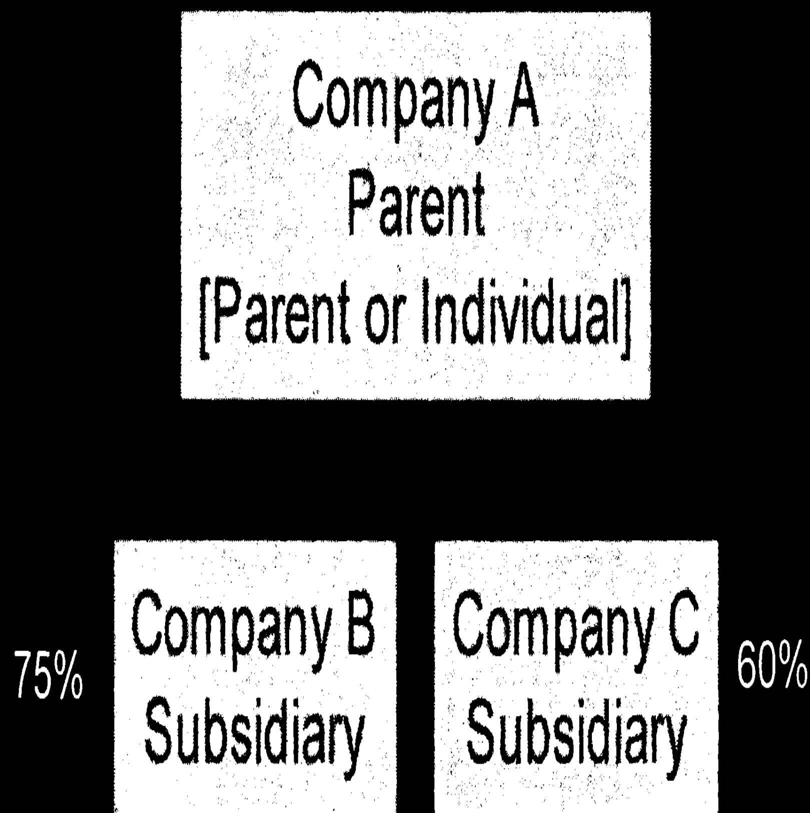
Company A
Parent
[Parent or Individual]

Company B
Subsidiary

Company C
Subsidiary

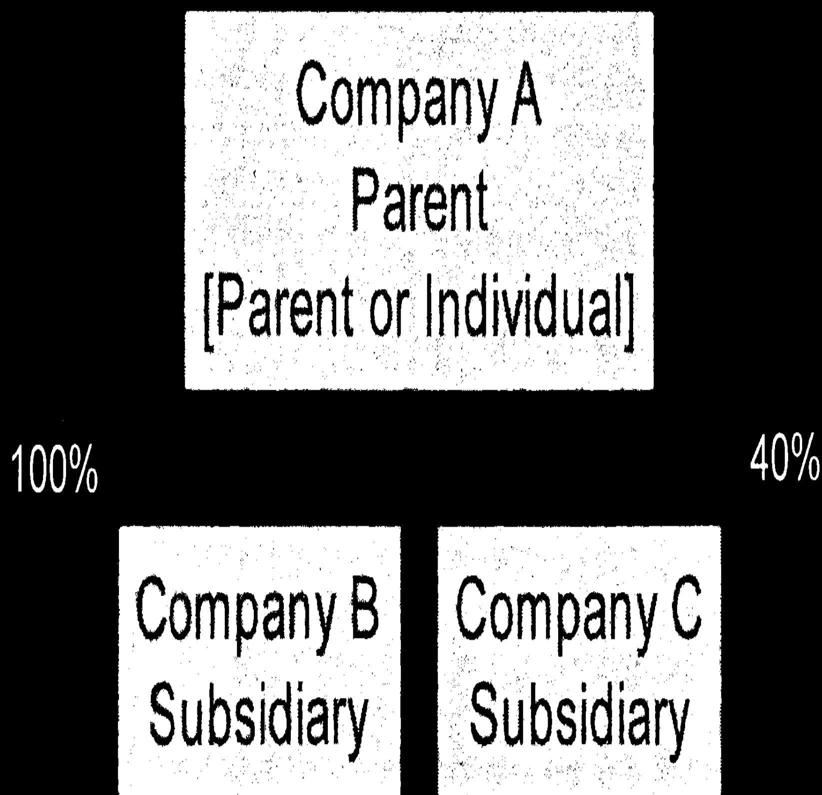
Example 2 – How two separate subsidiaries can be affiliates of each other

Parent Company A owns 75% of subsidiary B and 60% of subsidiary C. Company A controls B and C. Companies B and C are affiliates.



Example 3– How two separate subsidiaries <u>will not</u> be affiliates of each other

Parent Company A owns 100% of subsidiary B and 40% of subsidiary C. Company A controls B but not C. Companies B and C are <u>not</u> affiliates. Company A's employee may qualify to work at B but not C.



Affiliates – Multiple Owners

One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Example – Multiple Owners of Qualified Affiliates

The two entities below are owned by individuals A, B, C, and D in the percentages indicated

These entities are affiliates as they are both owned by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity

A B C

25% 25% 24%

Franchise Agreements

- Franchises are companies operating under franchise agreements. Franchise agreements are entered into to allow one independently owned company to license the name and/or product of another independently owned company. There is usually no qualifying relationship between a foreign entity and a U.S. entity associated by a franchise agreement or contract.

  Example: *Cheap TV's* located in the United States enters into a franchise agreement with *BONY Corp* in Japan. Under the agreement, *Cheap TV's* will be the sole distributer of *BONY* flat screen televisions in the United States and will be able to open and operate stores under the name *BONY Corp* but still wholly owned by *Cheap TV's*. In return, *BONY* will receive 10% of the profit from each flat screen television sold.

  Note: No ownership or control exists in this franchise agreement as neither company owns a portion of the other company. As such, there is no qualifying relationship between *Cheap TV's* and *BONY Corp*.

- Franchises and those relationships based on contractual or licensing agreements usually are not qualifying relationships for L-1 purposes.

  See Matter of Schick, 13 I&N Dec. 647 (Reg. Comm. 1970)

Affiliate – Partnership Accounting

- A partnership that is organized in the United States to provide accounting services along with managerial, and/or consulting services will be considered an affiliate of a foreign partnership (or similar organization) that provides accounting services in another country if:

  (1) They both market their services under the same internationally recognized name,

  (2) Under the agreement with a worldwide coordinating organization that is owned by member accounting firms,

  (3) Both the U.S. accounting partnership and the foreign accounting partnership are members of the worldwide coordinating organization.

8 CFR 214.2(l)(1)(ii)(L)(3)

Affiliate – Partnership Accounting

- **Explanation**: Accounting firms such as *Deloitte Touche Tohmatsu Limited (Deloitte)* are large internationally branded accounting firms. However, the individual Deloitte firms in each respective country are single entity partnerships that do not normally own any part of the Deloitte firms in the other countries. [Deloitte-U.S. is an accounting firm set up as a partnership that is owned by the U.S. partners that in most instances do not own any part of Deloitte- Spain.] However, these firms are all part of an agreement to provide services under the same name and coordinated through a organization that is set up and owned by the member organizations with no actual control exerted by one member firm. This set-up has significant business benefits as it allows the individual member firms to refer their clients to other foreign member organizations and/or receive new clients through the same referral process. It also allows these firms to meet the different accounting regulations that are set up in each country and to cut ties with offending accounting firms without suffering financial losses. Example: Arthur Anderson/Enron Scandal

- These accounting partnerships are considered affiliates even though they do not exert control on each other or actually own any significant portion of each other.

Example of Accounting Service Affiliates

- *Accounting Partners*, NYC is a partnership that is organized in the United States and provides accounting and management consulting services under an agreement with a worldwide coordinating organization. The worldwide organization is owned and controlled by member accounting firms.
- *Accounting Partners*, UK is a partnership that is organized in Great Britain and provides accounting and management consulting services under an agreement with a worldwide coordinating organization. It markets its accounting services under the same internationally recognized name as Accounting Partners, NYC, and is a member of the same worldwide coordinating organization.
- *Accounting Partners*, NYC and Accounting Partners, UK are considered to be affiliates because:
- They both offer accounting services under the same internationally recognized name, and
- Are members of the same worldwide coordinating organization.

Well Known Examples

not an exhaustive list

- Pricewaterhouse Coopers L.L.P.
- Ernest & Young L.L.P.
- KPMG Peat Marwick L.L.P.
- Deloitte & Touche, Tohmatsu Limited (Deloitte) L.L.P.
- Schneider Downs & Co. Inc.
- Alpern, Rosenthal & Co.
- Sisterson & Company L.L.P.

Issues Regarding Ownership and Control

- Ownership and control can be two ways:

  1) De Jure = Of Law (By Law) Where a legal entity owns more than 50 percent of an entity and because of this controls the entity.

  2) De Facto = Of Fact (In Fact): Where a legal entity owns 50 percent or less of an entity yet still controls the entity.

Evidence of Ownership and Control

- Evidence of Ownership and Control must be submitted to establish the qualifying relationship.

- The petitioner may submit any evidence that it feels is appropriate; USCIS must weigh the evidence submitted appropriately. The best evidence would be financial documentation showing that the foreign entity and the U.S. entity are financially linked. However, the submission of Stock Certificates is a common way that Petitioners seek to establish the qualifying relationship. Stock ownership indicates that the owner has paid money or other capital into a company and in return owns the portion of the company stated on the stock.

Reviewing Stock
Preferred Stock vs. Common Stock

Companies generally issue two types of stock; common stock and preferred stock.

- Preferred stock usually gives holders certain privileges regarding the assets of the corporation in the event of a bankruptcy, but usually does not give preferred stockholders any voting rights. For L-1 purposes, if control is an issue in determining ownership, the stockholders with preferred stock would not qualify if they lack "control in fact" of the corporation/entity. For this reason, preferred stock certificates are rarely submitted as evidence.

- While common stock holders typically do not receive such privileges, they are, generally, the shareholders who have certain voting rights with respect to how the corporation may be managed. Common Stock holders generally do have various degrees of control over the corporation.

Reviewing Stock Certificates

- When reviewing stock certificates as evidence of ownership and control, an Officer should determine how much stock was issued in total and what percentage of the stock is owned by the entity seeking to establish control. (The total number of stock issued cannot exceed the amount authorized in the company's articles of incorporation.)

  Example: Brown-India indicates that they have a qualifying relationship with Brown-U.S. Brown-U.S. has issued 2 million shares of common stock. Brown-India submits a stock certificate indicating that they own 1.1 million shares of Brown-U.S. stock. Because Brown-India owns more than 50% of the voting stock issued by Brown-U.S., they have a qualifying relationship of parent-subsidiary.

Are the Stock Certificates Genuine?

Caveat: There exists a possibility in some cases that the submitted stock certificates may have been altered in order to make a qualifying relationship appear to exist and/or the possibility that the stock certificates were not issued in the normal course of business.

If submitted, an Officer should review stock certificates to determine if they (and the information contained on them) are genuine and were produced in the normal course of the company's business. Generally, an acceptable stock certificate includes the:

- Name of the shareholder
- Number of shares of ownership that the stock certificate represents
- Date of issuance
- Signature of an authorized official of the corporation

Are the Stock Certificates Genuine?

If the stock certificate does not appear genuine, comparison to a stock ledger may validate the certificate.

A stock ledger is a document that is used by the corporation to record various stock transactions, including:

- Initial issuance of stock.
- Transfer of stock from one shareholder to another.
- Repurchase of stock by its own corporation (treasury shares).
- Retirement or "cancellation" of stock.

Are the Stock Certificates Genuine?

- In those *limited* instances where the officer has *reason to question* the validity or authenticity of the stock certificate(s), it may also be appropriate to ask for evidence of the transfer of payment for the stock certificate(s) in question. Such evidence may include but is not limited to copies of cashed checks or documentation of wire transfers.

When to Ask for Financial Evidence of Ownership and Control

1. As indicated above - the officer has reason to question the validity or authenticity of submitted stock certificates.

2. In the case of a new office, if the submitted evidence is insufficient to determine whether the size of the U.S. investment is sufficient to conduct business.

3. If the entity is a type that does not issue stock certificates, such as a partnership or limited liability corporation.

4. If the Officer can articulate a justifiable reason that necessitates asking for the evidence. Examples: suspected fraud, investments suspected to originate in countries not free to invest in the U.S., the size of the entity in relation to the number of petitions filed.

Examples of Financial Evidence

1. Evidence of the stock purchase or Capital Contribution (if stock has no par value or company is anything other than a corporation, i.e. partnership or LLC).
   - Wire transfer receipts
   - Copies of cancelled checks
   - Deposit receipts
   - Bank statements

   This list is not all-inclusive.

2. Larger well-known companies may submit Annual Report/10-K or Federal Income Tax returns.

Issues Regarding Ownership and Control

- Ownership of a subsidiary need not be majority ownership if *actual control* of the subsidiary exists. For more discussion on this principle, see Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982).

- For instance, control may be obtained through a variety of means including proxy votes. A proxy is a person authorized to vote on behalf of a stockholder of a corporation.

  Example: Company A owns 49% of the voting stock of Company B and has proxy power over an additional 2% of Company B's voting stock. Company A has control of Company B by having the majority voting power of Company B (51%).

Non-Profit Organizations

- Non-profit organizations may, under certain circumstances, be considered qualifying organizations for L-1 purposes.
- Also frequently referred to as "tax-exempt" organizations or "501(c)(4) tax exempt" organizations, although there are other types of tax exempt organizations.
- Non-profit organizations may also become incorporated.
- Generally, L-1 petitioning non-profit organizations are incorporated and have branch organizations or affiliated corporations abroad. Examples include the Red Cross and Boy Scouts.
- Evidence of ownership and control can include incorporation documents, audited or reviewed financial statements, stocks or federal informational returns.

Non-Profits
Tax Forms as Evidence

- Most tax-exempt organizations (including private foundations) are required to file an annual informational return, called a Form 990 or 990EZ, Return of Organizations Exempt From Income Tax.

- Most religious organizations are not required to file Form 990 or 990EZ, but many file them anyway in order to comply with state regulations.

- Form 990 is organized very similarly to the Form 1120, U.S. Corporation Income Tax Return.

Qualifying Organization (Continued) - Is the company Doing Business?

- Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. See 8 CFR § 214.2(l)(1)(ii)(H)

- *International trade is not required in order to establish that the entity is doing business.*

Doing Business (Continued)

- Generally, both the U.S. employer and at least one qualifying organization abroad must be doing business for the <u>entire duration</u> of the beneficiary's stay in the United States as an L-1 intracompany transferee. Exceptions for new offices apply.

- The U.S. entity cannot be one created solely for the purpose of establishing an L-1 qualifying intra-company relationship.

MANAGERIAL and EXECUTIVE CAPACITY

Managerial Capacity Defined

8 CFR § 214.2(l)(1)(ii)(B)

An assignment within an organization in which the employee *primarily*:

(1) Manages the organization, or a department, subdivision, function or a component of the organization;

(2) Supervises and controls the work of other supervisory, professional or managerial employees or manages an essential function within the organization, or a department or subdivision of the organization;

Managerial Capacity Defined (Continued)

(3) Has the authority to hire and fire or recommend those actions as well as other personnel actions, such as promotion and leave authorization if employees are supervised. If no employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Executive Capacity Defined

8 CFR § 214.2(l)(1)(ii)(C)

An assignment within an organization in which the employee primarily:

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors or stockholders of the organization.

Managers/Executives

- A job description that uses partial definitions of both manager and executive (some of the criteria from the definition of manager and some criteria from the definition of executive) does not qualify for an L-1A.

- An employee's job description must fulfill all four criteria of the definition of either manager or all four criteria of the definition of executive.

Distinguishing Between Executives and Managers

- Generally, an executive may sign a company document, legally binding a corporation. Generally, a manager cannot, by signature, legally bind the corporation.
- An executive may direct multiple plants, sometimes in several different nations. A manager may oversee only one office or plant.
- Generally, executives make broader decisions over finance, manufacturing, marketing, legal, research, purchasing, engineering, and international departments, etc.

Evaluating Managerial or Executive Positions

Large, well-known and well-established business entity:

- A description of the position written by a high level executive of the company may be submitted as evidence. Such a description may be sufficient evidence of the nature of the employment. However, a determination of eligibility should not be made solely on the basis of a position title. You must always look at the job duties.

Small and/or young, unknown or less substantial business:

- The qualifications of the beneficiary and/or the eligibility of the proposed employment in the United States are more difficult to determine.
- Do not determine eligibility solely by size of company; rather, examine all the facts presented, including the nature of the duties to be performed, the nature of the petitioner's business, and the developmental stage of the company.

Staffing Levels as a Factor

INA § 101(a)(44)(C)

"If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity... take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity...merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed."

Staffing Levels (Continued)

Officers should take into account the reasonable needs of the organization.

In the case where a petitioner claims that the beneficiary will be employed as a manager of personnel, look not just at the number of employees to be managed, but at their duties (e.g., are these professionals, etc.).

Evidence can include an organizational chart and State quarterly wage reports upon request.

The employees managed, as opposed to the beneficiary, perform the majority of the everyday duties.

Too Many Queen Bees Not Enough Worker Bees

- Claims that the majority of its employees are primarily engaged as managers or executives that are inconsistent with the nature of the business in the United States or abroad may or may not require an RFE, depending on the facts presented.

- Request more detailed position descriptions and payroll documentation to determine who is performing the non-qualifying, everyday operational duties of the business.

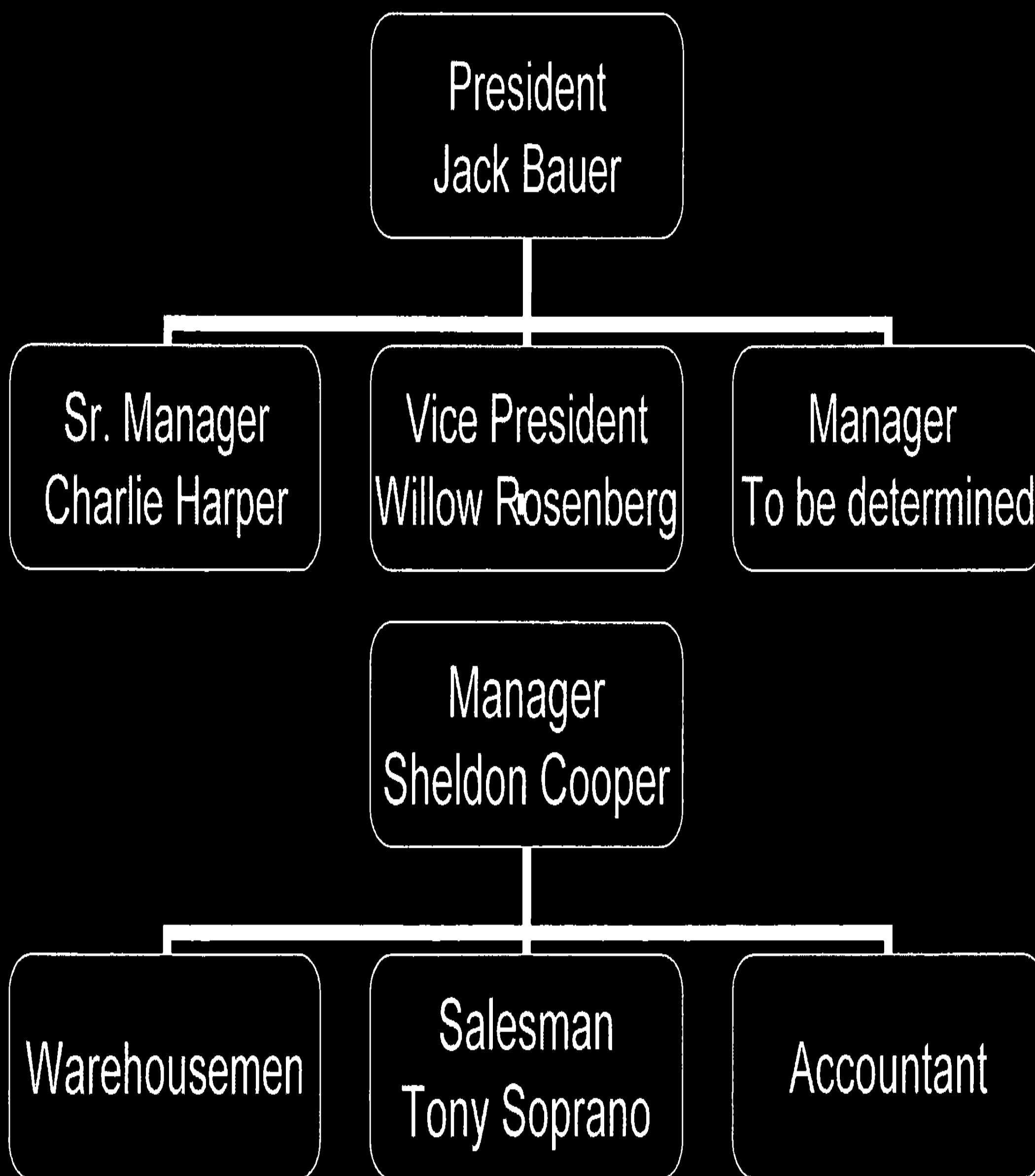
- Even though a beneficiary has a job title of a manager, he or she may or may not be performing primarily non-managerial duties. This is a fact question which you must determine on a case-by-case basis.

L-1A Manager or Executive

Useful evidence to establish whether the beneficiary was a manager or executive abroad and/or will be acting in that position in the United States may include, depending on the specific petition:

- The organizational chart for the foreign office.
- The U.S. organizational chart for the U.S. office.
- Quarterly wage reports for the employees in the U.S. office.

Example Organizational Chart
Petition Shows Eight Employees
Does this conform with the other documents submitted with the petition?



Managing a Function

- The organization is structured in such a way that the beneficiary is primarily *managing* the function, not primarily performing the duties of the function.

- Normally does not directly manage workers (NOTE: the person may still qualify as an L-1A *manager of personnel* if the beneficiary meets the requirements of 8 CFR § 214.2(l)(1)(ii)(B)).

- Directs or manages an essential function.

Specialized Knowledge

(SK)

Specialized Knowledge

See 8 CFR § 214.2(l)(ii)(D)

Specialized knowledge means:

- special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, *or*

- an advanced level of knowledge or expertise in the organization's processes and procedures.

Specialized Knowledge Terminology

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's:

- Product
- Service
- Research
- Equipment
- Techniques
- Management, or
- Other interests, and its application in international markets, or
- An individual's advanced level of knowledge or expertise in the organization's processes and procedures.

Policy Regarding the Interpretation of Specialized Knowledge

Puleo Memo – March 9, 1994

The *Puleo* memo is one of the agency's policy memos regarding the interpretation of specialized knowledge. Officers must follow this interpretation when adjudicating SK petitions. The memo instructs that Officers are to utilize common dictionary definitions of the terms "special" and "advanced;" the definitions cited in the Puleo memo are:

- ***Special***: (1) "surpassing the usual, distinct among others of a kind," OR;

  (2) "distinguished by some unusual quality; uncommon; noteworthy."

- ***Advanced***: (1) "highly developed or complex; at a higher level than others," OR

  (2) "beyond elementary or introductory; greatly developed beyond the initial stage."

Puleo Memo – The Special Knowledge Definition

Special: (1) "surpassing the usual, distinct among others of a kind," OR; (2) "distinguished by some unusual quality; uncommon; noteworthy."

Based on the above definition, an alien would possess specialized knowledge if it was shown that the knowledge is different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon.

Puleo Memo – The Advanced Level of Knowledge or Expertise definition

Advanced: (1) "highly developed or complex; at a higher level than others," OR (2) "beyond the elementary or introductory; greatly developed beyond the initial stage."

Based on the above definition, an alien would possess specialized knowledge if it was shown that the knowledge is advanced. There is no requirement that the knowledge be proprietary or unique, or narrowly held throughout the company, the knowledge must only be advanced.

Puleo Memo (Continued)

- The determination of whether the alien possesses SK does not involve a test of the U.S. labor market. Officers should not consider whether there are U.S. workers available to perform the duties in the United States when determining whether the alien has SK.

- Officers adjudicating petitions involving SK must ensure that the knowledge possessed by the beneficiary is <u>not general knowledge held commonly throughout the industry</u>, but that it is truly specialized. Examples of general knowledge may include: CPR training, First Aid training, and Safety training. These could be regarded as general knowledge in any industry. However, general knowledge will differ from case to case depending on the specific industry.

Possible Characteristics of SK

Puleo Memo

- The alien possesses knowledge that is valuable to the employer's competitiveness in the market place; or
- The alien is qualified to contribute to the U.S. employer's knowledge of foreign operating conditions as a result of knowledge not generally found in the industry (CAVEAT: There may be some industries that are so sophisticated or specialized in nature that even such generalized knowledge may rise to the level of specialized knowledge for L-1B purposes); or
- The alien has been employed abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image or financial position; or

Possible Characteristics of SK (Continued)

Puleo Memo

- The alien possesses knowledge which, normally, can be gained only through prior experience with that employer, (NOTE, there is no requirement that the SK must be gained through prior experience with the Petitioner. It may have been obtained through prior employment, education, or experience.); or
- The alien possesses knowledge of a product or process that cannot be easily transferred or taught to another individual; or
- The alien has knowledge of a process or a product, which is of a sophisticated nature, although not unique to the foreign firm, which is not generally known in the United States (although in some *limited* cases it may be generally known within a particular industry)

What to Look for in Reviewing SK

- How did the beneficiary obtain specialized knowledge?
- What evidence is there to show that the beneficiary's knowledge is specialized knowledge?
- How can it be shown that the job position in the United States is one of specialized knowledge?

Note on Specialized Knowledge

There is no rule of thumb in every case as to what constitutes specialized knowledge. Such knowledge is highly fact-dependent, and therefore, each case must be adjudicated on its own merits based on the facts presented.

Petitioner's Statements L-1B

- The weight and probative value Officers should give to statements by a Petitioner that a beneficiary possesses specialized knowledge will vary from case to case, and will depend on, among other things, its degree of detail and whether the statement is supported by other evidence (documentary or other) in the file.

- You should be alert to the fact that some Petitioners may base their claim that a beneficiary has specialized knowledge by merely reiterating the definition of specialized knowledge provided in the regulations, without providing evidentiary support to back up such an assertion.

- It is important for the Petitioner to fully explain and describe the beneficiary's position of specialized knowledge.

L-1B Evidence

- The petition should be accompanied by a description detailing how the beneficiary's knowledge of the Petitioner's equipment, system, product, technique, or service is "special" and/or "advanced."

- However, it is just as important for the Petitioner to include documented evidence to prove those assertions.

- Some common types of documentary evidence submitted are:
  Training Records;
  Descriptions of Proprietary Knowledge held by beneficiary;
  Patents held by the company obtained as a result of the beneficiary's work;
  Organizational Charts showing the beneficiary's current position in the organization;
  Published Material by or about the beneficiary;
  High level of Remuneration compared to others;
  Human Resources Records;
  A description of the impact on Petitioner's Business if L-1B not granted.

L-1B Evidence (Continued)

- No specific type of evidence is required under the regulations, but remember, as always, the burden of proof remains with the Petitioner.

  Example: If the Petitioner claims that the SK was obtained after the beneficiary underwent training, the Petitioner should be able to submit evidence of that training. Note that certificates of training are not the only way to establish training has occurred. Suppose a Petitioner indicates that the beneficiary underwent a one year training program at the cost of $250,000 paid for by the Petitioner, provided by a third party, in order for the beneficiary to become one of 20 individuals in the world that are qualified to fly a specific type of helicopter.

  As evidence of the claimed training, the Petitioner could submit one of the following (or something completely different):

  (1) A training certificate;

  (2) Records of the $250,000 in tuition payments to the third party;

  (3) The beneficiary's flight log that shows he/she underwent the specified training.

L-1 Visa Reform Act of 2004

see INA § 214(c)(2)(F)

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for L-1 classification if –

(i) the alien will be controlled and supervised principally by such unaffiliated employer; OR

(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

The L-1 Visa Reform Act applies to L-1B petitions filed on or after June 06, 2005, whether for initial, extended, or amended classification.

L-1B Off-Site Employment – What the Law Means

If an L-1B alien is stationed primarily at the worksite of an employer other than the Petitioner:

- Control and supervision must be with the Petitioner.
- Cannot be "labor for hire."
- The beneficiary's work (the specialized knowledge) must be specific to the Petitioner's product or service.
- The off-site work must require specialized knowledge.

L-1B Extension Adjudication

- When adjudicating L-1B extensions, Officers are required to give deference to the prior Officer's approval; however, Officers should review the claimed SK to determine if in the intervening time, the knowledge has become general knowledge.

- Be cognizant of the fact that:

  "Cutting edge" technologies may become "general industry knowledge" in a rather short period of time.

  The "advanced" nature of the beneficiary's knowledge must be considered in relation to the current level of knowledge.

Specialized Knowledge Becoming General Knowledge

- Note that knowledge that is or was once considered SK, may become common knowledge through the passage of time and technological advances.

  Example: In the early nineties, expertise in the creation and maintenance of certain internet websites was not commonly held in the computer industry. Such knowledge was considered truly specialized.

  Today, many grade school children possess the knowledge and ability to perform some, many or all of these tasks. Such commonly possessed knowledge is no longer thought of as "special" or "advanced".

BLANKET L-1 PETITION PROCESS

Blanket Petition Authority

INA § 214(c)(2)(A) requires that USCIS provide a blanket L-1 petition process in order to expedite the importation of L-1 aliens.

Blanket Petitions

- In order to bring a qualified L-1 alien into the United States under the Blanket L Petition process, two-steps must occur:

  (1) The Petitioner must file the Form I-129 and L Supplement requesting Blanket Petition (LZ) Approval.

  (2) With a currently valid approved LZ petition, the Petitioner may file Form I-129S on behalf of an employee in order to transfer him/her to the United States as an L-1 nonimmigrant. Note that there is no limit to the number of I-129S petitions that can be filed based on an approved LZ petition.

Filing an LZ Petition

A U.S. or foreign organization may file an I-129 requesting approval of an LZ petition on behalf of itself and its parent, branches, subsidiaries, and affiliated companies.

Officers should review Question 3 on Page 20 of the Form I-129 (the first page of the L Supplement) to determine if the Petitioner is requesting a LZ petition approval.

Filing an LZ Petition (Continued)

With the filing of the LZ petition, the Petitioner needs only to establish that the organizations listed in the petition qualify (that a qualifying relationship exists between them and that they are doing business as required by regulation). The LZ petition must include a list of all the organizations eligible to transfer L-1 workers under the blanket petition as well as documentation of qualifying relationships of the organizations and establishing that they are doing business.

The Petitioner will not submit evidence pertaining to a specific beneficiary as they will not be seeking classification of an employee as an L-1 nonimmigrant with the filing of an LZ petition.

Who May Use the Blanket Process

8 CFR § 214.2(l)(4)

- A Petitioner which meets the following requirements may file an LZ petition:

(A) The Petitioner and each of those entities are engaged in commercial trade or services; AND

(B) The Petitioner has an office in the United States that has been doing business for one year or more; AND

(C) The Petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; AND

(D) The Petitioner and the other qualifying organizations have:

(1) obtained approval of at least ten L-1 petitions during the previous 12 months; OR

(2) have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; OR

(3) have a United States work force of at least 1,000 employees.

LZ Petition Validity

An LZ petition to qualify a company as a blanket Petitioner (with no beneficiary listed) may be approved for an initial period of three years. A subsequent petition for extension may be approved indefinitely if all other requirements are met. See 8 CFR §§ 214.2(l)(7)(i)(B) and 214.2(l)(14)(iii)(A).

The LZ petition may be approved in part or in whole. See 8 CFR 214.2(l)(7)(i)(B)(3).

The extension must be filed in timely fashion or the company's LZ petition status will become invalid, and the Petitioner must then wait three years to file a new initial LZ petition. See 8 CFR § 214.2(l)(14)(iii)(B).

LZ Petition Validity (Continued)

- Petitioner must file an amended petition with fee if:
  - There are changes in approved relationships.
  - There are additional qualifying organizations.

See 8 CFR § 214.2(l)(7)(i)(C).

LZ Petition Validity (Continued)

- An amended petition may only be approved for the validity period of the petition it amends.
- A petition for an indefinite extension of a blanket petition that also contains amendments may be approved indefinitely.

Approving an LZ Petition (For the Petitioner)

When approving a case, you **must:**

- Complete the approval information blocks on the petition.
- Indicate on the petition the classification (which is **LZ**).
- Indicate the dates of approval/validity dates (which will either be **three years** (for an initial) **or "INDEFINITELY"** (for an extension)).
- Make a notation "**BLANKET PETITION**" in the block entitled "PARTIAL APPROVAL (explain)."
- Stamp the petition with your approval stamp and sign it.

Filing an I-129S for the Beneficiary

See 8 CFR § 214.2(l)(4)(ii).

- A U.S. Petitioner listed on an LZ petition approval notice may file a Form I-129S on behalf of an employee. (Note that the I-129S Petitioner must be a U.S. Petitioner unlike an I-129 Petitioner.)

- The Petitioner bears the burden of establishing:

  (1) that the beneficiary meets the 1 in 3 rule and,

  (2) that the beneficiary will be employed in the United States in a managerial or executive capacity or as a specialized knowledge *Professional*. (Note that if filing the I-129S on behalf of a specialized knowledge employee, the position in the United States must be a 'profession' as defined by INA § 101(a)(32) and the beneficiary must be a professional. However, there is no requirement that the beneficiary have been employed abroad in a position as a specialized knowledge Professional.)

Specialized Knowledge *Professional*

- INA § 101(a)(32) provides that the term "profession" includes but is not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

- "Profession," as defined by section 101(a)(32) of the Act, contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. see Matter of Sea, 18 I&N Dec. 817.

- In order to be considered a professional, the alien must hold a U.S. bachelor's degree or equivalent (may include a work experience evaluation) and be working in a position that normally requires a minimum of a bachelor's degree.

Notes about the Form I-129S

- There is no filing fee required. However, the Petitioner must submit the $500 fraud fee and the $2,250 P.L. 111-230 fee if required.
- The Petitioner does not need to establish that they are a qualifying organization as this has already been established with the approval of the LZ petition. The Petitioner only needs to submit a copy of the LZ approval notice with the I-129S filing documenting that the Petitioner is listed on the LZ approval notice.

I-129S Filing Options

The U.S. Petitioner may file the I-129S with:

(a) DOS – If the beneficiary is abroad and requires a visa to seek admission to the United States, the I-129S should be submitted directly to the Consulate or Embassy with the beneficiary's L-1 visa application. If approved, the beneficiary may use the L-1 visa and apply for admission to the United States. See 8 CFR § 214.2(l)(5)

I-129S Filing Options (Continued)

(b) USCIS – If the beneficiary is a visa exempt alien (Canadian citizens and certain aliens resident in the Caribbean) who is outside the United States, the I-129S may be filed with the appropriate USCIS Service Center. If approved, the alien may apply for admission to the United States with the approval notice. [Aliens currently present in the United States may not use Form I-129S to COS or EOS or amend a previously approved I-129S.] See 8 CFR § 214.2(l)(5)(C)

(c) CBP at a Port Of Entry (POE) on the Canadian-U.S. land border or a pre-clearance/pre-flight station (PFI) in Canada – If the beneficiary is a citizen of Canada, the Form I-129S may be filed with CBP at the POE or PFI in conjunction with the alien's application for admission to the United States as an L-1. See 8 CFR § 214.2(l)(17)(ii)

- It is the responsibility of the agency with whom the I-129S is filed to collect all required fees and adjudicate the I-129S properly.

Reassignment Benefits of an I-129S

- An employee admitted under the blanket petition process may be reassigned to any organization on the blanket without filing a petition with USCIS if the employee will be performing virtually the same job duties. Such a reassignment will not be considered a violation of status.

  Therefore, when adjudicating EOS petitions for L-1 aliens who were previously admitted by means of an approved I-129S, the Officer may not deny the petition if the employee has moved to a different organization *listed on the blanket LZ petition* without filing a new petition.

  Example: Bony-Japan has an approved LZ petition which includes Bony-US, Bony-CA, and Bony-VT. An I-129S completed by Bony-US is filed with the Japanese Consulate and Mr. Bones is issued an L-1 visa and is admitted to the United States as a Blanket L beneficiary for 3 years. After two years, Mr. Bones is reassigned to Bony-CA to perform the same work without requesting an amendment of the petition. One month prior to the expiration of the beneficiary's status, a Form I-129 requesting an EOS is filed on Mr. Bones' behalf. During adjudication, the Officer notes that Mr. Bones has switched employers without notifying USCIS. However, because the new employer was listed on the LZ petition for Bony-Japan, this is not a violation of status and the EOS can be approved if the beneficiary is otherwise eligible.

Notes About I-129S Filed with DOS

- Form I-129S filed with DOS will be adjudicated by a Consular Officer. If approved, the alien will be given copies of the I-129S. One copy should be collected by CBP upon the alien's admission to the United States at a POE and forwarded to USCIS for interfiling in the LZ petition.

- L-1 aliens admitted pursuant to an I-129S petition adjudicated by DOS may, instead of filing an EOS petition with USCIS, return to a Consulate and file a new Form I-129S with an L-1 visa renewal.

- I-129S petitions adjudicated by DOS are not tracked in CLAIMS and there will be no I-797 approval notice available. When reviewing EOS petitions filed on behalf of beneficiaries whose original I-129S was approved by DOS, Officers may need to review the L-1 visa issued to the beneficiary, CCD and/or SQ94 if additional information is required.

Notes About I-129S Filed with CBP

- I-129S petitions filed with CBP at a POE/PFI on behalf of a Canadian citizen will be adjudicated by a CBP Officer. If approved or denied, a copy will be forwarded to the USCIS Service Center for data entry into CLAIMS and interfiling into the LZ petition. Additionally, if CBP cannot issue a formal denial notice to the alien, they may forward the I-129S to the USCIS Service Center for final action. Some USCIS Officers may be required to work I-129S petitions filed with CBP or EOS petitions for L-1 employees whose petitions were initially adjudicated by CBP.

- L-1 aliens admitted pursuant to I-129S petition adjudicated by CBP may, instead of filing an EOS petition with USCIS, return to a POE on the U.S.-Canadian land border or a PFI inside Canada and file a new Form I-129S and seek readmission as an L-1 nonimmigrant.

I-129S Filings

- All I-129S requests filed for an L-1 alien must contain the LZ petition approval notice to show the Petitioner was previously approved as a blanket Petitioner.

Filing For An L-1 Beneficiary Who is in the United States

- If an approved L-1 blanket employer wants to file a petition on behalf of an employee who is in the United States applying for either a change of nonimmigrant status (COS) or an extension of stay (EOS), **Form I-129 must be used, not the Form I-129S**. The petition must be adjudicated as an individual L-1 petition and all the requirements of an individual petition must be met.

- Normally, when a Petitioner files an I-129 Individual L-1 petition, they must submit documentation establishing the fact that they are a qualifying organization (including evidence that they have a qualifying relationship and are doing business). However, in the above instance, where a blanket L-1 Petitioner is filing an I-129 on behalf of an alien who is already inside the United States seeking an EOS or COS, a copy of the LZ Blanket approval notice is often submitted as proof that the qualifying relationship has already been established (this may be acceptable, though the approval notice still should be reviewed by the adjudicating officer).

I-129S Validity Period

- An I-129S filed for a beneficiary under an initial LZ petition of three years or an indefinite blanket petition may be approved initially for a period of up to three years, even if the LZ petition will expire before the three-year validity period granted the beneficiary.
  See 8 CFR 214.2(l)(11)

- Extensions may be granted in up to two year increments. See 8 CFR 214.2(l)(15)(ii)

- It is the burden of the Petitioner to file a LZ petition extension in timely fashion and to timely file extensions for individual L-1 aliens approved under a blanket petition.

Blanket Petitions (Continued)

A blanket Petitioner can file an I-129S for an alien under the blanket petition or can file a normal individual petition for an alien, but cannot file both for the same alien.

If an I-129S is filed for an alien at the consulate and is denied, the Petitioner may subsequently file an I-129 individual L-1 petition for that alien at the appropriate Service Center. The petition must contain evidence of the consulate denial including the date of denial, the office where it was denied and the reasons for denial.

NEW OFFICES

New Offices

- A 'new office' is an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. See 8 CFR § 214.2(l)(1)(ii)(F)

New Offices

- An organization seeking to establish a new business entity in the United States must meet different requirements than a petition for an established company.

Requirements for an L-1A New Office petition

see 8 CFR § 214.2(l)(3)(v)

- The Petitioner is not required to establish that the U.S. entity is doing business.

- However the Petitioner must submit evidence establishing that:

  (A) Sufficient physical premises to house the new office have been secured;

  (B) The beneficiary's one continuous year of employment abroad was in a managerial or executive capacity (prior employment abroad in specialized knowledge is not permitted); AND

New Office L-1A (Continued)

(C) The intended United States operation will within one year of the approval of the petition support an executive or managerial position by submitting:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; AND
- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; AND
- (3) The organizational structure of the foreign entity.

Requirements for an L-1B New Office Petition

See 8 CFR § 214.2(l)(3)(vi)

- In all cases, a prerequisite to filing the initial new office is that the Petitioner demonstrate that the U.S. entity – even if it is not yet doing business – is or will be in a qualifying relationship with the foreign entity

- Further, the L-1B new office Petitioner must submit evidence that:

  (A) Sufficient physical premises to house the new office have been secured;

  (B) The business entity in the United States is or will be a qualifying organization; and

  (C) The Petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

Examples of New Office Evidence

- Evidence of the purchase, lease or rental of sufficient physical premises to house the proposed business.

- Evidence describing the proposed nature and scope of the business, its organizational structure and financial goals.

- Evidence of the amount of the U.S. investment, source of funds and ability of the foreign entity to pay the bills related to operating the U.S. office.

More Examples of New Office Evidence

- Evidence that the foreign entity owns the U.S. office (stock certificates, wire transfers, etc.).
- The organizational structure (e.g. chart) of the foreign entity.
- Ability of the proposed business venture to support this L-1 position within one year of the establishment of the business.

Note: Purchase and Takeover of an Established Business

- If the Petitioner purchases and takes over the management of an established business that is already staffed and capable of supporting an executive or managerial employee, the petition should not be treated as that for a "new office" and a "new employee."

- Such petition, as any other *non*-new office L-1 petition, if approvable, should be granted for an initial period of up to three years or the period requested by the petitioner, if less.

Dormant Business

- A U.S. company that stops operations and remains dormant for an extended period of time and is then reactivated should be treated as a 'new office.' There is no rule of thumb as to whether to treat such a company as a 'new office;' this is a fact-based question.

- The Petitioner must establish the requirements of a new office.

- The petition may only be granted up to one year initially.

New Office Extensions

see 8 CFR § 214.2(l)(14)(ii)

To extend after the first year, the Petitioner must submit:

(A) Evidence that the United States and foreign entities are still qualifying organizations (that a qualifying relationship exists);

(B) Evidence that the United States entity has been *doing business* for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition (to establish qualifying U.S. employment);

(D) In the case of a manager or executive, a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees (such evidence may include organizational chart and quarterly tax returns); and

(E) Evidence of the financial status of the United States operation.

New Office Extensions

Remember:

- In the initial petition for a new office, the Petitioner must meet different standards to qualify the petition. The L-1A was given one year to set up the new office, hire a staff and initiate doing business. An L-1B was given one year for the Petitioner to set up the business and commence doing business. Upon extension, the Petitioner must establish that the new office has commenced doing business. 8 CFR 214.2(l)(14)(ii)

- In new office extensions, adjudicators should be aware that an extension may be granted in situations where the office is in fact progressing, but may not have completely reached the goal stated in the initial new office petition. Where the adjudicator determines that the office is doing business and is well on track to meet its goal, then the petition, if otherwise approvable, may be granted.

- If you have an extension petition and the previous approval was for one year, you *may* have a new office extension, but you must review the petition and the facts presented in the EOS to make that determination.

- Note: After one year, the "new office" will be treated as an existing company; there are no extensions of "new office" status beyond one year

Things to Know

Conversion from L-1B to L-1A

- Aliens who were *initially admitted* as specialized knowledge aliens may change to a manager or executive and stay for seven years, BUT, the alien must have been employed as a manager/executive for at least six months (of the five-year stay) before applying to EOS from L-1B to L-1A, and the change must have been approved by USCIS. [8 CFR § 214.2(l)(15)(ii)]

- This means the change from L-1B to L-1A must have taken place and been approved at least six months before the expiration of the alien's five-year stay. If not, if the alien is otherwise qualified, approve the change for only the balance of the five years. [8 CFR § 214.2 (l)(15)(ii)]

- If the L-1B was initially admitted as an L-1A manager or executive, for example, as an IT manager, then the six month rule noted above does not apply, and the L-1B can file a request to change back to L-1A status at any time (*provided that* he or she has not been in L-1B status for more than five years, and *further provided that* his or her maximum period of stay as an L-1 nonimmigrant does not exceed seven years).

- If an amended petition was filed notifying USCIS of the L-1B being promoted to a managerial position before the 4½-year mark, then this also satisfies the requirement.

Dependents

- Dependents of L-1 principal aliens are L-2s. Their periods of stay depend on the principal alien.
- Dependents file for EOS/COS on Form I-539.
- Dependents do not require a pre-approved petition or application to consular process; all that is required is that there be a currently valid approved petition on behalf of the L-1 principal.

Requirements for Extension of Stay (EOS)

- Alien must be in the United States at the time of filing the petition.
- Alien does not have to be physically in the United States 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 per 8 CFR § 214.1(c)(4).

RFEs and Denials on EOS Petitions

A prior determination by an adjudicator that an alien is eligible for the classification should be given deference unless one of the following conditions can be established.

- "Material Error"
- "Substantial Change in Circumstances"
- "New Material Information"

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".

RFEs and 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.

Requirements for Change of Status (COS)

- Unlike EOS, alien must be physically in the United States.
- Departure is 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 per 8 CFR § 248.1(b).

General Things To Know

- A qualifying U.S. organization must employ the beneficiary for the entire duration of his or her L-1 nonimmigrant status.
- The qualifying foreign employer may file the petition on the beneficiary's behalf. EXCEPTION: In the case of an I-129S filed on behalf of a blanket beneficiary, the Petitioner must be a U.S. Petitioner.
- The beneficiary may not directly perform services for a foreign employer.
- The beneficiary's wages may be paid by the foreign organization.

General Things To Know

- The presence of a dormant corporation, an agent or a holding company (not active) abroad is not sufficient for establishing a qualifying relationship for L-1 purposes.

- A foreign qualifying entity must be doing business the entire time the beneficiary is in L-1 status. The foreign qualifying entity need not be the exact same one as the one that employed the L-1 while he or she was abroad.

- Example: L-1A was a manager for Company A in Italy. L-1A transfers to the United States to work for affiliated Company B. After L-1A transfers, Company A ceases to do business and becomes a dormant company. Company B still has foreign affiliate, Company C, that is doing business in Japan. Therefore, the petition remains valid.

Things to Know

- A general manager can, depending on the facts, be an executive position within a company. Therefore, for petitions filed on behalf of "general managers," it is important to look at the company's organization chart to discover where the beneficiary's position falls within the company. In such cases, officers should determine whether the beneficiary can qualify either as a manager or executive

- A denial of a petition filed on behalf of a general manager should include denial language for both executive and manager.

Things to Know Independent Contractors as Employees

- In determining whether an employee meets the criteria of a manager, the persons who the manager supervises abroad or will supervise in the United States may include independent contractors.

- There is no regulation requiring that the employees supervised must be individuals on the company's payroll.

see 9 FAM 41.54 N 7.2-1

Company Owner as Petition Beneficiary

- An owner or majority stockholder of the petitioning or affiliated company may be the beneficiary of a petition for L-1 status if the petition is accompanied by evidence that the beneficiary's services are to be temporary and that the beneficiary will be transferred abroad at the completion of the temporary services in the United States. See 8 CFR § 214.2(l)(3)(vii) and also Matter of M, 8 I&N Dec. 24 (BIA 1958; Ass't Comm'r, AG 1958)

- The petitioner must establish, however, that a foreign qualifying company will be doing business the entire time the owner or majority stockholder is in the United States in L-1 classification.

Things to Know

- Companies may use different corporate titles/forms depending on where the company was set up. Example: In Great Britain, a "Limited" Company is a common form of business, where registration under the Companies Act is comparable to incorporation under state law in the United States. It is abbreviated Ltd.

  Limited = Incorporated; Ltd. = Inc.

- Do not get confused by the type of company that is involved in the petition or the way in which it was formed. The criteria regarding qualifying organizations and establishing the qualifying relationship are the same regardless of the country where the company is set up and the form of company used.

Note on 1 in 3 Rule for Certain Blanket Beneficiaries Adjudicated Prior to June 6, 2005

Prior to June 6, 2005, blanket L-1 beneficiaries were only required to have worked abroad in qualifying employment for 6 continuous months of the prior 3 years.

In reviewing EOS petitions, you may see petitions that were initially filed prior to June 6, 2005 that were approved based on the beneficiary having worked abroad for 6 continuous months in the prior three years. You may not deny these EOS petitions based on the fact that the regulation now requires 1 year of continuous employment abroad.

Required Systems Checks

- IBIS
- SQ94
  - EOS Approval within 15 days before adjudication
  - EOS Denial within 15 days before
  - 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 generally no appeal rights for:

- Status denials – cases where the petition for classification as an L-1 is approved but the requested EOS or COS is denied (split decisions).
- Denial for failure to pay the Fraud Detection fee.
- Abandonment denials (in most cases).

Summary – Three Basic Requirements

In general, when adjudicating an L-1, look for:

- Qualifying Organization (*relationship* and *doing business* requirements).

- Beneficiary was employed abroad for one continuous year within the prior three years as a manager, executive or in specialized knowledge capacity.

- Proposed employment in United States as a manager, executive or in specialized knowledge capacity (if filing under blanket petition, specialized knowledge professional).

Summary

New office - Beneficiary is allowed one year to set up the office. At the conclusion of one year, evidence should be submitted showing that the "new office" has been and is continuing to be "doing business" since the original petition was approved, and that the beneficiary is now and will be performing tasks of a managerial/executive or specialized knowledge nature.

Summary

- L-1A Manager/executive is allowed a total of seven years stay.
- L-1B specialized knowledge alien is allowed a total of five years stay.

Thank You,

The End

Austin, Deon T

From: Laroe, Lisa A <Lisa.A.Laroe@uscis.dhs.gov>
Sent: Monday, September 12, 2011 8:58 AM
To: Lauver, Tinnina M
Cc: Tamanaha, Emisa T
Subject: RE: CBP L Cases - Denials/ITRs

Thank you Tina. We will make sure our processes are in line with this guidance.

Lisa

From: Lauver, Tinnina M
Sent: Monday, September 12, 2011 8:37 AM
To: Laroe, Lisa A
Cc: Tamanaha, Emisa T
Subject: FW: CBP L Cases - Denials/ITRs

Lisa,

CSC requested guidance relating to the following two issues:

- If a CBP L case is denied and sent to the center for final action, should the center issue a written denial based on the limited information CBP provides in their internal memo to USCIS or should the center issues an RFE?
- If a CBP L case is approved, and CBP is requesting USCIS to revoke the case, should the center issue an ITR?

Please see message below containing the guidance provided.

Thank you very much!

Tinnina (Tina) Lauver
Adjudication Officer
United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Lauver, Tinnina M
Sent: Monday, September 12, 2011 8:32 AM
To: Sun, Catherina C
Cc: Tamanaha, Emisa T
Subject: FW: CBP L Cases - Denials/ITRs

Catherina,

In response to your request below, SCOPS is issuing the following guidance:

1. If a CBP L case is denied and sent to the center for final action, should the center issue a written denial based on the limited information CBP provides in their internal memo to USCIS or should the center issues an RFE?

   As we know, CBP sends L petitions to USCIS pursuant to 8 CFR 214.2(l)(17)(iv) which states, "If a formal denial order cannot be issued by the port of entry, the petition with a recommendation for denial shall be forwarded to the appropriate Service Center for final action." According to CBP, Class A POEs, except

seaports, adjudicate L petitions; however, none of the Class A POEs issue a formal written denial. It is currently CBP's policy and practice to return an L petition to a beneficiary if it is not clear whether the L petition is approvable or deniable based on the documentary record presented at the POE. The beneficiary is instructed to obtain the missing document(s) and reappear at the POE. If CBP determines that a beneficiary is not eligible for L nonimmigrant classification at the Class A POE, the beneficiary is offered the opportunity to withdraw his/her request for admission into the United States at the POE. The withdrawal is in lieu of another form of adverse action. If the beneficiary agrees to withdraw his/her request for admission into the United States, the petition is stamped denied, a copy is provided to the beneficiary and the petition is sent to USCIS with a recommendation for denial. If the beneficiary does not agree to withdraw his/her request for admission into the United Sates, the beneficiary will be processed as a removal and be formally charged with under Section 212(a)(7) of the INA or another ground which may have a bar to entry associated with it. The petition would still be annotated denied and sent to the Service Center, with an indication that the beneficiary was formally charged with 212(a)(7). In that case, if it were in fact favorably adjudicated, the beneficiary may need to obtain a waiver prior to entry, which complicates things. CBP stated that the vast majority of petitions that the centers receive with a recommendation for denial are those in which the beneficiary withdrew his/her request for admission.

If CBP sends an L petition to a center with a recommendation for denial and the reasons for the denial are clearly articulated in the internal memo to USCIS and the center agrees with the denial, the center can issue a formal written denial using the information CBP provides in the memo. However, if the center believes the petition may have been denied in error and with additional evidence the beneficiary may in fact be admissible as an L or the reasons for the denial are not sufficiently explained in the internal memo to USCIS, the center can reopen the denial on a service motion, and issue an RFE, and, if appropriate, issue a NOID and denial notice (or approval notice). In addition, the service motion/RFE should indicate that CBP sent the petition to USCIS with a recommendation for denial; however, upon review of the record, USCIS deems it more appropriate to solicit additional evidence in order to render a final decision. Therefore, USCIS moves to reopen the petition on its own motion and the petitioner will be afforded an opportunity to submit additional evidence to establish the beneficiary's eligibility as an intra-company transferee.

2. If a CBP L case is approved, and CBP is requesting USCIS to revoke the case, should the center issue an ITR?

   If CBP subsequently requests USCIS to revoke a CBP approved L petition and there are clear grounds to do so in accordance to 8 CFR 214.2(l)(9) (See below), then the center can proceed with the ITR. It is important that CBP articulates in writing why they are recommending the issuance of an ITR.

   CFR 214.2(l)(9) states that the director may revoke the approval of an individual and blanket petition at any time and shall send the petitioner an ITR if he/she finds that:
   (1) One or more entities are no longer qualifying organizations;
   (2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;
   (3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;
   (4) The statement of facts contained in the petition was not true and correct; or
   (5) Approval of the petition involved gross error; or
   (6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

Please contact me if you would like further clarification and/or if you have any concerns.

Thank you very much!

Tinnina (Tina) Lauver
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Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Sun, Catherina C
Sent: Monday, July 18, 2011 04:28 PM
To: Lauver, Tinnina M
Cc: Elias, Erik Z; Moran, Karla; Steele, Jenny B

Subject: CBP L Cases - Denials/ITRs

Hi Tina.

Thank you so much for organizing this morning's telecon. Based on our call this morning, there are two main issues:

3. If a CBP L case is denied, do we issue a written denial based on the limited information CBP provides in their internal memo to USCIS? Or do we RFE?
4. If a CBP L case is approved, and CBP is requesting USCIS to revoke the case, what is SCOPS' guidance on this issue?

As always, thank you so much for your assistance!

From: Moran, Karla
Sent: Monday, July 18, 2011 8:48 AM
To: Lauver, Tinnina M
Cc: Sun, Catherina C
Subject: HELI LIFT

Hi Tina,

Here are the Heli Lift copies.
Please distribute to everyone.
Talk to you soon.

Thanks
Karla

Austin, Deon T

From: Lauver, Tinnina M <Tinnina.M.Lauver@uscis.dhs.gov>
Sent: Friday, December 09, 2011 5:29 AM
To: Brouillette, Charlene M
Cc: Laroe, Lisa A; Tamanaha, Emisa T
Subject: RE: I-129L-1B Labor for Hire Denial
Attachments: FW: Labor for Hire (31.4 KB)

Charlene,

Yes, the VSC can include the labor for hire language in L1B denials for 3rd party placement (L-1 Visa Reform Act of 2004). I have attached an e-mail chain which contains OCC's opinion that the center should do such as long as the officer has the facts to support it.

The CSC has confirmed that they have been including this language in their denials.

Thanks!!!

Tinnina (Tina) Lauver
Adjudication Officer
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Service Center Operations Directorate
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From: Brouillette, Charlene M
Sent: Thursday, December 08, 2011 4:06 PM
To: Lauver, Tinnina M
Cc: Laroe, Lisa A
Subject: I-129L-1B Labor for Hire Denial

Tina,

Would you please confirm that even though the VSC has most recently not routinely used the provisions from the Reform Act Memo (control and supervision of the work, and labor for hire) as grounds for denial or as additional grounds that we may now do so. I know we have had the conversation but it may have been telephonically.

Thanks.
Charlene

Austin, Deon T

From: Lauver, Tinnina M <Tinnina.M.Lauver@uscis.dhs.gov>
Sent: Tuesday, July 05, 2011 1:07 PM
To: Tamanaha, Emisa T
Subject: RE: L-1B, RFE, Suggested Evidence
Attachments: RE: L-1B, RFE, Suggested Evidence (36.9 KB)

Already did...see attached....I forgot to include you...my bad!!!!!

Tinnina (Tina) Lauver
Adjudication Officer
United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Tamanaha, Emisa T
Sent: Tuesday, July 05, 2011 2:02 PM
To: Lauver, Tinnina M
Subject: FW: L-1B, RFE, Suggested Evidence

Thanks, Tina. Although this question came from CSC, I think it is good to inform VSC as well (it is duly noted that VSC is on the same page with CSC). Will you please inform VSC as well since you asked them how they are handling this type of cases?

From: Moran, Karla
Sent: Tuesday, July 05, 2011 1:44 PM
To: Lauver, Tinnina M
Cc: Sun, Catherina C; Tamanaha, Emisa T
Subject: RE: L-1B, RFE, Suggested Evidence

Hi Tina,

Great, thanks for the update.

Karla

From: Lauver, Tinnina M
Sent: Tuesday, July 05, 2011 8:58 AM
To: Moran, Karla
Cc: Sun, Catherina C; Tamanaha, Emisa T
Subject: RE: L-1B, RFE, Suggested Evidence

Hello Karla,

We did discuss your inquiry below with OP&S and OCC. To explain, we inquired about applicability of the attached April 23, 2004 memo to L-1B off-site employment EOS cases. Specifically, we informed both OP&S and OCC, that CSC and VSC are currently issuing an RFE for cases that fit into the following scenarios:

- if the L-1B offsite petition is marked, "Continuation of previously approved employment without change with the same employer," but the petitioner submits documentation indicating otherwise (such as a statement indicating a switch to a new 3rd party employer or paystubs indicating an unauthorized switch to a 3rd party); and/or

- if there is evidence that the L-1B offsite petition marked, "Continuation of previously approved employment without change with the same employer" was not properly adjudicated at the time the initial petition was adjudicated.

The attached memo dated April 23, 2004, states that centers should give deference to the prior petition adjudication except when:

(1) it is determined that 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.

The L-1 Visa Reform Act of 2004, effective June 06, 2005, states the following:
SEC. 412. NONIMMIGRANT L-1 VISA CATEGORY.
(a) IN GENERAL- Section 214(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)) is amended by adding at the end the following:

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if--

(i) the alien will be controlled and supervised principally by such unaffiliated employer; or
(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.'.
(b) APPLICABILITY- The amendment made by subsection (a) shall apply to petitions filed on or after the effective date of this subtitle [June 06, 2005], whether for initial, extended, or amended classification.

SCOPS, OCC and OP&S agree that in light of the above, an RFE would be appropriate in such circumstances, to ensure compliance with the L-1 Visa Reform Act. We need to know the nature of the off-site employment. If, however, the alien continues to be working at the original off-site location (described in the previously approved petition) and his/her duties have not substantially/materially changed, then there would not be a need to RFE (absent an indication of material error, per the Yates memo).

Please let me know if you have any additional questions.

Many thanks!!

Tinnina (Tina) Lauver
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United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Moran, Karla
Sent: Wednesday, June 08, 2011 11:53 AM
To: Lauver, Tinnina M
Cc: Sun, Catherina C
Subject: RE: L-1B, RFE, Suggested Evidence

Hi Tina,

Based on the scenarios given below, the CSC would RFE the L1b offsite petitions indicated. However, we do give deference to many of our L1b petitions.

In regards to an L SOP, the CSC does not have an L SOP. While I was at SCOPS, I was tasked with finalizing a national L SOP. I'm almost finished with it but never completed it. I can send it to you if you'd like but it needs to be finished.

Thanks
Karla

From: Lauver, Tinnina M
Sent: Wednesday, June 08, 2011 4:24 AM
To: Moran, Karla
Cc: Sun, Catherina C
Subject: FW: L-1B, RFE, Suggested Evidence

Karla,

In addition to the information requested below, may I obtain a copy of your L SOP? I would like to review in an effort to gain more knowledge in this portfolio.

Thanks so much!

Tinnina (Tina) Lauver
Adjudication Officer
United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Lauver, Tinnina M
Sent: Monday, June 06, 2011 9:49 AM
To: Moran, Karla
Cc: Tamanaha, Emisa T; Sun, Catherina C
Subject: FW: L-1B, RFE, Suggested Evidence

Karla,

We are currently reviewing your inquiry below. However, we are curious as to how the center is currently processing L-1B off-site employment EOS cases that fit into the below described scenarios:

- the L-1B offsite petition is marked, "Continuation of previously approved employment without change with the same employer," but the petitioner submits documentation indicating otherwise (such as a statement indicating a switch to a new 3rd party employer or paystubs indicating an unauthorized switch to a 3rd party); and/or
- there is evidence that the L-1B offsite petition marked, "Continuation of previously approved employment without change with the same employer" was not properly adjudicated at the time the initial petition was adjudicated.

Your time and assistance is sincerely appreciated.

Tinnina (Tina) Lauver
Adjudication Officer
United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Moran, Karla
Sent: Tuesday, May 31, 2011 9:48 AM
To: Lauver, Tinnina M
Subject: Re: L-1B, RFE, Suggested Evidence

Hi Tina,

Second scenario - only when we have evidence in the petition. Of the off-site employment.

Thanks
Karla
Karla Moran
SISO, CSC
(949) 389-8633

From: Lauver, Tinnina M
Sent: Tuesday, May 31, 2011 07:00 AM
To: Moran, Karla
Subject: FW: L-1B, RFE, Suggested Evidence

Karla,

I am working to follow-up on the message below. I have a quick follow-up question for you. Are you asking if the center can *broadly* issue an RFE for L-1B off-site EOS cases **or** if the L-1B offsite petition is marked "Continuation of previously approved employment without change with the same employer," but the petitioner submits documentation indicating otherwise (such as a statement indicating a switch to a new 3rd party employer or paystubs indicating an unauthorized switch to a 3rd party) and/or if there is evidence that the L-1B offsite petition marked "Continuation of previously approved employment without change with the same employer" was not properly adjudicated at the time the first petition was adjudicated, can the center issue an RFE on that L-1B off-site issue?

Thanks!!!

Tinnina (Tina) Lauver
Adjudication Officer
United States Citizenship and Immigration Services
Service Center Operations Directorate
Business Employment Services Team
☎: 202.272.0904 | ✉: Tinnina.Lauver@dhs.gov

From: Moran, Karla
Sent: Thursday, May 19, 2011 7:29 PM
To: Ammerman, Michael J; Lauver, Tinnina M
Cc: Sun, Catherina C; Steele, Jenny B; Brokx, John B
Subject: RE: L-1B, RFE, Suggested Evidence

Hi Michael,

We had a follow up meeting to last weeks L1B Stakeholder call today. Director Melville asked about deference on L1B (off-site). I explained to her that we give deference to L1B (on-site) but L1B (off-site) we are able to revisit based on the regs. She wanted me to follow up with you again and ask if this was still correct, after Don Neufeld's information on giving deference for O's. Director Melville wanted to know if we were applying this to the L1B off-site.

If I'm not making sense – I'll call you to talk.

Thanks
Karla

From: Moran, Karla
Sent: Thursday, May 19, 2011 1:54 PM
To: Ammerman, Michael J; Brokx, John B; Lauver, Tinnina M
Subject: RE: L-1B, RFE, Suggested Evidence

Hi Michael,
John isn't in today but I'm sending you the most current L1B RFE.

From: Ammerman, Michael J
Sent: Thursday, May 19, 2011 1:55 PM
To: Moran, Karla; Brokx, John B; Lauver, Tinnina M
Subject: RE: L-1B, RFE, Suggested Evidence

John,

Sorry, I didn't get a chance to review yet. Can you send me a copy of the RFE template you currently use? I don't want to make any revisions, I just want to see how these suggestions look in the overall context of the RFE. There might be an easier way of doing this.

Thanks,
Michael

From: Moran, Karla
Sent: Wednesday, May 18, 2011 2:29 PM
To: Brokx, John B; Ammerman, Michael J; Lauver, Tinnina M
Subject: RE: L-1B, RFE, Suggested Evidence

(b)(5)

We also *suggest* in the beginning of the RFE:

From: Brokx, John B
Sent: Wednesday, May 18, 2011 10:47 AM
To: Ammerman, Michael J; Lauver, Tinnina M
Cc: Moran, Karla
Subject: L-1B, RFE, Suggested Evidence

Michael and Tina,

--Suggested Evidence to Establish the Beneficiary has Specialized Knowledge:

Thanks,

John Brokx

(b)(6)

(b)(5)

U.S. Citizenship and Immigration Services

BASIC

NONIMMIGRANTS

INSTRUCTOR GUIDE

SYLLABUS

COURSE TITLE: Nonimmigrant Classifications

COURSE NUMBER: 207/209

COURSE DATE: May 2012

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
7:00	**1:00**	**0:00**	**8:00**	**BASIC**

DESCRIPTION:

This is a 8-hour course of lecture, discussion, and practical exercises with emphasis on the various nonimmigrant alien classifications. In addition the officer will identify the criteria needed for an approval of an extension of stay and change of status. Types of forms filed by nonimmigrant aliens and the documentary requirements are also discussed.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

When adjudicating an application or petition, reviewing agency files/databases, providing information to a customer, or in the conduct of an interview, the officer will be able to make an accurate determination of an alien's current nonimmigrant status or assess the alien's eligibility for the nonimmigrant classification requested, according to applicable laws, regulations, and policies.

ENABLING PERFORMANCE OBJECTIVES (EPOs):

EPO #1: Classify applicants based on established criteria for the "A", "G", "C" and "D" nonimmigrant classifications, and identify the documentary requirements for such classifications.

EPO #2: Classify applicants based on established criteria for the "B", "WB", or "WT" nonimmigrant classifications, and identify the documentary requirements for such classifications.

EPO #3: Classify applicants based on established criteria for "F", "M" and "J" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #4: Classify applicants based on established criteria for "H" and "L" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #5: Classify applicants based on established criteria for "O", "P" and "Q" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #6: Classify applicants for admission to the U.S. based on established criteria for "E", "R", "TN" and "I" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #7: Classify applicants for admission to the U.S. based on established criteria for "K" and "V" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #8: Classify applicants for admission to the U.S. based on established criteria for "S", "T" and "U" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

EPO #9: Specify the purpose of Form I-539, Application to Extend/Change Nonimmigrant Status and Form I-129, Petition for a Nonimmigrant Worker, and determine eligibility requirements for nonimmigrant extension of stay under an existing nonimmigrant classification.

EPO #10: Specify forms and eligibility requirements for a change from one nonimmigrant classification to a different nonimmigrant classification.

STUDENT SPECIAL REQUIREMENTS:

1. Review the "Pocket Field Guide" reference tool to become familiar with its presentation of nonimmigrant classifications.

2. Review the appendix materials.

   Optional: Read pages 148 - 199 in *Immigration Law and Procedure in a Nutshell, 5th Edition,* by David Weissbrodt and Laura Danielson.

   NOTE: Like other reference guides and textbooks, *Immigration Law and Procedure in a Nutshell* is written by a private author, and is **not** a U.S. Government publication. Accordingly, any opinions expressed in the text are those of the author, and not those of U.S. Citizenship and Immigration Services or the Department of Homeland Security. This text is being used to provide background information on the law to the student, in order that the student may apply that background to the duties performed by USCIS adjudicators.

   Additionally, the Fifth Edition of this book was published in 2005. Since the immigration law and policy is constantly changing and evolving, it is always important to

verify whether there have been changes to the law or procedures when using this or other reference materials.

METHOD OF EVALUATION:

Written Examination

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OUTLINE OF INSTRUCTION

I. INTRODUCTION

Nonimmigrant aliens are individuals who enter the U.S. for a temporary period of stay for a variety of reasons. These may include attending school, employment, tourism, or for diplomatic reasons.

There are provisions under many classifications that (1) permit spouses and children to derive status from the principal visa holder, (2) provide employment authorization and/or (3) provide the opportunity to extend nonimmigrant status or to change to a different nonimmigrant classification. In most cases aliens require a passport and nonimmigrant visa, unless they are exempt by a reciprocal agreement between the U.S. and the alien's home country. Generally, if a passport is required, it must be valid for at least six (6) months beyond the date of intended departure.

INSTRUCTOR'S NOTE: Point out the use of the classification chart, reference guide (found in appendix.) and the Pocket Field Guide.

II. PRESENTATION

A. EPO #1: Classify applicants based on established criteria for the "A", "G", "C" and "D" nonimmigrant classifications, and identify the documentary requirements for each classification.

1. A-1 AMBASSADORS, PUBLIC MINISTERS, CAREER DIPLOMATS, CONSULAR OFFICERS, AND CAREER COURIERS, INA § 101(a)(15)(A)(i); 8 CFR § 214.2 (a)

   This classification is granted to officials, diplomats, and employees of foreign governments coming to the U.S. for official business. Initial A-visa requests are made at a U.S. consulate overseas (no petition or application is filed with USCIS). Requests to change to A or G status in the United States is done on Form I-539 (Application to Extend/Change Nonimmigrant Status). Any request to change to or from A or G status requires the submission of Form I-566 (Inter-Agency Record of Individual Requesting Change/Adjustment to, or from, A or G status; or Requesting A, G or NATO Dependent Employment Authorization).

   These aliens must be accredited by a foreign government which has been recognized de jure by the United States and who are accepted by the President or by the Secretary of State. As used in INA § 101(a)(15)(A) and 101(a)(15)(G), "de jure" means to recognize by right or legal establishment. De jure recognition is not synonymous with having diplomatic relations with a foreign government. De jure recognition may continue even though diplomatic relations with that government have been severed. (Example: Cuba)

a. As used in INA § 101(a)(15)(A) and 101(a)(15)(G), accredited means an alien holding an official position, other than an honorary official position, with a government or international organization and possessing a travel document or other evidence of intention to enter or transit the U.S. to transact official business for that government or international organization.

b. Examples include:

1) Ambassadors, Ministers, Heads of State (kings, queens, presidents, emirs, etc.)
2) Consulate General arriving to take official post in the U.S.
3) Secretary – (as in Secretary of State – not a clerk)
4) Attaché – (as in military, commercial, financial, agricultural, or scientific).
5) High ranking diplomats on official business
6) Aliens employed permanently as professional couriers for a foreign government.
7) A-1 includes family members

c. A determination by a U.S. consular officer abroad and recognition by the U.S. Secretary of State establishes eligibility for the class.

d. A-1 aliens are admitted for duration of status (D/S). Therefore, extensions of stay are not needed.

2. A-2 OTHER ACCREDITED OFFICIALS OR EMPLOYEES OF FOREIGN GOVERNMENTS AND ACTING COURIERS, INA 101(a)15)(A)(ii), 8 CFR § 214.2(a)

a. Upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government de jure by the U.S. who have been accepted by the Secretary of State

b. Examples include:

1) Embassy or consulate employees such as: secretaries, interpreters, aides, land support staff of A-1 or A-2

2) An alien not regularly and professionally employed as a courier and proceeding to the U.S. on official business by the government of the country to which he owes allegiance.

3) Foreign military personnel and civilian employees of foreign military coming to the U.S. for education or training at any armed forces training facility.

4) A-2 classification includes family members.

c. Requests to change from another nonimmigrant status are adjudicated on Form I-539. A-1's are admitted for duration of status, so there is no provision for extensions of stay.

d. Requirements for this classification are similar to those for A-1.

3. A-3 ATTENDANTS, SERVANTS, AND PERSONAL EMPLOYEES OF A-1 OR A-2, INA 101(a)(15)(a)(iii); 8 CFR § 214.2(a)

a. Attendants, as used in INA 101(a)(15)(A)(iii) and 101(a)(15)(G)(v) means aliens paid from the public funds of a foreign government or from the funds of an international organization, accompanying or following to join the principal alien to whom a duty or service if owed. Examples of attendants include:

1) Secretaries
2) Chauffeurs
3) Security personnel

b. Servants and Personal Employees, as used in INA §§ 101(a)(15)(A)(iii) and 101(a)(15)(G)(v), means aliens employed in a domestic or personal capacity by a principal alien, are paid from the private funds of the principal alien, and seek to enter the U.S. solely for the purpose of such employment. Examples of servants and personal employees include:

1) Cooks
2) Nannies
3) Housekeepers

c. A-3 classification includes family members.

d. Aliens in the A-3 classification are admitted for three-year duration. Requests for extension are made on Form I-539 with a letter from the A-1 or A-2 explains the nature of the employment along with a copy of the employer's certified Form I-566.

4. G-1 PRINCIPAL RESIDENT REPRESENTATIVE TO A DESIGNATED INTERNATIONAL ORGANIZATION, INA § 101(a)(15)(G)(i), 8 CFR § 214.2(g)

This classification is granted to aliens seeking to enter the U.S. on official business as a foreign government representative to an international organization. International Organization, as used in INA § 101(a)(15)(G), means any public international organization which has been designated by the President in an Executive Order entitled to enjoy the privileges, exemptions, and immunities as provided for in the International Organizations Immunities Act. (See 8 C.F.R. § 316.20.)

Initial G-visa requests are made at a U.S. consulate overseas (no petition or application is filed with USCIS). Requests to change to A or G status in the United States is done on Form I-539, (Application to Extend/Change Nonimmigrant Status). Any request to change to or from A or G status requires the submission of Form I-566 (Inter-Agency Record of Individual Requesting Change/Adjustment to, or from, A or G status; or Requesting A, G or NATO Dependent Employment Authorization).

a. Examples include:

1) Representative assigned permanently to a designated international organization in the U.S. such as:

a) United Nations
b) World Health Organization
c) International Atomic Energy Agency
d) Organization of American States
e) International Monetary Fund

2) Representatives who reside regularly in the U.S. for the duration of their assignment.

b. The U.S. must recognize the foreign government de jure.

c. The foreign government must be a member of the designated international organization.

d. A determination by a U.S. consular officer abroad and recognition by the U.S. Secretary of State establishes eligibility for the class. Included in this classification are accredited resident staff members of the G-1 representative.

e. G-1 classification includes family members.

5 G-2 OTHER REPRESENTATIVES TO A DESIGNATED INTERNATIONAL ORGANIZATION, INA § 101(a)(15)(G)(ii), 8 CFR § 214.2(g)

a. Examples include:

1) Representative assigned temporarily to a designated international organization.

2) Other accredited representatives who do not reside regularly in the U.S. during their assignment.

3) G-2 classification includes family members

b. Requirements for this classification are similar to those for G-1.

c. Admitted for duration of status and therefore are ineligible for extensions.

6. G-3 PRINCIPAL OR OTHER ACCREDITED REPRESENTATIVE FROM A NONRECOGNIZED OR NONMEMBER COUNTRY, INA § 101(a)(15)(G)(ii), 8 CFR § 214.2(g)

a. Examples include those listed under G-1 and G-2.

b. The U.S. does not recognize the foreign government de jure or the foreign government is not a member of the designated international organization.

c. A determination by a U.S. consular officer abroad and recognition by the U.S. Secretary of State establishes eligibility for the class.

d. G-3 classification includes family members.

e. Other requirements for this classification are similar to those for G-1.

f. Admitted for duration of status and are ineligible for extension of stay.

7. G-4 OFFICERS OR EMPLOYEES OF A DESIGNATED INTERNATIONAL ORGANIZATION, INA § 101(a)(15)(G)(iv), 8 CFR § 214.2(g)

a. Examples include:

1) Chief Officers of designated international organizations.

2) Officers on the managing boards of designated international organizations

3) Staff members and employees employed by the international organization:

a. Office Managers

b. Secretaries

c. Interpreters

b. G-4 classification includes family members.

c. The G-4 alien must be on the payroll of the designated international organization.

d. Determination by a U.S. consular officer abroad and recognition by the U.S Secretary of State establishes eligibility for the class.

e. Other requirements for this classification are similar to those for G-1.

f. Admitted for duration of status and are ineligible for extension of stay.

8. G-5 ATTENDANTS, SERVANTS AND PERSONAL EMPLOYEES OF G-1 THROUGH G-4, INA § 101(a)(15)(G)(v), 8 CFR § 214.2(g)

a. Attendant, as used in INA §§ 101(a)(15)(A)(iii) and 101(a)(15)(G)(v), means aliens paid from the public funds of a foreign government or from the funds of an international organization; who will accompany or follow to join the principal alien to whom a duty or service is owed.

b. Examples of attendants:

1) Secretaries
2) Chauffeurs
3) Security personnel

c. Servants and Personal Employees, as used in INA §§ 101(a)(15)(A)(iii) and 101(a)(15)(G)(v), means aliens employed in a domestic or personal capacity by a principal alien, are paid from the private funds of the principal alien, and seek to enter the U.S. solely for the purpose of such employment.

d. Examples of servants and personal employees include:

1) Cooks
2) Nannies
3) Housekeepers

e.. Personal employees are individuals considered as dependent aliens based upon employment. These individuals are generally support personnel. Usually a dependant alien may not precede the principal alien into the U.S. (there are exceptions).

f. A determination by a U.S. consular officer abroad and recognition by the U.S. Secretary of State establishes eligibility for the class.

g. G-5 classification includes family members.

h. Aliens in the G-5 classification are admitted for three-year duration. Requests for extension are made on Form I-539 with a letter from the G-1, G-2, G-3 or G-4 which explains the nature of the employment, along with a copy of the employer's certified Form I-566.

9. C-1 ALIEN IN TRANSIT THROUGH U.S., INA § 101(a)(15)(C), 8 CFR § 214.2(c) This classification is for aliens whose primary and principal purpose for entering is to transit through the U.S. Initial C-visa requests are made at a U.S. consulate overseas (no petition or application is filed with USCIS).

   a. The C-1 alien must demonstrate ability to effect transit (tickets, sufficient funds, and documents to enter the next country)

   b Includes C-1 "deadhead" who is arriving as a passenger to join a vessel or aircraft as a crew member.

   c. The C-1 alien's maximum period of admission is 29 days; no extensions of stay or changes of status are permitted by law.

10. C-2 ALIEN IN TRANSIT TO UNITED NATIONS HEADQUARTERS, INA § 101(a)(15)(C); 8 CFR § 214.2(c)

   a. Primary purpose is to proceed directly to United Nations Headquarters and remain in the immediate vicinity until departure from the U.S. The immediate vicinity of the United Nations Headquarters District is the area lying within a 25-mile radius of Columbus Circle, in New York City, New York.

   b. This classification is used for aliens from non-recognized countries who are not members of the U.N. but who need to visit the U.N. for their government.

   c. The C-2 alien must possess documents establishing ability to enter another country after their trip to the U.N. Headquarters.

   d. The C-2 alien is admitted D/S, so extensions of stay are not necessary; changes of status are not permitted by law.

11. C-3 FOREIGN GOVERNMENT OFFICIAL IN TRANSIT THROUGH U.S., INA § 101(a)(15)(C

   a. Aliens in C-3 classification are accredited officials of a foreign government who would normally qualify in the A or G nonimmigrant classification if they were assigned in the U.S.

   b. The C-3 alien must be passing immediately and continuously through the U.S., traveling on official business.

   c. Included in this classification are members of the immediate family, attendants, servants, or personal employees of such an official.

d. The maximum period of admission is 29 days; no extensions of stay or changes of status are permitted by law.

12. D-1 CREWMEN DEPARTING ON VESSEL OR AIRLINE OF ARRIVAL, INA § 101(a)(15)(D)(i), 8 CFR § 214.2(d)

This classification is for aliens arriving in the U.S. as crewmen aboard a vessel or aircraft. The term "crewman" means a person serving in any capacity on board a vessel or aircraft. Also see 8 CFR § 252.1(d)(1).

a. Crewmen must apply for permission to land, which is not considered an admission.

b. Crewmen arriving on vessels must depart as a working crewmember on the same vessel.

c. Crewmen arriving on an aircraft must depart as a working crewmember on the same transportation line but not necessarily on the same aircraft.

d. If shore leave is granted, the crewman is issued an endorsed Crewman's Landing Permit (Form I-95) for a maximum period of 29 days. No extensions of stay or changes of status are permitted by law.

13. D-2 CREWMEN DEPARTING ON ANOTHER VESSEL OR AS A PASSENGER, INA § 101(a)(15)(D)(i), 8 CFR § 214.2(d)

a. Crewmen must apply for permission to land, which is not considered an admission.

b. Crewman must intend to depart the U.S. on a different airline, vessel, or other means of transportation as arrival. They may depart as working crew or as a passenger 8 CFR § 252.1(d)(2).

c. If shore leave is granted the crewman is issued an endorsed Crewman's Landing Permit (Form I-95) for a maximum period of 29 days. No extensions of stay or changes of status are permitted by law.

Have students answer questions for Unit 1. Answers are in Section IV, page

B. EPO #2: Classify applicants based on established criteria for the "B", "WB", or "WT" nonimmigrant classifications, and identify the documentary requirements for such classifications.

1. B-1 VISITOR FOR BUSINESS, INA § 101(a)(15)(B), 8 CFR § 214.2(b)

   a. The intention of the B-1 alien is to temporarily visit the U.S. for business purposes.

   b. Applications are adjudicated by U.S. Consular Officers at the consulate (no USCIS petitioning process is involved).

   c. A nonimmigrant alien may be classified as a B-1 (visitor for business) to engage in the following activities:

      1) Participate in scientific, educational, professional or business conventions, seminars

      2) Installers, repair and maintenance personnel, and supervisors possessing specialized knowledge essential to the seller's contractual obligation

      3) Tourism personnel (tour and travel agents, tour guides and tour bus operators) conducting tours in the U.S.

      4) A professional athlete, such as a golfer or tennis player, who receives no salary or payment other than prize money for his or her participation in a tournament or sporting event

      5) An athlete or team member who seeks to enter the U.S. as a member of a foreign based team in order to compete with another sports team

      6) An amateur team sports player who is seeking to join a professional team during the course of the regular professional season or playoffs for brief try-outs (the teams may provide only for such expenses as round-trip fare, hotel room, meals, and other try-out transportation costs)

      7) An alien coming to perform services on behalf of a foreign-based employer as a jockey, sulky driver, trainer, or groom

      8) Personal and domestic servants of non-immigrant aliens (B-1A), or USC's (B-1B), who are subject to frequent international transfers.

   d. The B-1 alien must maintain a residence abroad.

   e. Aliens in the B-1 category are admitted for the time necessary to complete business, but not to exceed one (1) year.

f. Extensions of stay are filed on Form I-539. This form will be submitted with a written statement explaining the reasons for the request, why the stay will be temporary, plans to depart and any effect on foreign employment or residency. Generally, extensions of temporary stay may not be granted for more than six months each.

INSTRUCTOR'S NOTE: Review Operations Instructions concept

2. B-2 VISITOR FOR PLEASURE, INA § 101(a)(15)(B), 8 CFR § 214.2(b)

   a. The intention of the B-2 alien is to temporarily visit the U.S. for the purpose of pleasure.

   b. Visa applications are adjudicated by U.S. Consular Officers at the consulate (no USCIS petitioning process is involved).

   c. A nonimmigrant alien generally may be classified as a B-2 (visitor for pleasure) to engage in the following activities. This list is not comprehensive, but serves as common examples of acceptable activities.

      1) Aliens participating in conventions, conferences or convocations of fraternal, social, or service organizations.

      2) Aliens traveling to the U.S. for purposes of tourism or to visit with relatives or friends.

      3) Aliens coming to the U.S. for health purposes.

      4) An alien who is an amateur in an entertainment or athletic activity. The amateur or group of amateurs will not be paid for performances but will perform in a social and/or charitable context, or as a competitor in a talent show, contest, or athletic event. The alien may be reimbursed for incidental expenses associated with the visit.

      5) An alien entering the U.S. as a prospective student. Effective April 12, 2002, for national security reasons, nonimmigrant aliens admitted in a B-2 classification who are prospective students may not enroll or begin school until after Form I-539 (Application to Change /Extend Stay Non-Immigrant Status) is approved or the status is changed from visitor to student classification.

   d. The B-2 alien must show maintenance of a residence abroad.

e. The maximum initial period a B-2 may be admitted is one (1) year.

f. The B-2 alien is usually admitted for a minimum period of six (6) months whether of not less time is requested. Exceptions to the minimum six-month admission may be made on a case-by-case basis. Generally, extensions of temporary stay may not be granted for more than six months each.

3. WB/WT VISA WAIVER PROGRAM, INA § 217, 8 CFR § 214.2(b)(3), 8 CFR § 217

The Visa Waiver Program contains two nonimmigrant classifications, WB and WT. In 1986, the Immigration Reform and Control Act (IRCA) incorporated the Visa Waiver Pilot Program into the Act. The pilot program became effective on July 1, 1988. On October 30, 2000, the program was changed from a pilot or test program to the Visa Waiver Permanent Program (VWPP), also known as the Visa Waiver Program (VWP), which permits nationals from designated countries noted in 22 C.F.R. § 217.2(a), to apply for admission into the U.S. without a nonimmigrant visa. See also the Pocket Field Guide for further reference.

As of January 12, 2009, all passengers traveling under the Visa Waiver Program are required to have an approved travel authorization prior to traveling to the U.S. by air or sea. On-line application is made through the CBP Visa Waiver Program Electronic System for Travel Authorization (ESTA).

a. WB VISITOR FOR BUSINESS (VISA WAIVER PROGRAM)

1) The alien must intend to be a temporary visitor for business.

2) The alien must be a national of a designated Visa Waiver country.

3) VWP applicants must complete an Arrival/Departure Record, (Form I-94W). By signing Form I-94W, applicants agree to abide by the restraints of the program as well as waive any right to administrative review if refused admission.

4) Aliens arriving by air or sea must have a round-trip ticket on a transportation carrier that is also a signatory of the VWP Agreement.

5) Aliens arriving at a land border are required to produce evidence of economic solvency. Aliens must have the ability to support themselves financially during the duration of their stay and have the means to depart the U.S.

6) The alien must maintain a residence abroad.

7) The maximum period of admission for WB is 90 days. No extensions are allowed by law.

b. WT VISITOR FOR PLEASURE (VISA WAIVER PROGRAM)

1) The alien must intend to be a temporary visitor for pleasure.

2) The alien must be a national of a designated Visa Waiver country

3) VWP applicants must complete Form I-94W. By signing Form I-94W, applicants agree to abide by the restraints of the program and waive any right to administrative review if refused admission.

4) Aliens arriving by air or sea must have a round-trip ticket on a transportation carrier that is also a signatory of the VWP Agreement.

5) Aliens arriving at a land border are required to produce evidence of economic solvency. In other words, aliens have the ability to support themselves financially during the duration of their stay and have the means to depart the U.S.

6) The WT alien must maintain a residence abroad.

7) The maximum period of admission for WT is 90 days. No extensions are allowed by law.

INSTRUCTOR NOTE: Remind the students that today USCIS also confronts the possibility of terrorist attacks at rail stations.
Have students answer questions for Unit 2. Answers are in Section IV, page

C. EPO #3: Classify applicants based on established criteria for "F", "M" and "J" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

The "F" classification is assigned to aliens coming to the U.S. as students to attend established academic institutions. Some examples are colleges, universities, seminaries, conservatories, academic high schools, private elementary schools, or a language-training program designated and approved by the Attorney General.

Foreign students typically apply for a student visa at a U.S. consulate abroad. See 22 CFR § 41.61. However, there are provisions to request a change to F-1 status on Form I-539. A USCIS adjudicator is also likely to encounter students who need to apply for employment authorization on Form I-765. Schools that receive foreign students are included in the Student Exchange Visitor Information System (SEVIS), which is administered by ICE.

INSTRUCTOR'S NOTE: Instructor should review the sample I-94 included in the Appendix, , showing admission as an F-1 student for D/S (meaning "duration of status" - the duration of schooling).

1. F-1 ACADEMIC STUDENTS, INA § 101(a)(15)(F)(i), 8 C.F.R. § 214.3(a)(2)(i).

   a. This is a principal classification when the alien's primary intent is to attend an academic school in the U.S. as a full time student.

   b. An alien may not attend a publically funded elementary school or a publically funded adult education program. An alien may attend twelve months in the aggregate at a public secondary school, if reimbursement has been made to the school for the full cost of providing such education.

   c. An alien may attend a public or private college, university, seminary, or conservatory without restriction. An alien may attend a privately funded high school, junior high, or elementary school without restriction. An alien may also attend a privately funded adult education program without restriction.

   d. Must be in possession of SEVIS Form I-20 A-B, Certificate of Eligibility for Nonimmigrant (F-1) Student Status - for Academic and Language Students. Must have evidence of financial support in the amount indicated on the Form I-20 A-B.

      4) Must be maintaining a full course of study at an approved school. Service regulations define a full course of study in various contexts. (Exceptions apply). See 8 CFR § 214.2(f).
      5) Aliens in the F-1 category are required to maintain a residence abroad
      6) Spouses and children of F-1 aliens are granted F-2 classification, once they establish the relationship to the F-1. The status of such derivative aliens is dependent on the principle F-1 alien, and the dependents must accompany the principal F-1 alien or follow to join them.

2. F-3 BORDER COMMUTER STUDENT

   BRIEF HISTORY: When the primary purpose for entering the U.S. is to attend school, the law requires that aliens be classified as nonimmigrant students (F-1 or M-1) not as "B" visitors for business or pleasure. 8 U.S.C. § 1101(a)(15)(B) defines a nonimmigrant visitor for business or pleasure as:...an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the U.S. temporarily for business or temporarily for pleasure. It was commonplace, for aliens residing in Mexico and Canada to regularly enter the U.S. across a land border for the purpose of studying part-time at a college or university. They were classified as "B" nonimmigrant aliens. As a result of the terrorist attacks on September

11, 2001, the Immigration and Naturalization Service (INS) faced increased scrutiny, particularly with the use of the "B" visitor classification. The INS responded by announcing that it would bar part-time commuter students from Mexico and Canada. After an outcry from students, universities, and members of Congress, the INS proposed amending existing regulations that would take into account the unique educational circumstances of these students. Amended regulations found at 8 C.F.R. § 214.2(f)(18) permit border commuter students to maintain a lesser course load than is required of nonimmigrant F-1 and M-1 students. On November 2, 2002, President Bush signed into law the "Border Commuter Student Act" which created the new F-3 and M-3 nonimmigrant classifications (Public Law 107-274). *Note:* According to the *IFM, Chapter 15.4(f)(1)(D), Reduced Course Load Commuter Students from Canada and Mexico*, CBP officers at land borders are admitting these students as F-1 in lieu of F-3.

a. The alien must be a citizen of Canada or Mexico.

b. Aliens classified as F-3 may be part-time or full-time academic students, as long as they commute to and from a residence in their country of nationality to a school located in the U.S. within 75 miles of the border.

c. The F-3 must be in possession of SEVIS Form I-20 A-B.

d. The alien is enrolled in a full course of study at the school. That is, a course of study that leads to the attainment of a specific educational or professional objective.

e. Admitted for a fixed period, semester, quarter, or term, rather than D/S. The Designated School Official, DSO, will be required to specify on SEVIS Form I-20 A-B the term-by-term completion date. A new SEVIS Form I-20 A-B will be required for each new quarter or semester of attendance.

3. M-1 VOCATIONAL STUDENT, INA § 101(a)(15)(M)(i), 8 C.F.R. § 214.2(m), 8 C.F.R. § 214.3(a)(2)(ii).

a. M-1 nonimmigrant aliens, as defined in INA § 101(a)(15)(M), are foreign nationals pursuing a full course of study at an approved vocational or other recognized nonacademic institution in the U.S. The alien must attend full time. Examples of vocations include:

1) Air conditioning repair.

2) Automobile mechanics

3) Flight training schools

4) Gemology

5) Diesel mechanics

b. The M-1 alien must maintain a full course of study. Service regulations define a full course of study" in various contexts. (Exceptions apply) See 8 CFR §214.

c. The M-1 alien cannot change educational objectives, such as changing from air conditioning repair to gemology, without reapplying for the new objective.

d. The alien must be in possession of SEVIS Form I-20 M-N, Certificate of Eligibility for Nonimmigrant (M-1) Student Status - For Vocational Students.

e. The M-1 alien must maintain a residence abroad.

f. The M-1 student is admitted for duration of the course, plus 30 days, not to exceed 1 year.

g. Spouses and children of M-1 aliens are granted M-2 classification. The status for each of these derivatives is dependent on the status of the principle M-1 alien, and they must accompany the principle M-1 alien or follow to join them.

4. **M-3** BORDER COMMUTER STUDENTS

Note: According to the *Inspectors Field Manuel (IFM), Chapter 15.4(m)(1)(B), ReducedCourse Load Commuter Students from Canada and Mexico*, CBP officers at land borders admit these students as M-1 instead of M-3.

a. Aliens classified as M-3 may be part-time or full-time vocational students, as long as they commute to and from a residence in their country of nationality to a school located in the U.S. within 75 miles of the border.

b. The alien must be a citizen of Canada or Mexico.

c. The alien is enrolled in a full course of study at the school. That is, a course of study that leads to the attainment of a specific educational or professional objective.

d. The M-3 must be in possession of SEVIS Form I-20 M-N.

5. **J-1** EXCHANGE VISITOR, **INA § 101(a)(15)(J), 8 C.F.R. § 214.2(j)**

This classification allows aliens the opportunity to participate in an exchange visitor program in the U.S. In 1999 the U.S. Information Agency (USIA) was consolidated into the Department of State under the Bureau of Educational and Cultural Affairs Unit.

a. The J-1 alien's intention is to participate in an approved program for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, receiving training, or receiving graduate medical education or training.

b. Examples of Exchange Visitors include:

1) Professors or scholars
2) Research assistants
3) Students
4) Trainees
5) Teachers
6) Specialists
7) Leaders in a field of specialized knowledge or skill

c. The alien must be in possession of a Certificate of Eligibility for Exchange Visitor (J-1) Status, Form DS-2019 (formerly Form IAP-66).
d. The program must be approved by the Department of State.
e. Exchange visitors may be subject to a two-year foreign residence requirement under INA § 212(e). This means that they may be required to reside in their home country for two years following the completion of their program, in order to be eligible for change of status (COS) or adjustment of status (AOS). Form DS-2019 includes a block which is endorsed by the consular official issuing the nonimmigrant visa (if required), the ISO adjudicating an I-539 requesting change to J-1, or by the CBP officer at a port-of-entry. The requirement applies if:

1) The program is financed in whole or in part, directly or indirectly, by either the sending government or the U.S. Government, and/or
2) The alien receives graduate medical education or training
2) The alien's occupation is on the Skills List for country of nationality or last residence.

NOTE: Since 1972 the Secretary of State has identified a list of fields of specialized knowledge or skill, and a list of developing countries which requires persons trained in one of the named areas.

f. Aliens admitted as or changed to J nonimmigrant classification, who are subject to the foreign residence requirement, are ineligible to change or adjust status, unless they have been granted a waiver of such requirements. Requests for waiver are filed on **Form I-612,** Application for Waiver of Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act, as amended. The J-1 alien must maintain a residence abroad.

Spouses and children of J-1 aliens are granted J-2 classification. The status for each of these derivatives is dependent on the status of the principle J-1 alien, and they must accompany the principle J-1 alien or follow to join them.

Have students answer questions for Unit 3. Answers are in Section IV, page 71.

D. EPO #4: Classify applicants based on established criteria for "H" and "L" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

The H and L nonimmigrant classifications are designated for eligible aliens entering the U.S. as temporary workers, and require the filing of a Form I-129, Petition for Nonimmigrant Worker. The adjudication of Form I-129 determines if the beneficiary is eligible for initial classification and to extend a period of authorized stay. Form I-129 is currently filed with the California Service Center or the Vermont Service Center.

Once the petition is approved, the employer or agent is sent a Notice of Approval, Form I-797. A copy of the approved petition is sent to the U.S. consulate or embassy where the alien will apply for a visa. When an alien is exempt the visa requirement, a copy of the approved petition is sent to the port-of-entry where the beneficiary intends to apply for admission. Approval of a petition does not guarantee visa issuance or admission into the U.S. In most cases the beneficiary of an approved Form I-129 may be admitted up to ten days before the validity period of the petition and remain ten days after it ends. However, the alien may not work except during the validity period of the petition. In the case of aliens who are already in the U.S. in a valid nonimmigrant status, the authorization to change status to H or L will be adjudicated at the same time as the petition.

INSTRUCTOR'S NOTE: As a classroom exercise, the Instructor should review the Form I-129, Petition for a Nonimmigrant Worker and its instructions, included in the Appendix. Walk through the various parts and review the purposes of each part, indicating in particular the employer and beneficiary information, as well as need for extension or change of status. Suggest that the students read through the Instructions because of the volume of helpful background information, but do so on their own time.

1. **H-1B** SPECIALTY OCCUUPATIONS, **INA § 101(a)(15)(H) ; 8 C.F.R. § 214.2(h)**

The H-1B classification includes specialty occupations, an alien coming to perform services of an exceptional nature relating to a project administered by the U.S. Department of Defense, or a fashion model who has national and international acclaim.

Congress has set numerical limitations of 65,000 per fiscal year for H-1B visas, with some specific circumstances that are exempt from this cap (e.g., where the beneficiary has a Master's or higher degree from a U.S. institution of higher education).

a. H-1B SPECIALTY OCCUPATION – IDENTIFIED AS H-1B1

Specialty Occupation - means an occupation which requires theoretical and practical application of a body of highly specialized knowledge and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry level into the occupation in the U.S.

The alien must hold a U.S. baccalaureate or higher degree required by the specialty occupation, or a foreign degree determined to be equivalent, hold an unrestricted license to immediately perform the specialty occupation if a license is required, or

have education, specialized training and/or progressively responsible experience that is equivalent to a U.S. baccalaureate degree.

The alien does not need to retain their foreign residence abroad. The doctrine of dual intent applies. The alien may, at the same time they are in the U.S. as a H-1B nonimmigrant, seek to become a permanent resident.

8 C.F.R. § 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. For example, as an Industry-wide Standard, a bachelor's degree in Accounting is normally a minimum prerequisite for a Certified Public Accountant position with an accounting firm.

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.

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

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.

Note: If the alien does not have a U.S. degree or its equivalent, must 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 has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

INSTRUCTOR'S NOTE: In a classroom exercise, the Instructor should review the DOL ETA Form 9035 Labor Condition Application and its instructions in Training Aid Packet.

have education, specialized training and/or progressively responsible experience that is equivalent to a U.S. baccalaureate degree.

The alien does not need to retain their foreign residence abroad. The doctrine of dual intent applies. The alien may, at the same time they are in the U.S. as a H-1B nonimmigrant, seek to become a permanent resident.

8 C.F.R. § 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. For example, as an Industry-wide Standard, a bachelor's degree in Accounting is normally a minimum prerequisite for a Certified Public Accountant position with an accounting firm.
- 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.
- 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: The petitioner must provide a detailed description of the job duties to be performed. 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.

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.

Note: If the alien does not have a U.S. degree or its equivalent, must 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 has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

INSTRUCTOR'S NOTE: In a classroom exercise, the Instructor should review the DOL ETA Form 9035 Labor Condition Application and its instructions in Training Aid Packet.

Petitions filed for H-1B classification must be accompanied by a Labor Condition Application (LCA), Form ETA 9035, for the alien's occupational specialty with evidence of having been seen and stamped by the Department of Labor (DOL). On Form ETA 9035 the petitioner (employer) certifies that:

- The alien hired in a specialty occupation (or as a fashion model) will be paid the higher of the actual or prevailing wage for the occupation in the local area of employment
- The alien will be provided with working conditions which will not adversely affect the working conditions of workers similarly employed;

- There is no strike or lockout;
    i. No U.S. worker has been or will be displaced as a result of the alien's employment
- The LCA contains the following information:

    a. **Number of alien workers sought,**
    b. **The occupational classification,**
    c. **The wage rate,**
    d. **Working conditions, and**
    e. **Period of intended employment**

Certification by the DOL of a Labor Condition Application (LCA) in an occupational classification does not constitute a determination by that agency that the occupation is a specialty occupation. DOL Certification is evidence that the employer filing the LCA has agreed to:

2. Offer the actual wage level for the occupational classification at the place of employment, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, determined at the time of filing the LCA.
3. Provide working conditions for such aliens that will not adversely affect the working conditions of United States workers similarly employed.
4. Attest on the day the application was signed and submitted to DOL that there was not a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment, and if such a strike, lockout, or work stoppage occurs after submitting the application, the employer will notify the Employment and Training Administration (ETA) within three days of such occurrence and the application will not be used in support of a petition filed with USCIS for H-1B nonimmigrant to work in the same occupation at the place of employment until the ETA determines the strike, lockout, or work stoppage has ceased.
5. Provide notice of filing to the bargaining representative (if any) or have a posted notice of filing in conspicuous locations at the place of employment.

    a. Must be filed by a U.S. employer (or agent thereof).
    b. The maximum initial period of admission is the validity of Form I-129 but may not exceed 3 years.

H-1B DEPARTMENT OF DEFENSE (DOD) WORKER – IDENTIFIED AS H-1B2

ii. Department of Defense Workers – The alien is coming temporarily to the U.S. to perform services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects which require a baccalaureate or higher degree, or its equivalent, to perform the duties.

iii. An LCA is not required for the H-1B2 DOD worker.

iv. The petition must contain a verification letter from the Department of Defense project manager for the project the alien will be working on.

v. DOD is limited to100 visas per year. The number of DOD visas does not affect the cap of 65,000 set for the H-1B classification.

vi. The maximum initial period of admission is the validity of the I-129 petition, but not to exceed 5 years.

H-1B FASHION MODEL – IDENTIFIED AS H-1B3

vii. Fashion Model - Any alien of distinguished merit and ability in the field of fashion modeling coming temporarily to the U.S. to perform services in that field.

viii. Services to be performed must involve events or productions that have a distinguished reputation, or the services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.

ix. An LCA is required for the H-1B3 classification.

x. Maximum initial period of admission is the validity of the I-129 petition, not to exceed 3 years.

H-1C REGISTERED NURSE

xi. According to the Department of Labor there are only fourteen facilities in the U.S. that were initially determined to qualify to apply for H-1C registered nurses. The DOL acknowledges that other facilities might qualify, but have yet to be identified

xii. The facility of intended employment must meet DOL eligibility

xiii. requirements and have an un-expired attestation from the Department of Labor filed on Form ETA 9081.

xiv. The alien must be employed at a facility located in a Health Professional Shortage Area (HPSA) as designated by the Department of Health and Human Services (DHHS).

xv. Registered Nurses must:

1. **Have a full and unrestricted license to practice nursing in the country where they were educated or trained, or they were educated in the U.S.**

   2) Have passed the exam given by the Commission on Graduate Foreign Nursing Schools (**CGFNS** – Examination given to foreign nurses seeking employment in the U.S. The exam is given by selected certified agencies in various parts of the country bi-annually. There are two components to the exam, competency and English proficiency.

3) Be fully qualified and eligible under the laws governing the place of intended employment.

xvi. Multiple named beneficiaries are allowed.
xvii. Visas in this classification may not exceed 500 in a fiscal year. States with a population of fewer than nine million, according to the 1990 Census, are limited to 25 H-1C nurses. States with a population over nine million are limited to 50 nurses.
xviii. The maximum initial period of admission is the validity of the I-129 petition, not to exceed 3 years.

Labor Certification - A petition to import an alien, as an H-2A or H2B worker may not be approved by the Service unless the petitioner has applied (on Form ETA 9035) to the Secretary of Labor for a certification that:

1. There are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
2. The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

H-2A TEMPORARY AGRICULTURAL WORKER

xix. The H-2A alien is coming to the U.S. to engage in temporary or seasonal agricultural employment.
xx. For H-2A classification, temporary and seasonal employment generally means seasonal planting, thinning, harvesting, etc., when labor levels are far above those necessary for normal ongoing operations. This need generally lasts less than a year. It can also apply to a longer cycle.
xxi. This classification requires temporary labor certification from the DOL.
xxii. The alien must be the beneficiary of an approved I-129 petition.
xxiii. The I-129 petition may include multiple beneficiaries either named or unnamed.
xxiv. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities, or representing foreign entities.

xxv. In the case of an agent petitioner, the beneficiary may work for multiple employers.
xxvi. Congress has not set any annual numerical limits to this classification.
xxvii. The H-2A alien must maintain a residence abroad.
xxviii. The maximum initial period of admission is the validity of the I-129 petition, not to exceed 1 year.

H-2B TEMPORARY WORKER OTHER THAN AGRICULTURE

xxix. The alien is coming to the U.S. to perform temporary services or labor other than agricultural.
xxx. For the H-2B classification, temporary services or labor generally means any job (other than agricultural) in which the petitioner's need for the duties to be performed by the alien workers are temporary, rather than the job itself. Ordinarily, this means that the need must be a year or less. It may be a one-time occurrence, a seasonal need, a peak load need or an intermittent need. Examples would include but are not limited to:

1. **Fighting massive forest fires**
2. **Rebuilding homes after natural disasters**
3. **Catalog company during a busy holiday season**
4. **Winter ski lodge during peek season**

xxxi. Aliens that are coming to work in the medical profession are prohibited from H-2B classification.
xxxii. This classification requires temporary labor certification from the DOL.
xxxiii. The alien must be the beneficiary of an approved I-129 petition.
xxxiv. The I-129 petition may include multiple beneficiaries all of whom must be named.
xxxv. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities or representing foreign entities.
xxxvi. In the case of an agent petitioner, the beneficiary may work for multiple employers.
xxxvii. Congress has set an annual numerical limit of 66,000 visas.
xxxviii. The alien must maintain a residence abroad.
xxxix. Maximum initial period of admission is the validity of the I-129 petition, not to exceed one (1) year.

H-2R RETURING H-2B WORKER

xl. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 created the classification of H-2R. The alien is returning to the United States to perform temporary services or labor other than agricultural.

xli. The alien must have had a H-2B visa at least one (1) of the previous three (3) years prior to the fiscal year of the approved start date. In addition, they must have certification from petitioning employer that the alien is a returning worker.

xlii. Approved occupations and restrictions are the same as H-2B.

xliii. This classification requires temporary labor certification from the DOL

xliv. The alien must be the beneficiary of an approved I-129 petition..

xlv. The I-129 petition may include multiple beneficiaries all of whom must be named.

xlvi. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities or representing foreign entities.

xlvii. In the case of an agent petitioner, the beneficiary may work for multiple employers

xlviii. Visas issued are not counted against the H-2B limits.

xlix. The alien must maintain a residence abroad.

l. Maximum initial period of admission is the validity of the I-129 petition, not to exceed one (1) year.

H-3 TRAINEE

li. There are two distinct sub-categories to the H-3 trainee classification.

lii. The first sub-category is an alien who is coming to the U.S. temporarily to receive training in any field of endeavor. The alien is in the U.S. 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. This category does not apply to physicians, who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.

liii. The second sub-category is an alien who is participating in a special education exchange visitor program for children with physical, mental, or emotional disabilities. The facility providing the training program must have 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 program.

liv. The H-3 classification does not require a labor certification or LCA.

lv. The alien must be the beneficiary of an approved I-129 petition.

lvi. Multiple named beneficiaries are allowed.

lvii. There are no annual numerical limits for the H-3 trainee classification. However, Congress has set a numerical limitation of 50 per fiscal year for the Special Education trainee.

lviii. The alien must maintain a residence abroad.

lix. For the alien trainee the maximum initial period of admission is the validity of the I-129 petition, not to exceed 2 years. For the alien participating in a Special Education program, the maximum initial period of admission is the validity of the I-129 petition, not to exceed 18 months.

H-4 Derivatives

Spouses and children of H-1, H-2 and H-3 aliens are granted H-4 classification. The status for each of these derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them.

L-1 INTRACOMPANY TRANSFEREE

This classification, which originated in 1970, was designed to facilitate the temporary transfer of aliens to the U.S. to continue employment with a parent, branch, subsidiary or affiliate of the same employer that employed the alien abroad. **INA § 101(a)(15)(L);** 8 C.F.R. § 214.2(*l*)(1)(i).

An alien who within the preceding three (3) years has been employed abroad for one (1) continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate or subsidiary of that employer in a managerial, or executive capacity, **[L-1A]**, or in a position requiring specialized knowledge **[L-1B]**.
Managerial - directs the organization, a department or a function of the organization. Like executives, a qualifying manager will not be overseeing the primary performance of a task. Also see 8 C.F.R. § 214.2(I)(1)(ii)(B))
Executive - is one who directs the management of the company or a major part of the function of the organization. Typical executive positions are presidents, vice-presidents and controllers. An executive is expected to have a supervisory role in the company (either over personnel or a function) and would not include people who are primarily performing the specific tasks of production or providing service to customers. (Also see 8 C.F.R. § 214.2(I)(1)(ii)©)
Specialized Knowledge - refers to employees with a special knowledge of the company's products and their applications in world markets; an advanced or proprietary of the company's processes or procedures. (Also see 8 C.F.R. § 214.2(I)(1)(ii)(D)).

lx. The alien must be the beneficiary of an approved I-129 petition. There are two (2) types of petitions for L-1 intra-company transferees:

Individual petition – an I-129 petition filed by a qualifying organization on behalf of a single named alien granting approval for that specific petitioner to import the named L-1 employee to work in the U.S. **Qualifying Organization -** means a U.S. or foreign firm, corporation, or other legal entity which has a qualifying relationship as a parent, branch, affiliate, or subsidiary who is or will be doing business as an employer in the U.S. and in at least one (1) other country for the duration of the alien's stay in the U.S. as an L-1.

1. **Blanket petition – an I-129 petition filed by a qualifying organization without specific beneficiaries that serves to grant continuing approval for itself and some or all of its parents, branches, subsidiaries, and affiliates to import L-1 alien employees to work in the U.S.**

   lxi. The petitioner filing Form I-129 may file for a single L-1 beneficiary or file a Blanket Form I-129. The alien may be employed in an established office or come to the U.S. to open or be employed temporarily in a new office on behalf of the qualifying organization abroad. **New Office** - means an organization that has been doing business in the U.S. through a parent, branch, affiliate, or subsidiary for less than one (1) year

   lxii. The petitioner must establish that:

1. **The petitioner and the organization, which employed or will employ the alien, are qualifying organizations.**
2. **The alien will be employed in an executive, managerial, (L-1A) or specialized knowledge (L-1B) capacity.**
3. **The alien has at least one (1) continuous year of full-time employment abroad with the qualifying organization within the three (3) years preceding the filing of the petition**
4. **The alien's prior one (1) year of employment was in an executive, managerial, or specialized knowledge capacity.**

   lxiii. In addition to the above, the petitioner filing a Blanket Form I-129 must also establish that:

1. **The petitioner and all qualifying entities are engaged in commercial trade.**
2. **The petitioner's office in the U.S. has been doing business for one (1) year or more.**
3. **The petitioner has three (3) or more domestic and foreign branches, subsidiaries, or affiliates.**
4. **The petitioner and all qualifying organizations have obtained approval for at least a total of 10 L nonimmigrant aliens; or have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or have a U.S. workforce of at least 1000 employees.**

   lxiv. Labor certification or LCA is not required.

   lxv. Congress has not set any annual numerical limits.

   lxvi. Aliens in the L-1A or L-1B classification do not need to retain their foreign residence. The doctrine of dual intent applies.

   lxvii. The maximum initial period of admission is the validity of the I-129 petition, not to exceed three (3) years. For those aliens establishing or coming to work in a new office the validity of the petition is one (1) year.

lxviii. Spouses and children of L-1 aliens are granted L-2 classification. The status for each of these derivatives is dependent on the status of the principle L-1 alien, and they must accompany the principle L-1 alien or follow to join them.

Have students answer questions for Unit 4. Answers are in Section IV, page 71.

12. EPO #5: Classify applicants based on established criteria for "O", "P" and "Q" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

Background: The O, P, and Q nonimmigrant classifications are designated for specific types of eligible aliens entering the U.S. as temporary workers. Hiring foreign workers for employment in the U.S. normally requires approval from several government agencies. Certain classifications of temporary nonimmigrant workers require employers to seek written advisory opinions from the appropriate peer group, labor organization, or management organization (commonly called letters of consultation). **Advisory Opinion** – AKA consultation letter – means a consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications. It shall be in the form of a written advisory opinion. The advisory opinion shall be submitted along with the petition when the petition is filed. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts, which supports the conclusion reached in the opinion. Advisory opinions must be submitted in writing and must be signed by an authorized official of the group or organization. Consultations are advisory and are not binding on the Service.

Once the consultation is issued, the employer may petition USCIS to classify an alien as a temporary worker by filing Form I-129. In most cases the beneficiary of an approved I-129 petition may be admitted up to ten days before the validity period of the petition and remain ten days after it ends. However, the alien may not work except during the validity period of the petition

O-1 ALIENS OF EXTRAORDINARY ABILITY

The Immigration Act of 1990 created the O nonimmigrant classification. It specifically provides for the admission of persons with extraordinary abilities in the sciences, arts, education, business, and athletics - **Extraordinary Ability in the Field of Art** - means distinction at a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered. **Extraordinary Ability in the Field of Science, Education, Business, or Athletics** - means a level of expertise indicating that the person is one of the small percentage who have risen to the very top of the field of endeavor.

or extraordinary achievement in motion picture and television production and their essential support personnel. **Extraordinary Achievement with Respect to Motion Picture and Television Productions** - means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and r **Arts** - includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and

performing arts. It includes not only the principal creators and performers but also other essential persons.
recognition significantly above that ordinarily encountered.

INA § 101(a)(15)(O)(i); 8 C.F.R. § 214.2(o)(1)(ii)(A).

i. An alien who has extraordinary ability in the sciences, arts, education, business, or athletics that has been demonstrated by sustained national or international acclaim and who is coming temporarily to the U.S. to continue work in the area of extraordinary ability, or;
ii. An alien who has extraordinary ability with respect to motion picture and television production as demonstrated by a record of recognized extraordinary achievement in the field and who is coming to the U.S. to continue working in that field.
iii. The O-1 classification relates to individual aliens not groups.
iv. The alien must be the beneficiary of an approved Form I-129 petition. Documentary requirements and other evidence for establishing eligibility for the O-1 classification include, but are not limited to:Receipt of a major, internationally recognized award such as the Nobel Prize or similar, OR;

1. **At least three of the following types of documentary evidence:**
2. **Receipt of nationally or internationally recognized prizes or awards for excellence;**
3. **Membership in associations in the field for which classification is sought, which require outstanding achievements of their members;**
4. **Published material in professional or major trade publications or major media about the alien, relating to the alien's work;**
5. **Participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization;**
6. **Original scientific, scholarly, or business-related contributions of major significance;**
7. **Authorship of scholarly articles in the field, in professional journals, or other major media;**
8. **Employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;**
9. **Commanded a high salary or will command** Event - **means an activity such as, but not limited to. A scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement. It could also include short vacations, promotional appearances, stopovers, or professional athletic contract a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.**
10. **Extraordinary ability in the Arts requires evidence of being nominated for or receipt of a significant national or international award or prize in the particular field such as an Academy Award, Grammy, or Director's Guild Award, or similar, OR;**
11. **At least three of the following types of documentary evidence:**

a) Performed, and will perform, services as a lead or starring participant in a production or event which has a distinguished reputation;
b) Achieved national or international recognition for achievements;
c) Performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation;
d) Has a record of major commercial or critically acclaimed successes;
e) Has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts; or
f) Has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field.

12. **Extraordinary achievement in the motion picture or television industry requires evidence of being nominated for or receipt of a significant national or international award or prize in the particular field such as an Academy Award, Grammy, or Director's Guild Award, or similar, OR;**
13. **At least three of the following types of documentary evidence:**

a) Has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation;
b) Has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
c) Has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation;
d) Has a record of major commercial or critically acclaimed successes;
e) Has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field; or
f) Has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field.

A consultation with an appropriate U.S. peer group, labor organization, or management organization in the area of the alien's ability regarding the nature of the work to be done and the alien's qualifications must also accompany the petition. **Peer Group -** means a group or organization, which is comprised of practitioners of the alien's occupation. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, such a representative may be considered the appropriate peer group for the purpose of consultation.

Additional documentary requirements necessary to support the petition:

14. **The employer must file Form I-129 with the proper fee, before the alien employee's previously authorized status expires. Form I-129 is filed with the California Service Center or the Vermont Service Center.**
15. **The alien must not be the subject of removal proceedings.**
16. **A letter from the employer must indicate the alien's position, duties and responsibilities, and remuneration.**
17. **Evidence the alien has maintained previously accorded nonimmigrant status, as evidenced by the alien's Form I-94.**
18. **Congress has not set any annual numerical limits.**

v. Aliens in the O-1 classification do not need to retain their foreign residence. The doctrine of dual intent applies.

vi. The alien may be admitted up to 10 days prior to the validity of the petition and may remain up to 10 days after the validity of the petition expires. Even so, the alien may only engage in employment during the validity period of the I-129.

vii. The maximum period of initial admission is the validity of the I-129 petition, but not to exceed three (3) years.

viii. The O-2 classification is available for aliens who are coming temporarily to the U.S. solely to assist an O-1 in the field of arts, athletics, or the field of motion picture or television production. See 8 C.F.R. § 214.2(o)(1)(ii)(B) for the eligibility and evidentiary requirements for this classification.

ix. Spouses and children of O-1 and O-2 aliens are granted O-3 classification. The status for each of these derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them.

P-1 INTERNATIONALLY RECOGNIZED ATHLETES / ENTERTAINMENT GROUP

The P classification was created by the Immigration Act of 1990, specifically to provide for certain athletes, entertainers, and artists who are coming to the U.S. to compete, hold an event, or perform. **INA § 101(a)(15)(P)**; 8 C.F.R. § 214.2(p)(1)(i).

The alien is coming temporarily to the U.S. as an internationally recognized athlete in an individual capacity **Internationally Recognized** means having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading or well known in more than one country.

or as a member of a team, **Team** means two(2) or more persons organized to perform together as a competitive unit in a competitive event.

OR members of an internationally recognized entertainment group **Entertainment Group** - means two (2) or more persons established as one entity or unit to perform or to provide a service. This "group" relates only to performing P-1 aliens. It does not include individuals who assist in the presentation who are not on the stage (e.g., lighting or sound technicians). These support aliens would need to be petitioned for as essential support P-1's and a separate petition must be filed for them. If a solo

artist or entertainer traditionally performs on stage with the same group of aliens, e.g., back-up singers or musicians, the act may be classified as a group.

commensurate with activities such as competition, event, or performance. **Competition, Event, or Performance** – means an activity such as an athletic competition or season, tournament, tour, exhibit, project or entertainment event or engagement. Such activity could include short vacations, promotional appearances and stopovers, which are incidental and/or related to the activity. An athletic competition or entertainment event could include an entire season of performances. A group of related activities shall also be considered an event. Members of a group

Member of a Group means a person who is actually performing the entertainment services.

must meet the 75% rule **The "75% rule"** - means that 75% of the members of the group must have been performing services for such group for a minimum of one (1) year or more. (Special provisions apply for certain entertainment groups including but not limited to alien circus personnel). If a group does not meet the 75% rule, the artist or entertainer would need to qualify as an O-1 and the back-up band as O-2's.

The alien is the beneficiary of an approved Form I-129 petition classifying the alien as a P-1. The petitioner of the I-129 may or may not necessarily be the alien's sponsor. **Sponsor** - means an established organization in the U.S. that will not directly employ a P-1, P-2 or P-3 alien but will assume responsibility for the accuracy of the terms and the conditions specified in the petition.

x. Form I-129 filed for an alien athlete entering the U.S. individually or as part of a team (P-1A) to perform at a specific athletic competition, at an internationally recognized level of performance, must establish:

1. **The athlete (competing individually or as a member of a U.S. team) has achieved international recognition in the sport based on his or her reputation.**
2. **The athlete or athletic team has a contract with a major U.S. sports league or team or a contract in an individual sport commensurate with international recognition. Contract - means the written agreement between the petitioner and the beneficiary(ies) that explains the terms and conditions of employment. The contract shall describe the services to be performed, and specify the wages, hours of work, working conditions, and any fringe benefits**
3. **The athlete or athletic team meets at least two (2) of the following documentary requirements:**

    a) Evidence of having participated, to a significant extent, in a prior season with a major U.S. sports league;
    b) Evidence of having participated in international competition with a national team;
    c) Evidence of having participated, to a significant extent, in a prior season for a U.S. college or university in intercollegiate competition;

d) A written statement from an official of a major U.S. sports league or an official of the governing body of the sport which details how the alien or team is internationally recognized;
e) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized;
f) Evidence that the individual or team is ranked if the sport has international rankings; or
g) Evidence that the alien or team has received a significant honor or award in the sport. Form I-129 filed for an alien member of an internationally recognized entertainment group (P-1B) entering the U.S. temporarily to perform with, or as an integral and essential part of the performance of an entertainment group must establish:

1. The group has been established and performing regularly for at least one (1) year.
2. The names of each member of the group and the exact dates each member has been employed on a regular basis by the group.
3. The group has been internationally recognized in the discipline for a sustained and substantial period of time.
4. The group meets at least three (3) **of the following documentary requirements:**

   a. Evidence that the group has performed, and will perform, as a starring or leading entertainment group in productions or events which have a distinguished reputation;
   b. Evidence that the group has achieved international recognition and acclaim for outstanding achievement in its field;
   c. Evidence that the group has performed, and will perform, services as a leading or starring group for organizations and establishments that have a distinguished reputation;
   d. Evidence that the group has a record of major commercial or critically acclaimed successes;
   e. Evidence that the group has achieved significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field; or
   f. Evidence that the group has either commanded a high salary or will command a high salary or other substantial remuneration for services comparable to others similarly situated in the field.

xii. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities or representing foreign entities. In the case of

an agent petitioner, the beneficiary may work for multiple employers.

xiii. The alien member of a group or athletic team may not perform services separate and apart from the group or team.

The essential support personnel for a P-1A or P-1B are given the same classification as the principal individual athlete, an athletic team, or an entertainment group. Essential support personnel require a separate I-129 petition to be filed on their behalf.

Essential Support Alien - means a highly- skilled, essential person determined by USCIS to be an integral part of the performance of a P-1, P-2 or P-3 alien because he or she performs support services which cannot be readily performed by a U.S. worker and which are essential to the successful performance of services by the P-1, P-2 or P-3 alien. Such alien must have appropriate qualifications to perform the services, critical knowledge of the specific services to be performed and experience in providing support to the P-1, P-2 or P-3 alien.

The P-1A athletes and P-1B members of entertainment groups do not need to retain their foreign residence. The doctrine of dual intent applies. P-1A and P-1B essential support personnel, however, are required to maintain a residence abroad.

The alien must be the beneficiary of an approved Form I-129. The maximum period of initial admission is the validity of the I-129 petition but cannot exceed the following restrictions:

1. **For P-1A individual athletes and their essential support personnel – not to exceed five (5) years.**
2. **For P-1A members of athletic teams and their essential support personnel – not to exceed one (1) year.**
3. **For P-1B members of entertainment groups and their essential support personnel – not to exceed one (1) year.**

xiv. The restrictions above are the maximum allowable time for the alien to remain in the U.S. Consequently, an extension of stay will be the remaining part of five (5) years for the P-1A athlete and essential personnel; one (1) year for the P-1A athletic team and essential personnel; and one (1) year for P-1B entertainment group and essential personnel.

- ***P-2*** RECIPROCAL EXCHANGE VISITOR

i. An artist or entertainer performing individually or as part of a group entering the U.S. temporarily to perform as an artist or entertainer under a reciprocal exchange program between an organization in the U.S. and an organization in another country.

ii. The exchange of artists and entertainers must be similar in terms of caliber of artist or entertainer, terms and conditions, and number of aliens involved in the exchange.

iii. Examples of negotiated reciprocal agreements include:

1. **The American Federation of Musicians (U.S.) with the American Federation of Musicians (Canada)**
2. **The Actor's Equity Association (U.S.) with the Canadian Actor's Equity Association**
3. **The Actor's Equity Association (U.S.) with the British Actor's Equity Association.**

iv. The alien must be the beneficiary of an approved Form I-129 petition classifying him or her as a P-2. The I-129 petition is filed by the sponsor and may include multiple named beneficiaries.

v. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities or representing foreign entities. In the case of an agent petitioner, the beneficiary may work for multiple employers.

vi. The I-129 petition for a P-2 alien or aliens must include:

1. **A copy of the formal reciprocal exchange agreement between the U.S. organization and the foreign organization.**
2. **A statement from the sponsoring organization describing the reciprocal exchange of U.S. artists and entertainers.**
3. **Evidence that an appropriate labor organization was involved in negotiating the reciprocal exchange program.**
4. **Evidence that the alien or aliens seeking the classification have comparable skills and similar employment terms and conditions.**
5. **A consultation with an appropriate U.S. peer group, labor organization, or management organization in the area of the alien's ability regarding the nature of the work to be done and the alien's qualifications must be on file.**

vii. The P-2 classification includes the essential support personnel for the artist or entertainer. They will also receive P-2 classification; however, a separate I-129 petition must be filed on behalf of the essential support personnel.

viii. The alien or aliens in the P-2 classification must maintain a residence abroad.

ix. The maximum period of initial admission is the validity of the I-129 petition, but may not exceed one (1) year.

- *P-3* ARTIST OR ENTERTAINER IN CULTURALLY UNIQUE PERFORMANCE

  Artists or entertainers individually or as a group, coming temporarily to the U.S. for the purpose of developing, interpreting, representing, coaching, or teaching a culturally unique traditional, ethnic, folk, musical, theatrical, or artistic performance or presentation. **Culturally Unique** - means a style of artistic expression, methodology or medium that is unique to a particular country, nation, society, class, ethnicity, religion, tribe or other group of persons.

i. The cultural event or events will further the understanding or development of the alien's art form.
ii. The program may be commercial or noncommercial in nature. It does not need to be sponsored by an educational, cultural, or government agency.
iii. The alien must be the beneficiary of an approved Form I-129 petition classifying them as a P-3. The I-129 petition is filed by the sponsor, and may include multiple named beneficiaries.
iv. The petitioner may be a single U.S. entity, or an agent representing several U.S. entities or representing foreign entities. In the case of an agent petitioner, the beneficiary may work for multiple employers.
v. The I-129 petition for a P-3 alien must establish:

1. **The authenticity of the alien's or group's skills in performing, presenting, coaching, or teaching a unique or traditional art form.**
2. **The documentation must come from recognized experts who have direct knowledge of the alien or group.**
3. **The performance of the alien or group is culturally unique.**
4. **All performances or presentations in the U.S. will be culturally unique events.**
5. **A consultation with an appropriate U.S. peer group, labor organization, or management organization in the area of the alien's ability regarding the nature of the work to be done and the alien's qualifications must be on file.**

vi. The P-3 classification includes the essential support personnel for the artist or entertainer. They will also receive P-3 classification;, however, a separate I-129 petition must be filed on behalf of the essential support personnel.
vii. The alien or aliens in the P-3 classification must maintain a residence abroad.
viii. The maximum period of initial admission is the validity of the I-129 petition, but may not exceed one (1) year.
ix. The artist or entertainer must not be in removal proceedings.

- ***P-4*** Derivatives

Spouses and children of P-1, P-2 and P-3 aliens are granted P-4 classification. The status for each of these derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them.

- ***Q-1*** INTERNATIONAL CULTURAL EXCHANGE PROGRAM PARTICIPANT

The Q nonimmigrant classifications were established to allow eligible aliens temporary entry into the U.S. for the purpose of working under the specific terms of a program. **INA § 101(a)(15)(Q)(i)**; 8 C.F.R. § 214.2(q)(2)(i). The Q-1 classification was created in 1990. The

Q-2 classification (and Q-3 for their dependents) was created in 1998. Q-2 and Q-3 have sun setted.

i. The alien is coming temporarily to the U.S. to take part in an approved international cultural exchange program that provides practical training and employment for the purpose of sharing the history, culture, and traditions of the alien's country of nationality.
ii. The alien Q-1 must meet the following qualifications:

1. **Be at least 18 years of age at the time the petition was filed.**
2. **Is qualified to perform the service or labor; or receive the type of training stated in the petition.**
3. **Possesses the ability to communicate effectively about the cultural attributes of his or her country of nationality to the American public.**
4. **Has resided and been physically present outside the U.S. for the immediate prior year, if the alien was previously admitted as a Q-1.**

iii. The request for approval of the international cultural exchange program and the request to classify the alien as a Q-1 are filed simultaneously on Form I-129.
iv. The international cultural exchange program must be approved by USCIS. The program must meet the following qualifications:

1. **Accessibility to the public. The program must take place in a public setting such as a school or museum. Activities that take place in a private home or an isolated business do not qualify.**
2. **Cultural component. The program must have a cultural component, which is an essential and integral part of the alien's employment or training. It may include structured instructional activities such as seminars, courses, lecture series, or language camps.**
3. **Work component. The alien's employment or training in the U.S. may not be independent of the cultural component of the program.**

v. The alien must be the beneficiary of an approved Form I-129 petition classifying him or her as a Q-1. The petition for a Q-1 alien must establish:

1. **The employer in the U.S. is an eligible and qualified employer to participate in the program.**
2. **There is a qualified employee designated to administer the program.**
3. **The employer is actively doing business in the U.S.**
4. **The employer has the ability to pay the proffered wage.**
5. **The alien's wages and working conditions are comparable to local domestic employees.**
6. **The dates of birth, nationality, education, title, and job description for the alien participants.**

vi. Petitioner must be a U.S. entity and the petition may be for multiple named beneficiaries.
vii. The alien must maintain a residence abroad.
viii. Maximum period of initial admission is the validity of the I-129 petition, not to exceed 15 months.

Have students answer questions for Unit 5. Answers are in Section IV, page 73.

13. EPO #6: Classify applicants for admission to the U.S. based on established criteria for "E", "R", "TN" and "I" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

NOTE: Initial visa requests for these classifications are made at a U.S. consulate overseas (no petition or application is filed with USCIS), except the TN classification for a citizen of Canada is requested at a U.S. port of entry. USCIS adjudicators are more likely to encounter these classifications upon the filing of an application to extend nonimmigrant status or application to change to a different nonimmigrant classification.

The "E" categories are designated for an alien of any of the countries with which the U.S. maintains an appropriate Treaty of Friendship, Commerce, or Navigation, who is coming to the U.S. to carry on substantial trade, including trade in services or technology, principally between the U.S. and the treaty country, or to develop and direct the operations of an enterprise in which the alien has invested, or is actively in the process of investing a substantial amount of capital. **INA §101(a)(15)(E)(i)**; 8 C.F.R. § 214.2(e)(1).

- *E-1* TREATY TRADER

i. An alien who is coming to the U.S. solely to carry on substantial trade either on his own behalf or as an employee of a foreign person or organization engaged in trade principally between the U.S. and the foreign state of which the alien is a national.
ii. The alien must be a national of the treaty country.
iii. The trading firm the alien works for or represents must have the nationality of the treaty country.
iv. The alien must be employed in a supervisory or executive capacity, or possess skills essential to the efficient operation of the enterprise.
v. The international trade must be "substantial" in the sense that there is a sizable and continuing flow of international trade items.
vi. The alien's country must be a signatory to the trade agreement and carry on a substantial proportion of trade or services with the U.S. A substantial proportion means over 50% of the volume of

international trade of the treaty trader is conducted between the U.S. and the treaty country of the treaty trader's nationality.

vii. Trade is the existing international exchange of items of trade for consideration between the U.S. and the treaty country. Title to the trade items must pass from one treaty party to the other. Items of trade include, but are not limited to, goods, international banking, data processing, advertising, accounting, design, engineering, tourism, etc.

viii. No petition or labor certification is required. Aliens outside the U.S. seeking this classification may apply directly to the U.S. consular office abroad. Form I-129 is used only if the alien is already in the U.S. and is applying for a change of status, extension of stay, or change of employment.

ix. The alien must intend to depart the U.S. upon the expiration or termination of the E-1 visa.

x. The alien does not need to retain a foreign residence. The doctrine of dual intent applies.

- *E-2* TREATY INVESTOR

i. An alien who has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the U.S. and is coming to the U.S. solely to develop and direct the investment enterprise.

ii. The alien must be a national of the treaty country.

iii. The trading firm the alien works for or represents must have the nationality of the treaty country.

iv. If the petitioner is not the principal investor, the alien may be an employee but must be employed in a supervisory or executive capacity or possess special qualifications that are essential to the successful or efficient operation of the treaty enterprise.

v. The investment must be in an actual operating commercial enterprise or one that is in the active process of formation, not merely constituting a paper corporation. **Paper Corporation** – refers to an entity (usually a company) invested with legal powers granted to them by a state to conduct lawful business. The idea of a "paper corporation" is a company identified as a legal enterprise, which has not conducted any meaningful business. It is a corporation in paper, only.

vi. The investor must be in possession of and have control over the capital invested or being invested.

vii. Passive speculative investment in stock or real estate held for appreciation in value is not sufficient.

viii. The investment must be at risk. The capital must be subject to partial or total loss if investment fortunes reverse. Such

investment capital must be the investor's unsecured personal business capital or capital secured by personal assets.

ix. The investment must be substantial. An investment of a relatively small amount of capital in a marginal enterprise for the sole purpose of earning a livelihood is not substantial.

x. A petition or labor certification is not required. Aliens outside the U.S. who are seeking this classification may apply directly to the U.S. consular office abroad. Form I-129 is used only if the alien is already in the U.S. and if applying for change of status, extension of stay, or change of employment.

xi. The alien must intend to depart the U.S. upon the expiration or termination of the E-2 visa.

xii. The alien does not need to retain a foreign residence. The doctrine of dual intent applies.

- ***E-3*** SPECIALTY OCCUPATION WORKERS FROM AUSTRALIA

On May 11, 2005 President Bush signed into law the REAL ID Act, which created the new E-3 visa category. **INA § 101(a)(15)(E)(iii).**

i. An alien who is solely coming to the U.S. to perform services in a specialty occupation. This classification has similar requirements as an H-1B – alien that performs services in a specialty occupation.

ii. The alien must be a national of the Commonwealth of Australia.

iii. The alien must hold a U.S. baccalaureate or higher degree required by the specialty occupation or a foreign degree determined to be equivalent; or have education, specialized training and/or progressively responsible experience that is equivalent to a U.S. baccalaureate degree.

iv. The alien must hold an unrestricted license to perform the specialty occupation, if a license is required.

v. Congress has limited the number of visas to 10,500 per year.

vi. The E-3 classification requires a LCA.

vii. The E-3 alien must maintain a residence abroad.

viii. The maximum initial period of admission is two (2) years.

- ***R-1*** TEMPORARY RELIGIOUS WORKERS

This nonimmigrant classification was created in 1990, specifically for aliens seeking admission to the U.S.to perform the duties of a religious worker. The alien must be coming to the U.S. solely to carry on the vocation of a minister of tej religious denomination or to work in a professional capacity in a religious vocation or religious occupation. (INA §101(a)(15)(R); 8 C.F.R. 214.2(R)(1). USCIS has identified a significant level of fraud in this classification in recent years, and specific protocols are in place to address these issues.

Religious Occupation - means an activity, which relates to a traditional religious function. Examples include liturgical workers, religious instructors or cantors, workers in religious hospitals or religious health care facilities, missionaries, religious broadcasters. It does not include janitors, maintenance workers, clerks, fundraisers or persons involves solely in the solicitation of donations.

Religious vocation - means a calling to religious life, evidenced by the demonstration of a lifelong commitment, such as taking vows. Examples include nuns, monks, and religious brothers and sisters.

Minister - means an individual duly authorized by a recognized denomination to conduct religious worship and perform other duties usually performed by members of the clergy, such as administering the sacraments, or their equivalent. Deacons, practitioners of Christian Science and officers of the Salvation Army may be deemed ministers. The term does not include a lay preacher not authorized to perform such duties.

Professional Capacity - means an activity in a religious vocation or occupation for which the minimum of a U.S. baccalaureate degree or a foreign equivalent degree is required. An alien coming temporarily to the U.S. for the purpose of carrying on the activities of a religious worker in the vocation of a minister of a religious denomination, in a professional capacity for a religious organization, or in another religious vocation or occupation at the request of a religious organization.

- **i.** No petition or labor certification is required. Aliens outside the U.S. seeking this classification may apply directly to the U.S. consular office abroad. Form I-129 is used if the alien is already in the U.S. and is applying for a change of status, extension of stay, or change of employment.
- **ii.** The alien must maintain a residence abroad.
- **iii.** Change of employer may be authorized with the filing of a new I-129 by the new religious organization for the alien classified as R-1.
- **iv.** The maximum initial period of admission is three (3) years. Extensions of stay are authorized in the 2-year increments. Total time in the U.S. as an R-1 is limited to five (5) years. The alien may return to the U.S. in R-1 status after remaining outside the U.S. for one (1) year.
- **v.** Spouses and children of R-1 aliens are granted R-2 classification. The status for each of these derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them.

- **TN** – NAFTA

On January 1, 1994 the North American Free Trade Agreement (NAFTA) was established creating one of the largest trading areas in the world. Besides trade, it allows eligible Canadian and Mexican citizen business persons to seek temporary entry into the U.S. to engage in business activities at a professional level in one of the professions set forth in Appendix 1603.D.1 of the NAFTA. **INA § 214(e).** List of professions from Appendix 1603.D.1 of the NAFTA reprinted in 8 C.F.R. § 214.6©.

i. Examples include, but are not limited to:

1. **Accountant**
2. **Economist**
3. **Hotel Manager**
4. **Scientist**
5. **Medical Professions**
6. **Computer Systems Analyst**
7. **Engineer**
8. **Landscape Architect**
9. **Technical Publications Writer**

- *TN* - CANADIAN OR MEXICAN CITIZEN

i. A citizen of Canada or Mexico who seeks to temporarily enter the U.S. pursuant to the provisions of Section D of Annex 1603 of the NAFTA to engage in business activity at a professional level.
ii. No labor certification or LCA is required.
iii. Congress has not set any numerical limitations to this classification.
iv. Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence, so the alien must retain a residence abroad. The doctrine of dual intent does not apply.
v. A citizen of Canada seeking entry into the U.S. as TN under the provisions of the NAFTA may apply for that classification directly at a "Class A" port-of-entry (U.S. airports handling international flights or a pre-flight inspection airport abroad) where they are seeking admission. A citizen of Mexico seeking entry into the U.S. as TN under the provisions of the NAFTA may apply for that classification at a U.S. consulate or embassy in Mexico. An approved Form I-129 petition for initial entry from outside the U.S. is not required. The TN applicant must provide the following:

1. **Canadian Citizen:**

a. Evidence of Canadian citizenship.
b. A valid passport is required if the Canadian citizen is arriving from outside the Western Hemisphere.

c. A copy of their college degree/diploma and employment records which establishes qualification for the prospective job.
d. A statement or letter from their prospective U.S.-based employer offering the alien a job in the U.S. in one of the professions listed in Appendix 1603.D.1 of the NAFTA. Included in the letter is a brief summary of the alien's job duties and responsibilities, anticipated stay in the U.S., and arrangements for remuneration for services.
e. The appropriate processing fee.
f. Canadian citizens inside the U.S. in another valid nonimmigrant classification may be granted TN status by having the prospective U.S. employer request the classification by filing Form I-129 on their behalf.

2. Mexican Citizen:

a. Evidence of Mexican citizenship.
b. A copy of their college degree/diploma and employment records which establish qualification for the prospective job.
c. A statement/letter from their prospective U.S.-based employer offering the alien a job in the U.S. in one of the professions listed in Appendix 1603.D.1 of the NAFTA. Included in the letter is a brief summary of the alien's job duties and responsibilities, anticipated stay in the U.S., and arrangements for remuneration for services.
d. The appropriate processing fee.
e. Mexican citizens outside the U.S. must apply for a nonimmigrant visa in the TN classification directly to a consular office abroad.
f. Mexican citizens inside the U.S. in another valid nonimmigrant classification may be granted TN status by having the prospective U.S. employer request the classification by filing Form I-129 on their behalf.
g. Mexican citizens require a valid passport and nonimmigrant visa in the TN classification.
h. Maximum initial period of admission not to exceed one (1) year. Extensions of stay are authorized in one-year increments. There are no limits on number of extensions.

- *I* - REPRESENTATIVE OF FOREIGN INFORMATION MEDIA, SPOUSE, AND CHILD

    i. On the basis of reciprocity with the foreign country, an alien who is a bona fide representative of the foreign press, radio, film, or other foreign information media, who seeks to enter the U.S. solely to engage in such vocation, and the spouse and children of such representative. **INA § 101(a)(15)(I).**
    ii. The I classification also includes freelance media in possession of a valid contract of employment.

1. **Employees in the U. S. offices of organizations that distribute technical industrial information.**
2. **Accredited representatives of tourist bureaus, controlled, operated, or subsidized in whole or in part by a foreign government, who engage primarily in disseminating factual tourist information about that country.**

    iii. The representative's employer must have its home office in a foreign country, the government of which grants reciprocity for similar privileges to representatives of such information media having home offices in the U.S.
    iv. The representative cannot change from one type of information media to another or change employers without permission from USCIS.
    v. This classification does not include film or television media producing commercial entertainment (such as feature films or television shows).
    vi. The exception to this rule is only for informational or educational productions.
    vii. The spouse or child of the principal alien also receives the same I classification.

Have students answer questions for Unit 6. Answers are in Section IV, page 74.

14. EPO #7: Classify applicants for admission to the U.S. based on established criteria for "K" and "V" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

The K classification was originally reserved for aliens and children (if any) who were entering the U.S. as the fiancé/fiancée of a U.S. citizen. The Legal Immigration Family Equity Act (LIFE Act) of December 21, 2000 expanded the K classification to include the spouse of a U.S. citizen who is waiting for approval of the petition filed on their behalf, and the spouse's children. 66 Fed. Reg. 19390 (April 16, 2001) implemented the new

nonimmigrant visa categories including the K-3 and K-4, and allowed consular officers to issue nonimmigrant visas. Issuance of nonimmigrant visas will permit these aliens to apply for admission into the U.S. where they may await the completion of the immigration process with their U.S. citizen family member. **INA § 101(a)(15)(K)(i)**; 8 C.F.R. § 214.2(k)(1).

- *K-1* FIANCÉES AND FIANCÉS OF UNITED STATES CITIZENS

  i. An alien who seeks entry into the U.S. solely for the purpose of concluding a valid marriage to the U.S. citizen petitioner within 90 days of admission.
  ii. The alien must be the beneficiary of an approved Petition for Alien Fiancé or Fiancée (Form I-129F) pursuant to INA § 214(d). Documentary requirements to be submitted with the I-129F are as follows:

1. **The U.S. citizen petitioner and alien beneficiary must have met in person within the two (2) years immediately preceding the filing of the I-129F petition. Such evidence may include airline tickets, hotel receipts, car rental receipts, etc, showing the citizen and the alien were at the same place at the same time. The meeting requirement may be waived if it is determined that compliance would violate strict and long established customs or social practices of either the citizen or the alien.**
2. **The alien must be able to conclude a legal marriage with the petitioner. Evidence of the termination of any prior marriages - divorce decree or death certificate of the previous spouse.**
3. **The alien must be eligible to receive an immigrant visa or the K-1 visa will not be issued.**

  iii. The approval of Form I-129F shall be valid for four (4) months to allow the alien to secure a K-1 nonimmigrant visa and enter the U.S. An I-129F that has expired may be revalidated under certain conditions. The approval of any I-129F petition is automatically terminated when the petitioner dies or files a written withdrawal of the petition before the beneficiary arrives in the U.S.
  iv. An Alien may not obtain K-1 status while inside the U.S.
  v. Both the U.S. citizen and alien fiancé (e) must remain unmarried until the arrival of the alien in the U.S.
  vi. The marriage between the U.S. citizen petitioner and the fiancé (e) must take place within 90 days of the beneficiary's entry into the U.S. for the alien to remain in status.
  vii. After the K-1 alien enters the U.S. and concludes a valid marriage within 90 days to the U.S. citizen petitioner, the K-1 may apply to adjust status to that of a Lawful Permanent Resident (LPR).
  viii. Foreign residence is not required because the alien is intending to immigrate.
  ix. Period of admission is 90 days.
  x. Under the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act" or "AWA"), Pub. L. 109-248, the

adjudication of Form I-130, Petition for Alien Relative and I-129F Petition for Alien Fiancé(e), now include a discretionary component regarding the criminal history of the U.S. citizen or LPR petitioner.

xi. The Act prohibits U.S. citizens and LPRs, who have been convicted of a specified offense against a minor, from filing a family-based immigrant petition on behalf of any beneficiary, unless USCIS determines in its discretion that the petitioner poses no risk to the beneficiary.

xii. The Act also bars U.S. citizens convicted of these offenses from filing nonimmigrant visa petitions to classify their fiancé(e)s, spouses, or minor children as eligible for "K" nonimmigrant status, unless USCIS determines in its discretion that the petitioner poses no risk to the beneficiary.

INSTRUCTOR'S NOTE: Inform the students that Adam Walsh Act will be discussed in Course 247.

xiii. Children of K-1 aliens are granted K-2 classification. The status for each of these derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them. Such derivatives must meet the definition of a "child" and must be listed on their parent's I-129F petition. They may be admitted up to one (1) year after entry of the K-1.

- ***K-3*** SPOUSE OF A U.S. CITIZEN

i. An alien spouse of a U.S. citizen who is the beneficiary of a Petition for Alien Relative Form I-130 filed by the U.S. citizen spouse that is still pending. **Form I-130** – Petition for Alien Relative, a citizen or lawful permanent resident of the United States may file this form to establish the relationship to certain alien relatives who wish to immigrate to the United States. A separate form must be filed for each eligible relative. The Service processes Form I-130 as a visa number becomes available. The alien is seeking entry into the U.S. solely for the purpose of waiting for the approval of such petition and the availability of an immigrant visa. **INA § 101(a)(15)(K)(iii).**

ii. The K-3 alien must have a valid marriage to the U.S. citizen petitioner.

iii. The U.S. citizen must file Form I-129F. After approval, the alien spouse must apply for the K-3 visa at the U.S. Embassy or Consulate having jurisdiction over the place where the marriage took place, or if married in the U.S., the Embassy or Consulate having jurisdiction over the spouse's residence abroad.

iv. A K-3 nonimmigrant visa will not be issued to an alien who is the beneficiary of an approved I-130 filed by the U.S. citizen spouse.
v. An alien may not obtain K-3 status while inside the U.S.
vi. K-3 status will be automatically terminated 30 days after any of the following events:

1. **Denial or revocation of the I-130.**
2. **Denial or revocation of the immigrant visa application.**
3. **Denial or revocation of the alien's application for adjustment of status.**
4. **Divorce from the U.S. citizen petitioner.**

Note: For purposes of this section, there is no denial or revocation of a petition or application until the administrative appeal applicable to that application or petition has been exhausted.

vii. Once the Form I-130 is approved and an immigrant visa is available, the alien must file for adjustment of status.
viii. Foreign residence is not required because the alien is intending to immigrate.
ix. Period of admission is two (2) years.
x. Children of K-3 aliens are granted K-4 classification. The status for such derivatives is dependent on the status of the principle alien, and they must accompany the principle alien or follow to join them. Such derivatives must meet the definition of a "child" and must be listed on their parent's I-129F petition. K-4 status may not be obtained in the U.S.

V-1 SPOUSE OF AN LPR **Pending -** for the purposes of this section a pending petition is defined as a petition to accord a status under INA § 203(a)(2)(A) that was filed with the Service under INA § 204 on or before 12/21/2000, that has not been adjudicated.

xi. The alien spouse of a LPR who is the beneficiary of an approved Petition for Alien Relative (Form I-130), filed by the LPR seeking entry into the U.S. solely for the purpose of waiting for the availability of an immigrant visa. **INA § 101(a)(15)(V)(i).**
xii. Eligible persons residing outside the U.S. may apply for a V-1 visa at the Consular office having jurisdiction over the alien spouse's residence abroad.
xiii. The alien must have a valid marriage to the LPR petitioner.
xiv. To establish eligibility for V-1 status, the alien must show the following:

1. **Form I-130 filed with the Service on the alien's behalf by the LPR spouse was filed on or before December 21, 2000; and**
2. **Form I-130 filed with the Service on the alien's behalf by the LPR spouse remains pending after three years from the date the petition was filed, or;**
3. **Form I-130 was approved and more than three years have passed since the filing date, and either of the following circumstances exist:**
4. **Eligible persons residing inside the U.S. may apply for V-1 status while inside the U.S. Request for change of status is filed on Form I-539, with special instructions found on Supplement A to Form I-539. The application packet must also include the boimetric fee and Form I-693, Medical Examination of Aliens Seeking Adjustment of Status.**

a. there is no immigrant visa immediately available,
b. there is a pending application for an immigrant visa, or
c. there is a pending application for adjustment of status.

xv. The alien need not be maintaining a valid immigration status in the U.S. to be granted V-1.
xvi. The alien is eligible to apply for adjustment of status when an immigrant visa becomes available.
xvii. Aliens who were granted V-1 status inside the U.S. may travel abroad during the pendency of their application for adjustment of status. If they travel without permission, they will not be in danger of abandonment of the adjustment of status application. However, they must obtain a new V-1 visa at the consular office in order to return to the U.S. in V-1 status.
xviii. Under 8 C.F.R. § 215.1(j), V-1 status will be automatically terminated 30 days after any of the following events:

1. **Denial, withdrawal, or revocation of the I-130.**
2. **Denial or withdrawal of the immigrant visa application.**
3. **Denial or withdrawal of the alien's application for adjustment of status.**
4. **Divorce of the V-1 from the LPR petitioner.**

xix. If the alien appeals the denial of the I-130, the alien retains V nonimmigrant status until 30 days after the administrative appeal is dismissed.
xx. Foreign residence is not required because the alien is intending to immigrate.
xxi. The period of admission is usually two (2) years but restricted to six (6) months if:

1. The priority date of the I-130 is current, and;
2. No application for an immigrant visa or adjustment of status has been filed.

xxii. Children of V-1 LPRs are granted V-2 classification. Such derivatives must meet the definition of a "child". The child is admitted for two (2) years or until the day before his or her 21st birthday (limited to six (6) months in certain circumstances). The child must be the beneficiary of an I-130 filed on or before December 21, 2000. The I-130 petition must:

1. Have been pending with legacy INS or USCIS for at least three (3) years, Or
2. Have been approved and three (3) years have passed since the filing date and a Second Preference visa number is not yet available, OR
3. Currently have a pending application for an immigrant visa or adjustment of status.

xxiii. Derivative children of V-1 or V-2 LPRs are granted V-3 classification. Such derivatives must meet the definition of a "child" and satisfy the same requirements of the V-1 or V-2 classifications. The child is admitted for two (2) years or until the day before his or her 21st birthday (limited to six (6) months in certain circumstances).

Have students answer questions for Unit 7. Answers are in Section IV, page 74.

15. EPO #8: Classify applicants for admission to the U.S. based on established criteria for "S", "T" and "U" nonimmigrant classifications, identify the periods of admission, and identify the documentary requirements for such classifications.

- *S-5* CERTAIN ALIENS SUPPLYING CRITICAL INFORMATION RELATING TO A CRIMINAL ORGANIZATION OR ENTERPRISE

The Violent Crime Control and Law Enforcement Act of 1994, also known as the "Crime Bill" created this classification. This new "S" nonimmigrant classification allows a federal or state law enforcement authority, which includes a state or federal court or U.S. Attorney's Office, to request "S" nonimmigrant classification of certain alien witnesses and informants. Applications using Form I-854 may be made for aliens who are in other countries awaiting entry into the U.S., or for aliens who are already in this country but, whose immigration status would not otherwise permit them to remain in the U.S. **Form I-854** - Used by law enforcement agencies (LEA's) to bring alien witnesses and informants to the United States in a "S" nonimmigrant classification. This form provides the Department of State (DOS) and the USCIS with information necessary to identify the requesting LEA, the alien witness and/or informant, and others, e.g., the United

States Attorney, needing the information or testimony of that alien. It assists DOS and USCIS in the exercise of their joint responsibility to adjudicate requests by LEAs for S classification. INA § 101(a)(15)(S)(i); 8 C.F.R. § 214.2(t)(1).

i. An alien witness or informant coming to the U.S. for the purpose of providing critical information relating to a criminal matter.
ii. To qualify for S-5 classification the alien must be sponsored by an interested federal or state Law Enforcement Agency (LEA), and it must be determined by the Director, USCIS, that the alien:

1. **Possesses critical and reliable information concerning a criminal organization or enterprise;**
2. **Is willing to supply, or has supplied, such information to federal or state LEA; and**
3. **Is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise.**

iii. The interested LEA must complete Form I-854 with all necessary endorsements and attachments. The I-854 must be filed with the Assistant Attorney General, Criminal Division, Department of Justice, who will forward properly certified applications to the Director of USCIS.
iv. The LEA or U.S. attorney must certify there is a need for the alien in the U.S. and that no promises may be, have been, or will be made indicating the alien may remain in the U.S. in S or any other nonimmigrant classification, parole, adjust status to LPR, or otherwise attempt to remain in the U.S. beyond a period of three (3) years.
v. The alien, including any derivative beneficiary who is 18 years of age or older, must sign a statement agreeing to the conditions of the S-5 status.
vi. The interested LEA assumes responsibility for the S-5 alien. The alien must:

1. **Report quarterly to the LEA on whereabouts and activities,**
2. **Notify the LEA of changes in home and work telephone numbers and any travel plans,**
3. **Abide by the law and all conditions of the S-5 status,**
4. **Cooperate with the LEA.**

vii. Limited to 200 principal alien's per fiscal year.
viii. The responsible LEA will coordinate the admission of the alien with the Service as to the date, time, place, and manner of the alien's arrival.
ix. Maximum initial period of admission not to exceed three (3) years.
x. Aliens in S-5 status may be eligible for adjustment of status to LPR only if the information supplied substantially contributed to the success of an authorized criminal investigation or prosecution.

- *S-6* CERTAIN ALIENS SUPPLYING CRITICAL INFORMATION RELATING TO TERRORISM

    i. An alien witness or informant coming to the U.S. for the purpose of providing critical information relating to a counterterrorism matter.
    ii. To qualify for S-6 classification the alien must be sponsored by an interested federal LEA, and it must be determined by the Secretary of State and the Director, USCIS, that the alien:

1. **Possesses critical and reliable information concerning a terrorist organization, enterprise or operation;**
2. **Is willing to supply or has supplied such information to a federal LEA;**
3. **Is in danger or has been placed in danger as a result of providing such information; and**
4. **Is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956.**

    iii. The interested federal LEA must complete Form I-854 with all necessary endorsements and attachments. The I-854 must be filed with the Assistant Attorney General, Criminal Division, Department of Justice, who will forward properly certified applications to the Director of USCIS.
    iv. The federal LEA or U.S. attorney must certify there is a need for the alien in the U.S. and no promises may be, have been, or will be made indicating the alien may remain in the U.S. in S or any other nonimmigrant classification, parole, adjust status to LPR, or otherwise attempt to remain in the U.S. beyond a period of three (3) years.
    v. The alien, including any derivative beneficiary who is 18 years of age or older, must sign a statement agreeing to the conditions of the S-6 status.
    vi. The interested LEA assumes responsibility for the S-6 alien. The alien must:

1. **Report quarterly to the LEA on whereabouts and activities,**
2. **Notify the LEA of changes in home and work telephone numbers and any travel plans,**
3. **Abide by the law and all conditions of the S-6 status,**
4. **Cooperate with the LEA.**

    vii. Limited to 50 principal aliens per fiscal year who qualify for a reward under the Secretary of State's anti-terrorist reward program.

viii. The responsible LEA will coordinate the admission of the alien with the Service as to the date, time, place and manner of the alien's arrival.
ix. Maximum initial period of admission is not to exceed thee (3) years.
x. Aliens in S-6 status may be eligible for adjustment of status to LPR only if the information supplied substantially contributed to:

1. **The prevention or frustration of an act of terrorism against the U.S., or;**
2. **The success of an authorized criminal investigation or prosecution involving an act of terrorism against the U.S., and**
3. **The alien received a reward under section 36(a) of the State Department Basic Authorities Act of 1956.**

- *T-1* VICTIMS OF SEVERE FORMS OF TRAFFICKING IN PERSONS

This classification was created on October 28, 2000 when the Victims of Trafficking and Violence Protection Act was signed into law. The "T" classification allows victims of severe forms of trafficking in persons to remain in the U.S. if they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (unless under 15 years of age), and would suffer extreme hardship involving unusual and severe harm upon removal. **Victim of a Severe Form of Trafficking -** is anyone who has been subjected to:

a. Sex trafficking in which a **commercial sex** act is induced by force, fraud or **coercion**, or in which the person induced in the commercial sex act is under 18 years of age, or
b. The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to **involuntary servitude**, **debt bondage**, or slavery.
c. **Coercion** - means threats of serious harm to, or physical restraint against, any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person.
d. **Commercial Sex Act** - means any sex act on account of which anything

of value is given to or received by any person.

e. **Debt bondage** - means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those service as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited or defined.

Involuntary servitude – also known as peonage, means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that the person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of legal process. INA § 101(a)(15)(T)(i); 8 C.F.R. § 214.11(a).

i. An alien in the U.S. who is or has been a victim of a severe form of trafficking in persons as defined in INA § 101(a)(15)(T)(i).
ii. To qualify for T-1 nonimmigrant status, it must be demonstrated that the alien:

1. **Is a victim of a severe form of trafficking in persons;**
2. **Is physically present in the U.S., (American Samoa, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands), territories and possessions of the U.S. or at a port-of-entry thereto, on account of such trafficking in persons;**
3. **Has complied with any reasonable request for assistance in the investigation and prosecution of acts of trafficking in persons, unless the applicant is less than 15 years old;**
4. **Would suffer extreme hardship involving unusual and severe harm upon removal from the U.S.**

Any alien is ineligible if there is evidence that the alien has ever engaged in a severe form of trafficking in persons.

The alien must also be admissible to the U.S. or obtain a waiver of inadmissibility from the Service. (Exceptions apply).

Aliens requesting T-1 status must apply directly to the Vermont Service Center (VSC) on Form I-914, Application for T Nonimmigrant Status. **Form I-914** - Provides temporary immigration benefits to aliens who are victims of severe forms of trafficking in persons, and to their immediate family members, as appropriate.

The applicant must provide the following:

A completed Form I-914 with the proper filing fee.

Three (3) current photographs

Proper biometric fee

5. **Evidence demonstrating that the applicant is a victim of a severe form of trafficking in persons as set forth in 8 C.F.R § 214.11(f)**
6. **Evidence that the alien is in the U.S. as a result of an act of a severe form of trafficking in persons as set forth in 8 C.F.R. § 214.11(g)**
7. **Evidence that the alien (15 or older) has complied with reasonable requests for assistance in the investigation or prosecution of acts of severe forms of trafficking in persons as set forth in 8 C.F.R. § 214.11(h)**
8. **Evidence that the alien would suffer extreme hardship involving unusual and severe harm if he or she were removed from the U.S., as set forth in 8 C.F.R. § 214.11(i)**

iii. All applicants for T-1 status must be physically present in the U.S. at the time of application.

iv. Limited to 5,000 principal aliens granted T-1 status each fiscal year.

v. T-1 status is granted for a maximum period of three (3) years.

vi. Spouses of T-1 aliens are granted T-2 classification, once they establish the relationship to the principle T-1. Children of T-1 aliens are granted T-3 classification, once they establish the relationship to the principle T-1 alien. Parents of a minor T-1 alien (under 21 years old) are granted T-4 classification, once they establish the relationship to the principle T-1 alien. The T-1 must list each of these relatives on his or her Form I-914 or file an I-914 on the relative's behalf. The status for each of these derivative classifications may be obtained inside or outside of the U.S.

- *U-1* VICTIMS OF CRIMINAL ACTIVITY

i. This classification was created on October 28, 2000 when the Victims of Trafficking and Violence Protection Act was signed into law. The "U" classification allows victims of crimes involving "criminal activity" (who have suffered substantial physical or mental abuse) to remain in the U.S. and assist law enforcement in the prosecution of these crimes by serving as material witnesses. **Criminal Activity** - referred to in this section is that involving one or more of the following mentioned crimes, or any similar activity in violation of federal, state or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. **INA § 101(a)(15)(U)**; INA § 101(a)(15)(U)(i)(I); INA § 214(p)(1).

USCIS published the governing regulations as an "interim final rule" in September 2007.

ii. An alien who has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in this section.

iii. To qualify for U-1 status the applicant must establish that:

1. **The alien has suffered substantial physical or mental abuse as a result of having been the victim of a qualifying criminal activity.**
2. **The alien (or if the alien is a child under 16, the parent, guardian or friend) possesses information about the criminal activity involved.**
3. **The alien (or if the alien is a child under 16, the parent, guardian or friend) has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local law enforcement official, to a Federal, State or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State or local authorities investigating or prosecuting the criminal activity. The criminal activity violated the laws of the U.S. or occurred in the U.S. (including in Indian country and military installations) or in the territories and possessions of the U.S.**

iv. An alien who has suffered substantial physical or mental abuse as a result of designated criminal activity must file a Form I-918 Petition for Nonimmigrant U Status directly with the Vermont Service Center for U-1 nonimmigrant status.

v. The petition must be accompanied by a U Nonimmigrant Status Certification (Form I-918, Supplement B) from a federal, state, or local law enforcement official, prosecutor, judge, or other federal, state, or local authority investigating the criminal activity. The certification may also come from a Service official in certain circumstances. The certification shall state that the alien has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the designated criminal activity.

vi. Limited to 10,000 principal alien (U-1) visas per fiscal year, although this limit does not apply to spouses, children, parents, and unmarried siblings who are accompanying or following to join the principle alien victim.

vii. U-1 status is granted for a maximum period of four (4) years, although extensions are permitted upon certification from a certifying agency that the alien's presence in the U.S. is required for the investigation or prosecution.

viii. Aliens in U-1 status are eligible for adjustment of status to LPR after they have been physically present in the U.S. for a continuous period of three (3) years in U-1 status and their continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

ix. Spouses of U-1 aliens are granted U-2 classification, once they establish the relationship to the U-1. Children of U-1 aliens are

granted U-3 classification, once they establish the relationship to the U-1. Parents of a minor U-1 alien (under 16 years old) are granted U-4 classification, once they establish the relationship to the U-1. The status for each of these derivative classifications may be obtained inside or outside of the U.S.

INSTRUCTOR NOTE: At this time, refer students to the Appendix and Other References Section for information on the Final Rule regarding the new classifications CW-1 and CW-2 for transitional workers in the Commonwealth of Northern Mariana Islands.

II. I Specify the purpose of Form I-539, Application to Extend/Change Nonimmigrant Status and the Form I-129, Petition for a Nonimmigrant Worker, and determine eligibility requirements for nonimmigrant extension of stay under an existing nonimmigrant classification.

INSTRUCTOR NOTE: As time permits, review Forms I-539 and I-129 and accompanying instructions found in the student Appendix. **NOTE: Identify the specific portion of the Form I-129 to be used for extension of stay requests.**

1. Nonimmigrant, other than temporary workers, can use Form I-539 to request an extension of stay or change from one nonimmigrant classification to another nonimmigrant classification. With some exceptions, Form I-539 should be filed with the Service Center having jurisdiction over the applicant's place of residence.

2. Employers may use Form I-129 to petition for all aliens in the H, L, O, P and Q categories. Employers may also use this form to request an extension of stay for persons in the above classifications, or for a change of status from one nonimmigrant classification to one of the classifications shown above, as well as to E-1, E-2, R-1 or TN nonimmigrant classifications.

3. There are 6 basic questions that must be answered in the affirmative for an applicant to be eligible to apply for an extension of stay:

   a. When the applicant was admitted, was a Form I-94, Arrival-Departure Record, issued?

      NOTE: Aliens admitted from Canada as nonimmigrant visitors without a Form I-94 may file Form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document.

   b. Does the applicant's current nonimmigrant classification allow an extension of stay? (Consult the applicant's Form I-94, Arrival-Departure Record).

The following are never eligible for an extension of stay:

Nonimmigrant Classification	
C1 C2 C3	Persons transiting the U.S.
D	Crewmembers
K1 or K2	Fiancé (e) of a U.S. Citizen and dependents
S	Informants
WB or WT	A temporary visitor in the United States through the Visa Waiver Program

c. Was the applicant's Form I-94 still valid (unexpired) at the time the application was filed, regardless of the expiration date of the visa?

   If no, then the applicant is usually not eligible for extension. If the period of authorized stay as shown on the Form I-94, Arrival-Departure Record, has already expired, USCIS will not usually grant an extension of stay. There are limited exceptions.

   Applicants who believe compelling unforeseen circumstances beyond their control prevented a timely filing must include documentation.

   NOTE: The visa only needs to be valid when the alien applies for entry into the U.S.

d. Has the applicant complied with all the terms and conditions of nonimmigrant status? Some examples of noncompliance are: working or going to school in the U. S. without authorization or committing a crime since coming to the U.S.

   If no, the applicant is not eligible for extension.

e. Has the applicant complied with all U.S. laws since entry?

   If no – this means the applicant has committed a crime or broken a law and is generally not eligible for extension.

f. Is the reason for requesting an extension consistent with the purpose of the applicant's current status?

   For example, does the applicant intend to return to the foreign residence when status terminates, intend to comply with all the terms of nonimmigrant status, and has the means for material support if the nonimmigrant status does not authorize working here?

   If no, an extension of stay cannot be granted.

If you answered YES to each question, and the applicant's current nonimmigrant classification is eligible for an extension, then the applicant is prima facie eligible for the requested extension of stay.

5. The form the applicant will use to apply depends on the current nonimmigrant status. If the applicant's current status is within any of the following nonimmigrant classifications, the extension request can usually be granted.

E	H	L	O	P	Q	R	TN

1) The employer must file a Form I-129, Petition for Nonimmigrant Worker.

   Please note: Form I-129 petitions for certain kinds of workers may require a labor condition application (LCA) from the U.S. Department of Labor or other documents. Employers should carefully read the instructions and consider the time required to obtain the necessary documents that must be filed with the application.

2) Dependents cannot be included in the Form I-129. The worker's spouse and unmarried children under 21, who are in the United States as derivative beneficiaries, can use Form I-539 to apply to extend their stay to remain with the principal.

3) USCIS recommends filing the Form I-539 application with the Form I-129 petition for the principal.

4) The principal's spouse and unmarried children under 21 can file a single Form I-539 as co-applicants, if they are all in the same nonimmigrant status, or derivative status, and they are all requesting an extension to the same date. For example, if an H1B applicant has four family members and all four are in H-4 status, then one Form I-539 application should be filed, not four separate applications.

b. If NO – the applicant has a different nonimmigrant status and should apply on Form I-539. A family, including unmarried children under 21, can file a single Form I-539 together if:

   They each have the same nonimmigrant status and all want an extension to the same date. The evidence that must be submitted as part of the petition/application will be indicated in the instructions to each form. The validity of the evidence will be evaluated by the Immigration Services Officer at the time of review.

II. J Specify forms and eligibility requirements for requests to <u>change</u> from one nonimmigrant classification to a different nonimmigrant classification.

1. Nonimmigrants, other than temporary workers, may use Form I-539 to request a change from one nonimmigrant classification to another nonimmigrant classification. All H, L, O, P and Q-1 change of status requests are submitted on Form I-129.

2. There are 8 basic questions that must be answered in the affirmative for an applicant to be eligible to apply to change current nonimmigrant status to another nonimmigrant status.

   a. When the applicant was admitted, was a Form I-94, Arrival-Departure Record issued?

   If no, then unless the applicant entered the U.S. as a nonimmigrant from Canada, and has proof of his/her admission, the alien is usually not eligible to change to another nonimmigrant status.

   Applicants admitted from Canada may still be eligible if they can show that they were admitted as nonimmigrants.

   b. Is the applicant's current nonimmigrant classification one which allows an extension of stay? This information is located on the Form I-94. While most nonimmigrants may be granted a change to another nonimmigrant classification if other conditions are met, the following are never eligible to change their status:

Nonimmigrant Classification	
<u>C1</u> <u>C2</u> <u>C3</u>	Persons transiting the U.S.
<u>D</u>	Crewmembers
<u>K1</u> or <u>K2</u>	Fiancé (e) of a U.S. Citizen and dependents
<u>S</u>	Informants
<u>WB</u> or <u>WT</u>	A Visitor here temporarily under the Visa Waiver Program

   J-1 exchange visitors subject to the two-year foreign residence requirement under INA 212(e) can only change to A or G. A J-1 whose status was for the purpose of receiving graduate medical education or training, who has not received the appropriate waiver, is ineligible for any change of status.

   c. Is the applicant's nonimmigrant classification one which allows a change of status, and is the requested classification one which allows for a change of status?

Just as the applicant cannot change status FROM any of the classifications listed above, neither can the applicant change status TO any of those classifications.

USCIS receives the most change of status requests for a nonimmigrant student, i.e., F-1, to a nonimmigrant worker, i.e., H-1B.

d. Has the applicant completed any required preliminary steps to change to the desired nonimmigrant status?

   In many circumstances, applicants must file separate applications with the request to change status. For example, a visitor for pleasure, a B-2, may want to change status to become an academic or vocational student.

   1) The applicant must first be accepted by a U.S. school that is authorized to accept nonimmigrant students;

   2) The school will then issue the student a Form I-20 enrollment document;

   3) Then the student must file a Form I-901, pay the nonimmigrant student fee and

   4) When students receive proof of payment, they may apply to change status.

e. At the time the Form I-539 was accepted for filing, was the applicant's Form I-94 still valid.

   If no, then the applicant is usually not eligible to change to another nonimmigrant status. If the period of authorized stay as shown on the Form I-94, Arrival-Departure Record, has already expired – then, USCIS usually will not grant a change of status. There are limited exceptions.

   1) Applicants who believe compelling unforeseen circumstances beyond their control prevented timely filing, these applicants will need to explain those circumstances in the application and include any documents to support the claim.

   2) If the applicant's visa is expiring or has expired, remember, the visa simply lets the applicant come to the U.S. to apply to enter. The visa doesn't control the length of stay. The period for which the applicant can stay was determined upon admission to the U.S. That information if located on the Form I-94, Arrival-Departure Record, issued to the applicant upon admission to the U.S.

f. Has the applicant complied with all the terms and conditions of status?

For example, not working or going to school in the United States unless the current status authorizes or allows it, and not committing a crime since coming to the U.S.?

If no, this means that the applicant has not complied with all the terms of status and is not eligible to change to another nonimmigrant status.

g. Has the applicant complied with all the laws of the U.S. since entering the U.S.?

   If no, this means the applicant has committed a crime or broken a law is not eligible to change to another nonimmigrant status.

h. Is the reason the applicant wants to remain in the U.S. consistent with the purpose of the new requested status?

   For example, does the applicant still intend to live abroad at the termination of status, still intend to comply with all the terms of the current nonimmigrant status, and has the means of support if current nonimmigrant status does not authorize working in the U.S.?

   If no, USCIS will not grant a change of status.

   If you answered YES to each question, it appears the alien is eligible for a change of status from one nonimmigrant classification to another.

3. The form used to request a change of status depends on the status being sought. A nonimmigrant who is in the U.S. and seeks a change of status to temporary worker in the E, H, L, O, P, Q, R or TN classifications cannot personally request to change status The temporary worker's employer must file for the alien on Form I-129, Petition for a Nonimmigrant Worker. A nonimmigrant seeking to change status to that of a spouse, unmarried child under the age of 21 of a temporary worker or to classifications other than those shown above should file Form I-539, Application to Extend/Change Nonimmigrant Status. Family members of temporary workers should file the Form I-539 at the same time the employer is filing the Form I-129 for the temporary worker.

4. Nonimmigrants seeking a change of status cannot begin engaging in the activities that the new status authorizes until USCIS grants the change of status. The applicant must comply with all the terms and conditions of the current status until the application for change of status is approved. If the applicant does not comply with the terms and conditions of status, the alien will not be eligible for a change of status. Typically, if the applicant changes status in the U.S. and then leaves the country, a nonimmigrant visa in the new category must be obtained before reentry.

Have students answer questions for Unit #8 Answers are in Section IV, page 75.

V. SUMMARY –Non immigrant

Nonimmigrants constitute the largest group of people admitted to the U.S. each year. While some nonimmigrants come under categories that do not require adjudication of a petition by USCIS, many nonimmigrants must request classification through the petitioning process. Nonimmigrant categories include both employment-based classifications as well as those that are not employment-based. USCIS adjudicators need to be familiar with the purposes of the different classifications, as well as the documentation or qualifications required for each. Adjudicators may encounter these classifications through the adjudication of a newly-filed petition, or through a request to change from one nonimmigrant classification to another. In some instances, the alien's nonimmigrant status or qualifications may impact their eligibility for a different nonimmigrant classification, or their eligibility for an immigrant petition that has been filed on their behalf. This Course attempts to provide an overview of purposes and requirements for each nonimmigrant classification, as well as specific issues of relevance for adjudicators.

IV. SUMMARY - EOS/COS

In general, most nonimmigrants may be able to request to extend their stay in the nonimmigrant classification using the Form I-539, Application to Extend/Change Nonimmigrant Status. However, there are a number of requirements, and this benefit is not available to all nonimmigrant classifications or in all circumstances.

A nonimmigrant worker in the E, H, L, O, P, Q, R or TN classifications must be the beneficiary of an approved Form I-129, Petition for Nonimmigrant Worked, filed by the prospective employer. Spouses and children (unmarried and under the age of 21) of temporary workers must apply for extensions of stay on Form I-539.

All nonimmigrants seeking an extension of stay will need to prove that the purpose of the extension is consistent with their status.

V. APPLICATION

A. Laboratory

1. Unit 1: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: Aliens who are in C-2 nonimmigrant status:

a) are eligible to extend their stay.
b) are eligible for employment.
c) can transit through the U.S.
d) can change status.

Q2: The Swiss chauffeur employed by the International Atomic Energy Agency (IAEA), a recognized international organization of which Switzerland is a member, is assigned to the principal delegate to the IAEA from Switzerland and was admitted to the U.S. The chauffeur's wife, their children, and the children's nanny accompanied him. The nanny is a citizen of Mexico. Consider the nanny.

a) G-5, D/S **b) G-5, 3 Years** c) G-4, D/S d) G-4, 3 Years

Q3: A Greek flight attendant for Olympic Airlines arrived as a "deadhead crewman" aboard British Airways Flight 212 from Argentina. She was scheduled to work Olympic Flight 901 back to Frankfurt, Germany the following evening.

a) C-1, D/S **b) C-1, 29 Days** c) C-2, D/S d) C-2, 29 Days

Q4: Amanda, the Master of the tour ship Carnival, presented evidence that she had been transferred to the tour company's sister ship, the Princess, which is located at the same port. The ship's agent had completed all of the necessary paperwork for her to take command of the vessel.

a) D-1, D/S b) D-1, 29 Days c) D-2, D/S **d) D-2, 29 Days**

2. Unit 2: TRAINING EXERCISE

Q1: Gordon entered the United States as a B-2 visitor four (4) months ago. Last week he was offered a job that he would like to accept. Is Gordon eligible for employment?

a) Yes **b) No**

Q2: Zachary, a civil engineer, was approved for a B-1 visa as a Temporary Visitor for Business. He continues to be employed by his company back in England, but he would also like to earn extra money working for an unrelated company during his visit. Is Zachary eligible to work for a U.S. employer during his visit?

a) Yes **b) No**

3. Unit 3: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: A Greek national entered the United States as a B-2 "prospective student" to look for a college to attend. He was accepted at Harvard University School of Law, and he will begin classes in two months. He has now submitted his Form I-539 with the following documentation: Form I-94, copies of his passport pages, a completed and signed copy of SEVIS Form I-20, proof of residence abroad, and financial documentation. Based on the information provided, what will you do?

a. RFE for additional evidence
b. Approve the alien as a J-1, D/S
c. approve the alien as a F-1, D/S
d. Deny

Q2: A citizen of South Korea was admitted to study English full time at a prominent language institute in Philadelphia, PA. After completion of the one year English course the student is prepared to continue his education at Drexel Institute for a degree in electrical engineering. What will be the alien's next course of action in maintaining his nonimmigrant classification?

a. Do Nothing.
b. Ask the DSO to extend his stay to continue his education.
c. File Form I-539 to change his status to F-1.
d. File Form I-539 to change his status to M-1.

Q3: A J-1 exchange visitor may be subject to a two-year residence requirement in their home country upon completion of their exchange program if:

a. a private institution funded the program.
b. the alien's occupation is on the Skills List.
c. the purpose of the program is to receive graduate-level education or training in literature.
d. they changed nonimmigrant status to A or G.

4. Unit 4: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: A citizen of Singapore was admitted for three years to model the latest fall fashions for a top designer at their preview show. She has appeared on many magazine covers and billboards. Her employer filed Form I-129 requesting an extension to her stay. If approved, her nonimmigrant classification and length of her stay will be:

a) H-1B, 1 Year. b) H-1B, 2 Years. c) H-2B, 3 Years. **d) H-1B, 3 Years.**

Q2: Sue Lee, a citizen of Korea, has worked for several years as a top-level production manager for Hyundai. Last week the company filed Form I-129 for her to assume the position of Vice President of Production for the Americas with Hyundai Corporation. If approved, her nonimmigrant classification and length of her stay will be?

a) L-1A, 1 Year **b) L-1A, 3 Years** c) L-1B, 1 Year d) L-1B, 3 Years

Q3: An agent, working in consultation with the Elaborate Construction Company, filed Form I-129 for 100 employees to work in New Orleans as carpenters and rebuild homes devastated by Hurricane Katrina. If approved, the aliens' nonimmigrant classifications and length of stay will be:

a) H-2A, 3 Years. b) H-1B, 1 Year. c) H-3, 3 Years. **d) H-2B, 1 Year.**

Q4: An agent for the ABC Produce Company filed Form I-129 for 100 workers to pick produce throughout Florida. The aliens will be admitted as agricultural contract laborers for the time needed to harvest the crops. If approved, the aliens' nonimmigrant classification and length of stay will be:

a) H-2A, 3 Years. **b) H-2A, 1 Year.** c) H-2B, 3 Years. d) H-2B, 1 Year.

Q5: The Children's Hospital in Los Angeles filed Form I-129 for Marcus, a national of Poland. Marcus would participate in a training program at the hospital with children who have physical disabilities. If approved, his nonimmigrant classification and length of stay will be:

a) H-3A, 12 Months. b) H-3B, 18 Months. c) H-2A, 12 Months. **d) H-3, 18 Months.**

Q6: A citizen of Brazil has been employed for the past six years as a chemist with the UR-A-Beauty Cosmetic Company, whose home office is in Rio de Janeiro. He, along with fellow chemists, successfully developed a line of skin care products that eliminate all signs of aging and make the user appear 10 years younger. Two years ago the company opened a new office in the U.S. and recently filed Form I-129 to transfer the chemist there to continue developing innovative skin care products. If approved, his nonimmigrant classification and length of stay will be:

a) L-1A, 3 Years. b) L-1A, 1 Year. **c) L-1B, 3 Years.** d) L-1B, 1 Year.

Q7: In which one of the following "H" classifications does the doctrine of dual intent apply?

a) DOD Workers b) Agricultural Workers c) Traineesd) Unskilled Workers

5. Unit 5: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: Members of the London Symphony Orchestra were admitted for six months as part of an exchange program. Their counterparts, members of the Los Angeles Philharmonic, are currently performing at the Palladium. Both orchestras are planning additional tours to various other cities in the respective countries. The sponsor submitted Form I-129 with supporting documentation. If approved, the aliens' nonimmigrant classifications and length of stay will be:

a) P-1A, Six Months. **b) P-2, Six Months.** c) P-1B, 1 Year. d) P-3, 1 Year.

Q2: A citizen of Japan has signed a contract to play for the Los Angeles Dodgers. Three weeks ago he was in the U.S. trying out for the team and thoroughly amazed the coaching staff. His employer filed Form I-129 to change the alien's status. If approved, his nonimmigrant classification and length of his stay will be:

a) P-1A, 1 Year.**b) P-1A, 5 Years.** c) P-1B, 1 Year. d) P-1B, 5 Years.

Q3: A citizen of Indonesia was admitted as a tourist. He delighted the management at the Grand Adventure Casino at the MGM Grand Hotel where he demonstrated a unique gambling game only found in Indonesia. The game has been a component of Indonesian culture for centuries. The Grand Adventure Casino offered the alien a job and filed Form I-129 on his behalf. If approved, his nonimmigrant classification and length of his stay will be?

a) Q-1, 15 Months **b) P-3, 1 Year** c) P-1B, 1 Year d) Q-2, 3 Years

Q4: While vacationing with friends in Florida, a German citizen was interviewed for a position with the German Pavilion of Epcot Center at Disney World. She would participate in sharing the culture and some culinary delights of her homeland to the American public. Her employer filed Form I-129. If approved, her nonimmigrant classification and length of her stay will be?

a) Q-1, 15 Months b) P-3, 1 Year c) Q-1, 24 Months d) P-3, 24 Months

Q5: The doctrine of dual intent applies to which one of the following aliens?
a) P-1 b) P-2 c) Q-1 d) Q-2

6. Unit 6: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: Sahrik Tengunsiana, a Buddhist monk from Thailand, was admitted to the U.S. as a B-1 to help establish a Temple in Seattle. He has completed extensive work as a Buddhist monk in Bangkok over the past ten years and has agreed to stay as the head of the Seattle Washington order. The Temple filed Form I-129. If approved, the alien's nonimmigrant classification and length of stay will be:

a) R-1, 3 Years. b) R-1, 5 Years. c) R-2, 1 Year. d) R-2, 2 Years.

Q2: Which one of the following statements is correct concerning an investment made by an E-2 treaty investor?

a) The investment may be in a commercial enterprise formed as a "paper" corporation.
b) The investor does not need to be in possession of and have control over the capital invested or capital being invested.
c) The investor may invest in speculative assets such as stock or real estate held for appreciation in value.
d) The investor's capital must be placed at risk and subject to partial or total loss if investment fortunes reverse.

7. Unit 7: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: A Mexican national who is the beneficiary of a pending I-130 filed by her U.S. citizen husband. Since she wants to wait in the U.S. until the I-130 is adjudicated, her spouse filed Form I-129F. What will be her classification, and period of admission, when the I-129F is approved?

a) K-1, 90 Days b) K-2, 90 Days **c) K-3, 2 Years** d) K-4, 2 Years

Q2: The beneficiary of an approved I-129F is coming to the U.S. for the purpose of concluding a valid marriage. What will be her classification at entry?

a) K-1 b) K-2 c) K-3 d) K-4

Q3: A Form I-129F was filed by a United States citizen for her alien fiancée. Submitted with the petition is evidence that:

a) The beneficiary is in the U.S.
b) A visa is immediately available.
c) The couple met in person three months ago.
d) They intend to marry within one year of admission.

Q4: A USC concluded his marriage to his alien fiancé two years ago. The child of the K-1 remained behind in order to complete his schooling. He was born 17 years, 3 months, and 15 days ago. Which one of the following statements is correct?

a) The son can pick-up his K-2 visa at the consulate abroad.
b) The son is ineligible because he delayed too long to immigrate to the U.S.
c) The son is ineligible because he is now over the age of 18.
d) The son does not need a visa.

Q5: Which nonimmigrant classification allows an eligible spouse of an LPR to immigrate to the U.S. while waiting for the I-130 petition filed on their behalf to be approved?

a) K-1 b) K-3 **c) V-1** d) V-2

8. Unit 8: TRAINING EXERCISE

Determine the correct answer from the choices below.

Q1: ICE agents raided the We-Pluck-M Chicken factory and discovered 50 men and women locked in an open-bay style barracks located on the premises. Another alien, considered to be the contact, indicated they were all brought to the United States as a result of involuntary servitude. He also stated he would be happy to assist in the investigation and prosecution of the criminal enterprise. The 50 aliens may be eligible for?

a) S-5, 3 Years b) S-6, 3 Years **c) T-1, 3 Years** d) U-1, 4 Years

Q2: Referring to Question 1, above, what benefit might be available for the alien contact?

a) S-5, 3 Years b) S-6, 3 Years c) T-2, 3 Years **d) U-1, 4 Years**

Q3: Jose Escobar, a citizen of Colombia, was admitted to the U.S. to testify at a DEA trial in New York City. He was a pilot for the Cali cartel who flew drugs from Colombia to Miami.

a) S-5, 3 Years b) S-6, 3 Years c) T-1, 3 Years d) U-1, 4 Years

Q4: Referring to Question 3, above, what were the classifications given to the pilot's spouse and child?

a) S-7, 3 Years b) T-2, 3 Years c) T-3, 3 Years d) U-3, 4 Years

Q5: An alien with an approved I-914, granting her T-1 status, files a subsequent I-914 on behalf of her spouse and child. When the child enters the U.S., her classification will be:

a) S-7, 3 Years. b) T-4, 3 Years. c) T-2, 3 Years. **d) T-3, 3 Years.**

Q6: A German national living in Canada possesses critical information on international terrorist cells operating in North America. At the request of the FBI the alien is entering the U.S. to assist them in their investigation. The alien's life could be in danger due to his cooperation with the FBI in the U.S.

a) S-5, 3 Years**b) S-6, 3 Years** c) T-1, 3 Years d) U-1, 4 Years

Q7: An alien may be eligible for T-1 status provided:

d. They did not suffer hardship as a result of being a victim of a severe form of trafficking in persons.
e. They were not in the U.S. at the time of the trafficking in persons.
f. They will comply with reasonable requests for assistance from the LEA.
g. They engaged in the severe form of trafficking in persons.

Q8: Which one of the following lists of relatives can derive their status from a 23-year-old alien granted U-1 status?

a) Spouse, and Parents
b) Spouse, and Children under 21
c) Spouse, and Siblings
d) Spouse, and Married Children of any age

Q9: Of the following nonimmigrant classifications, which one can be sponsored by a state LEA?

a) S-5 b) S-6 c) T-1 d) U-1

I. APPLICATION

A. PRACTICAL EXERCISE

Determine the correct answer from the choices below.

1. Extensions of stay cannot be granted for persons who entered the U.S. under which of the following:

   a) Visa Waiver Program b) Informants c) Crewmembers **d) All of the above**

2. A nonimmigrant who is in the U.S. as a temporary worker in the E, H, L, O, P, Q, R or TN classifications may file a request for his or her extension of stay. True or False?

(FALSE: The temporary worker's employer must file for the alien on Form I-129, Petition for a Nonimmigrant Worker.)

3. A nonimmigrant seeking an extension of stay does not need to prove that the purpose of the extension is consistent with his/her status. True or False?

   (FALSE: All nonimmigrants seeking extensions of stay need to prove that the purpose of the extension is consistent with their status).

4. A nonimmigrant is eligible to change nonimmigrant classification, or apply for an extension of stay, even if the alien has committed a crime during the period of authorized stay. True or False?

   (FALSE: If the applicant has not complied with all the laws of the U.S. since entering the U.S., he or she is usually not eligible to change to another nonimmigrant classification.)

5. Change of nonimmigrant classification cannot be granted for persons who entered the U.S. under which of the following:

   a) K-1 Fiancée b) D Crewmember c) Visa Waiver Program **d) All of the above**

V. REFERENCES

A. INA § 101(a)(15), § 211, § 214, § 248

B. 8 C.F.R. § 214, § 248

C. INA §101(a) (15), § 211, § 214, § 248.

D. 8 CFR § 214, § 248

B. Practical Exercises

2. NONE.

III. REFERENCES

A. Unit 1

1. General

102 INA

214(a), (b) INA
8 C.F.R. 214.1(a)

22 C.F.R. 41.11

203(d) INA
22 C.F.R. 41.1, 41.2, and 41.3

2. International Organization Aliens
101(a)(15)(G) INA
8 C.F.R. 214.2(g)

8 C.F.R. 316.20

22 C.F.R. 41.24

3. Foreign Government Officials
101(a)(15)(A) INA
8 C.F.R. 214.2(a)
22 C.F.R. 41.21 and 41.22

4. Transits
101(a)(15)(C) INA
8 C.F.R. 214.2©(2), (3)

22 C.F.R. 41.71

5. Crewmen
101(a)(15)(D) INA
8 C.F.R. 252.1(b), (c), (d), (e), (f), (g), & (h)

8 C.F.R. 252.2

8 C.F.R. 252.4
22 C.F.R. 41.41 and 41.42

B. Unit 2

1. Temporary Visitor
101(a)(15)(B) INA
8 C.F.R. 214.2(b)

22 C.F.R. 41.31, .32, .33

8 C.F.R. 214.1(a)

9 FAM 41.31

2. Visa Waiver Program
8 C.F.R. 217.2(a)

8 C.F.R. 217

8 C.F.R. 212.1(e)

C. Unit 3

1. Academic Students and Dependents
   101(a)(15)(F) INA
   8 C.F.R. 214.2(f)

22 C.F.R. 41.61

2. Vocational Students and Dependents
   101(a)(15)(M) INA
   8 C.F.R. 214.2(m)

22 C.F.R. 41.61

3. Exchange Visitor
   101(a)(15)(J) INA
   8 C.F.R. 214.2(j)

22 C.F.R. 41.62

212(e) INA
8 C.F.R. 212.7©

22 C.F.R. 514.23

D. Unit 4

1. Temporary Workers And Trainees
   101(a)(15)(H) INA
   8 C.F.R. 214.2(h)

22 C.F.R. 41.55

2. Intra-Company Transferees
   101(a)(15)(L) INA
   8 C.F.R. 214.2(l)

22 C.F.R. 41.54

214© INA

3. Form I-129 Petitioner for a Nonimmigrant Worker
4. U.S. Dept. of Labor Forms and website

(http://www.foreignlaborcert.doleta.gov/hiring.cfm)

E. Unit 5

1. Aliens with extraordinary ability or achievement
   101(a)(15)(O) INA
   8 C.F.R. 214.2(o)

2. Members of entertainment groups and internationally recognized athletes
   101(a)(15)(P) INA
   8 C.F.R. 214.2(p)

3. Cultural Exchange Participant
   101(a)(15)(Q) INA
   8 C.F.R. 214.2(q)

22 C.F.R. 41

F. Unit 6

1. Treaty Trader and Treaty Investor
   101(a)(15)(E) INA
   8 C.F.R. 214.2(e)

22 C.F.R. 41.51

2. Religious Workers
   101(a)(15)® INA
   8 C.F.R. 214.2®

3. NAFTA

8 C.F.R. 214.6

4. Media
   101(a)(15)(I) INA

G. Unit 7

1. Fiancé/Fiancée
   101(a)(15)(K) INA
   8 C.F.R. 214.2(k)

22 C.F.R. 41.81

2. Spouse & Child of
   101(a)(15)(V) INA

3. Legal Permanent Resident Alien
   8 C.F.R. 214.2(v)

8 C.F.R. 214.15

H. Unit 8

1. Alien Witnesses Or Informants
   101(a)(15)(S) INA
   8 C.F.R. 214.2(t)

22 C.F.R. 41.83

2. Victim of Severe Form Of Trafficking in Persons
   101(a)(15)(T) INA
   214(n) INA
   245(l) INA
   8 C.F.R. 214.11

Trafficking Victims Protection Act of 2000, Division A of Pub. L. 106-386, 114 Stat. 1464, Victims of Trafficking and Violence Protection Act

3. Victim of Criminal Activity
   101(a)(15)(U) INA
   214(o) INA
   245(l) INA
   1101 (a)(15)(U) 8 U.S.C.
   1184(o) 8 U.S.C.
   1255(l) 8 U.S.C.

I. Other References

1. **Immigration and Nationality Act (INA)**: 101(a)(15); 101(b); 102; 212, 214, 217, 218, 245 and 248.
2. **Regulations: Title 8 Code of Federal Regulation** (8 C.F.R.) 212; 214; 217; 248; 316.20, and 22 C.F.R. 41
3. **Citations to major Public Laws** affecting or amending the Immigration and Nationality Act of 1952:
4. **IMMACT 90** - Immigration Act of 1990, Pub. L. 101-649, Stat. (Nov. 29, 1990).
5. **IIRIRA** - Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sep. 30, 1996).
6. **NRDAA** - Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312 (Nov. 12, 1999).
7. **VTVPA** - Victims of Trafficking and Violence Protection Act of 2000 (includes the Battered Immigrant Women Protection Act of 2000 (BIWPA) (114 Stat. 1518) Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000).
8. **LIFE** - Legal Immigration Family Equity Act, Title XI of H.R. 5548, enacted by reference in Pub. L. 106-553, 114 Stat. 2762A-142 (Dec. 21, 2000) as amended by the LIFE Act Amendments of 2000, Title XV of HR 5666, enacted by reference in Pub. L. 106-554, 114 Stat. 2763A-324 (Dec. 21, 2000).
9. **USA PATRIOT Act** - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. Law. 107-56, 115 Stat. 272 (Oct. 26, 2001).
10. **The Homeland Security Act of 2002,** P.L.107-296, 116 Stat. 2135 (Nov. 25, 2002), which re-designated the INS and its authority to the Department of Homeland Security.
11. **The Homeland Security Act of 2002 Amendments, P.L. 108-7, 117 Stat. 526 (Feb. 20, 2003).**
12. **Refer to the Appendix for information regarding the new CW-1 and CW-2 classifications for transitional workers in the Commonwealth of Northern Mariana Islands.**
13. **Adjudicator's Field Manual (AFM)**

    http://onlineplus.uscis.dhs.gov/lpBinplus/lpext.dll/Infobase/afm/afm1?f=templates&fn=document-frame.htm#afm-afm-95-menu

14. **Operational Policy Memos and Guides**

    http://onlineplus.uscis.dhs.gov/graphics/lawsregs/handman/policypro.htm

15. **Inspector's Field Manual (IFM)**

http://onlineplus.uscis.dhs.gov/lpBinplus/lpext.dll/Infobase/m450/m450-1?f=templates&fn=document-frame.htm#m450-ifm-95-menu

16. Department of State's Foreign Affairs Manual (FAM)

http://www.state.gov/m/a/dir/regs/

17. Department of Labor's website

http://www.foreignlaborcert.doleta.gov/hiring.cfm

U.S. Citizenship and Immigration Services

BASIC

ANCILLARY BENEFITS

INSTRUCTOR GUIDE

July 2010

SYLLABUS

COURSE TITLE: Ancillary Benefits

COURSE NUMBER: 224

COURSE DATE: July 2010

LENGTH AND METHOD OF PRESENTATION:

LECTURE	LAB	P.E.	TOTAL	PROGRAM
2:00	0:00	0:00	2:00	BASIC

DESCRIPTION:

This course provides an overview of statutory and regulatory provisions regarding categories of aliens eligible for employment, including those entitled as a matter of right, incident to status, or those who may be granted discretionary employment authorization.

In addition, this course addresses the issuance of advance parole documents (USCIS Form I-512) to aliens who have pending adjustment of status applications, and the consequences of travel using a Form I-512 by an alien who is inadmissible to the United States based on prior unlawful presence. Through lecture and discussion, students will become familiar with the provisions and requirements enabling the student to adjudicate applications submitted by these individuals.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given an employment authorization application or an application for advance parole in the context of adjustment proceedings, the Immigration Service Officer (ISO) will be able to make an adjudicative decision which is consistent with statutory, regulatory and USCIS policy requirements which govern each respective benefit.

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO #1: Identify the purpose for filing of Form I-765.

EPO #2: Identify the procedures for filing of Form I-765.

EPO #3: Identify eligibility requirements for employment authorization document issuance.

EPO #4: Identify procedures for adjudication of Form I-765.

EPO #5: Identify the consequences of traveling abroad while an adjustment of status application under section 245 of the Act is pending.

EPO #6: Identify how an alien requests advance parole and the criteria for granting the request.

EPO #7: Identify the effect of granting a request for advance parole.

EPO #8: Identify the consequences of travel after a grant of advance parole, if the alien is inadmissible based on prior unlawful presence.

STUDENT SPECIAL REQUIREMENTS:

Read pages 300-302 in *Immigration Law and Procedure in a Nutshell, 5th Edition,* by David Weissbrodt and Laura Danielson.

NOTE: Like other reference guides and textbooks, *Immigration Law and Procedure in a Nutshell* is written by a private author, and is **not** a U.S. Government publication. Accordingly, any opinions expressed in the text are those of the author, and not those of U.S. Citizenship and Immigration Services or the Department of Homeland Security. This text is being used to provide background information on the law to the student, in order that the student may apply that background to the duties performed by USCIS adjudicators. Additionally, the Fifth Edition of this book was published in 2005. Since the immigration law and policy is constantly changing and evolving, it is always important to verify whether there have been changes to the law or procedures when using this or other reference materials.

METHOD OF EVALUATION:

Written Examination/Multiple Choice – open book

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OUTLINE OF INSTRUCTION

I. INTRODUCTION

The INA gives the procedures for granting employment authorization and advance parole to certain classes of aliens. These individuals must make these applications on Form I-765, Application for Employment Authorization and/or Form I-131, Application for Travel Document.

II. PRESENTATION

A. EPO#1: Identify the purpose of the Form I-765, Application for Employment Authorization

1. IRCA delegated the statutory authority to the former U.S. Immigration and Naturalization Service (legacy INS) to grant employment authorization to certain eligible aliens. On March 1, 2003, service and benefit functions of the legacy INS transitioned into the Department of Homeland Security (DHS) as the U.S. Citizenship and Immigration Services (USCIS). USCIS is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. Employers must verify that each individual, who is hired, is eligible for employment in the United States, even if the individual is a United States citizen. In response to a need for a uniform means of issuing and verifying employment authorization granted to aliens, legacy INS created the Employment Authorization Document. This document is more commonly referred to as an EAD.

2. Form I-765 is called the "Application for Employment Authorization."

B. EPO#2: Identify the procedures related to filing Form I-765, Application for Employment Authorization

1. Applicant files Form I-765;

2. Application is adjudicated;

3. If approved, biometrics are scanned;

4. Images are sent to card production;

5. EAD is produced and mailed to applicant;

   a. Employment Authorization Document (EAD) is evidence of work authorization that is temporary and unrestricted. It is typically issued in one year increments. EADs are issued for several different purposes and they are covered in the next section. They are not issued to lawful permanent residents. It is a List A document in Form I-9, Employment Eligibility Verification. Employers should

check the "alien authorized to work until [insert date]" box in Form I-9. The work authorization expiration date listed in Form I-9 Section 1 will often be the expiration date of the EAD presented for Section 2 purposes. Employers will need to reverify the employee's eligibility to work in Section 3 of Form I-9. Reverification must be done on or before the expiration date:

1) Form I-766 is the new version of the EAD and has many fraud resistant qualities;

2) The previous version of the EAD was Form I-688B, which was laminated and much easier to replicate. Form I-688 (Temporary Resident) and an I-688A were also used as employment authorization documents;

3) Both the I-688B and the I-766 cards are valid for employment in the U.S., although Form I-688B is in the process of being phased-out.

C. EPO#3: Determine eligibility requirements for employment authorization document issuance.

1. Aliens who are temporarily in the United States may file this form to request an Employment Authorization Document, 8 CFR 274a.12(c):

   a. Dependent of A-1 or A-2 Foreign Government Officials;

   b. Dependent of TECRO (Taipei Economic and Cultural Representative Office) E-1 Nonimmigrant;

   c. F-1 Student Seeking OPT or if offered Off-Campus Employment under certain circumstances;

   d. Dependent of G-1, G-3, or G-4 Nonimmigrant;

   e. J-2 Spouse or Minor Child of an Exchange Visitor;

   f. M-1 Student Seeking Practical Training After Completing Studies;

   g. Dependent of NATO-1 Through NATO-6;

   h. Asylum Applicant (With a Pending Asylum Application) who filed for Asylum on or after January 4, 1995;

   i. Adjustment Applicant

   j. Applicant for Suspension of Deportation or NACARA Section 203 Applicants;

   k. Paroled in the Public Interest;

l. Deferred Action;

m. Adjustment Applicant Based on Continuous Residence since January 1, 1972;

n. B-1 Nonimmigrant who is the personal or domestic servant under certain circumstances;

o. B-1 Nonimmigrant employed by a Foreign Airline;

p. Final Order of Deportation;

q. Temporary Treatment Benefits;

r. Legalization Applicant;

s. S Nonimmigrant and qualified family members;

t. Q-2 Nonimmigrant under certain circumstances;

u. LIFE Legalization Applicant; and

v. T-2, T-3, or T-4 Nonimmigrant.

2. Aliens who are in the U.S. and authorized to work incidental to their status but may need to apply for an EAD as evidence of their authorization to work, 8 C.F.R. 274a.12(a):

a. Refugee;

b. Paroled as a Refugee;

c. Asylee (Granted Asylum);

d. K-1 Nonimmigrant Fiancé(e) of U.S. Citizen or K-2 Dependent;

e. N-8 or N-9 Nonimmigrant;

f. Citizen of Micronesia, the Marshall Islands, or Palau;

g. K-3 Nonimmigrant Spouse of U.S. Citizen or K-4 Dependent;

h. Granted Withholding of Deportation or Removal;

i. Deferred Enforced Departure (DED)/Extended Voluntary Departure;

j. Temporary Protected Status;

k. Family Unity Program;

l. LIFE Family Unity;

m. V-1, V-2 or V-3 Nonimmigrant; and

n. T-1 Nonimmigrant.

3. Other aliens who are in the U.S. and authorized to work incidental to their status but may need to apply for an EAD as evidence of their authorization to work, although not currently in the regulations:

   a. Spouse of an E-1/E-2 Treaty Trader or Investor; and

   b. Spouse of an L-1 Intracompany Transferee.

4. Aliens, not including dependents, who are authorized for employment with a specific employer incident to status and do not need to file Form I-765. Their employment authorization is evidenced on Form I-94, Arrival-Departure Record.:

   a. A-1, A-2, or A-3 Nonimmigrant - A Foreign Government Official or his or her employee;

   b. C-2 or C-3 Nonimmigrant - A Foreign Government Official in transit;

   c. E-1 or E-2 Nonimmigrant - Treaty Trader or Investor;

   d. F-1 Nonimmigrant – Student for on-campus employment and curricular practical training under certain circumstances;

   e. G-1, G-2, G-3, G-4, G-5 Nonimmigrant – A representative of an international organization or his or her employee;

   f. H-1, H-2A, H-2B, or H-3 Nonimmigrant;

   g. I Nonimmigrant – Information Media Representative;

   h. J-1 Nonimmigrant – Exchange Visitor;

   i. L-1 Nonimmigrant – Intra-company transferee;

   j. O-1 and O-2 Nonimmigrant – Extraordinary ability in the sciences, arts, education, business, or athletics and accompanying aliens;

k. P-1, P-2, or P-3 Nonimmigrant;

l. Q-1 Nonimmigrant;

m. R-1 Nonimmigrant – Religious Workers;

n. NATO employees; and

o. TN Nonimmigrants.

D. EPO#4: Identify procedures for adjudication of Form I-765.

1. Procedure:

a. Check application for jurisdiction, signature, and correct fee;

b. Verify correct section of law;

c. Verify "A" number;

d. Signature card is no longer required;

e. Check for I-94, if applicable;

f. 2 Photographs - passport type; and

g. Check for copy of applicant's last EAD, if applicable.

2. Approval:

a. Place approval stamp in "Action Stamp" block;

b. Check the "Application Approved" box and circle "Authorized" or "Extended," as appropriate;

c. Write in authorized employment dates;

d. Note any applicable conditions for the authorization for employment.

3. Other Final Actions:

a. Denial;

b. Automatic termination of employment authorization per 8 C.F.R. 274a.12;

c. EAD expires;

d. Removal proceedings instituted;

e. This action does not require the issuance of a notice of intent to revoke; and

f. Revocation by District Director.

E. EPO #5: Identify the consequences of traveling abroad while an adjustment of status application under section 245 of the Act is pending.

1. Strictly speaking, an alien who is applying for adjustment of status does not need "permission " to travel abroad

   a. Only an alien who is subject to a "no departure" order under INA 215 is legally precluded from leaving the US

   b. So a request for advance parole is *not* a request for permission to travel.

   c. Rather, it is a request for a travel document that would permit the alien to *return* to the United States after travel

   d. Advance parole, therefore, doesn't *authorize* travel; it relieves the alien of a possible *consequence* of doing so.

2. An alien who is seeking adjustment of status under section 245 of the Act, and who is in removal proceedings, *abandons* the adjustment application by leaving the United States. 8 CFR 245.2(a)(4)(ii)(A).

3. A section 245 applicant who is *not* in removal proceedings, but who travels abroad, also *abandons* the adjustment application by leaving the United States, 8 CFR 245.2(a)(4)(ii)(B), *unless*:

   a. The alien:

      1) At the time of *departure*, was in valid H-1, L-1, H-4, L-2, K-3 or K-4 nonimmigrant status;

      2) At the time of *returning* presents a valid H-1, L-1, H-4, L-2, K-3 or K-4 nonimmigrant visa (unless the alien is not required to have a visa)

      3) For H-1, L-1, H-4 and L-2 aliens, the alien also presents, at the time of *returning* the original Form I-797 filing receipt for the Form I-485

      4) For H-1 and L-1 aliens remains employed by the H-1 or L-1 employer.

      5) 8 CFR 245.2(a)(4)(i)(C).

b. The alien was in lawful V nonimmigrant status at the time of departure and, upon return, remains admissible as a V nonimmigrant.

1) 8 CFR 245.2(a)(4)(ii)(D).

c. The alien, *BEFORE* leaving the United States obtained a grant of advance parole and, upon returning to the United States with the Form I-512, was inspected at a port-of-entry and paroled into the United States.

1) 8 CFR 245.2(a)(4)(i)(B)

F. EPO #6: Identify how an alien requests advance parole and the criteria for granting the request

1. An alien requests advance parole by filing Form I-131, Application for Travel Document. A copy of the Form I-131 accompanies this module.

a. Many aliens file the Form I-131 concurrently with the Form I-485

b. It is also permissible to file the Form I-131 after filing the Form I-485

c. Effective *July 30, 2007,* an adjustment of status application is *not* required to pay the Form I-131 filing fee

1) The cost of adjudicating the Form I-131 is *included* in the Form I-485 filing fee

2) Even if the Form I-131 is filed *after* the Form I-485, no Form I-131 filing fee is required.

d. 8 CFR 103.7(b) (1) (Form I-485 filing fee listing) *as amended* 72 *Fed. Reg.* 29,851, 29,873 (May 30, 2007).

2. Advance parole is an exercise of the general parole authority under INA 212(d) (5) (A).

a. Whether to grant advance parole is a matter of USCIS discretion, and not a matter of right. INA 212(d)(5)(A)

b. USCIS may exercise this discretion, on a case-by-case basis, only if parole is justified by:

1) Urgent humanitarian reasons OR

2) Significant public benefit

c. In the past, USCIS (then, INS) took a fairly strict approach to advance parole for adjustment applicants – usually, it would be granted only for "emergencies" as commonly understood

d. More recently, USCIS has been more willing to exercise the discretion to grant advance parole

1) As the USCIS caseload has grown, the time it takes to adjudicate cases has expanded, so more people claim the need to travel

2) Also, except with respect to those who are security risks, promotion of international travel can generally be seen as providing a "significant public benefit."

e. Still, each person's case stands on its own, so the general policy in favor of international travel does not compel the grant of advance parole, if the particular individual does not merit a favorable exercise of discretion.

3. Documenting the decision on a request for advance parole

a. If the request is approved, the officer would note the approval on the Form I-131 and arrange for issuance of a Form I-512. See the sample Form I-512.

b. If the request is denied, the officer would issue a written decision notifying the person of the reason for the denial. There is no administrative appeal from the denial of advance parole.

G. EPO#7: Effect of granting a request for advance parole

1. The issuance of a Form I-512 does *not* actually constitute a grant of parole

a. Parole may only be granted to someone who is an applicant for admission. INA 212(d)(5)(A)

b. The Form I-512, rather, serves as a *travel document* that the person may use instead of a visa, in returning to the United States after going abroad.

c. Thus, besides serving as a travel document, the Form I-512 simply means that parole is *authorized* when the person arrives at a port-of-entry.

2. The actual decision about whether to parole the alien is made by the CBP inspector at the port-of-entry

a. The inspector can deny parole, if the facts that actually exist when the person returns to the United States make parole inappropriate.

b. A *separate* decision to parole (or not parole) is required each time the person arrives at a port-of-entry with the Form I-512.

c. Since the person seeking parole, by definition, is an applicant for admission, if parole is denied, the subsequent removal proceeding would be against the alien as an *inadmissible* alien under INA 212, rather than as a *deportable* alien under INA 237.

3. Parole is *not* an admission of the alien into the United States

a. INA 212(d)(5)(A) makes this statement explicitly

b. A parolee is, of course, permitted to leave the port-of-entry, and go at large in the United States

c. In contemplation of the immigration law, however, the alien is treated as if he or she were still at the port-of-entry.

d. The Supreme Court expressed this theory well in *Kaplan v. Tod,* 267 U.S. 228, 257-58 (1925):

> . . . while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. . . . When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States.

4. Effect of parole, if the adjustment application is denied.

a. As noted, a parolee, by definition, is an applicant for admission.

b. If USCIS denies adjustment, after the person has traveled based on a grant of advance parole, the subsequent removal proceeding would be against the alien as an *inadmissible* alien under INA 212, rather than as a *deportable* alien under INA 237.

c. Depending on the alien's situation, the removal proceeding may be an expedited removal proceeding under INA 235(b) (1), rather than a removal proceeding before an immigration judge under INA 240.

d. The standard Form I-512 warns aliens of these risks.

H. EPO#8: The consequences of travel using a Form I-512, if the alien is inadmissible based on prior unlawful presence.

1. Inadmissibility on the basis of unlawful presence

   a. INA 212(a)(9)(B)(i)(I) – three year bar

      1) Unlawfully present more than 180 days, less than one year

      2) Departed ***before commencement*** of removal proceedings

      3) Inadmissible if seeking admission within 3 years of departure or removal

   b. INA 212(a)(9)(B)(i)(II) – ten year bar

      1) Unlawfully present more than one year

      2) Inadmissible if seeking admission within 10 years of departure or removal

2. What constitutes departure?

   a. In *Matter of Lemus,* 24 I&N Dec. 373 (BIA 2007) , the alien claimed "departure" has a technical meaning – only a departure under threat of removal triggers 212(a)(9)(B). The Board rejected the alien's argument that the term "departure" necessarily means a "voluntary departure" in lieu of removal.

   b. The Board construed the plain language of section 212(a)(9)(B)(i)(II) of the Act to encompass any "departure" from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or a departure made wholly outside the context of a removal proceeding. The Board further found that adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i) (2000), is unavailable to an alien who is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

3. Hence, if an alien with the requisite unlawful presence leaves the United States under a grant of advance parole, the alien makes himself or herself inadmissible under INA 212(a)(9)(B).

   a. The Form I-131, the Form I-512, and the regularly-issued press releases about advance parole *all* warn aliens of this risk.

   b. Thus, if the alien travels, and becomes inadmissible, it may become necessary for USCIS to deny the Form I-485, unless the alien qualifies for a waiver of inadmissibility because:

1) Denying the alien's admission as an LPR will impose extreme hardship on USC or LPR spouse or parent of the alien (*NOTE:* extreme hardship to the alien's USC or LPR *child* or *adult son or daughter* is *not* a basis for the waiver. INA 212(a)(9)(B)(v).

   OR

2) The alien qualifies for immigration based on the approval of a Violence Against Women Act Form I-360, and establishes a substantial connection between the abuse and the alien's violation of his or her nonimmigrant status. INA 212(a)(9)(B)(iii)(IV).

   OR

3) The alien is a victim of a severe form of human trafficking, and the alien establishes the severe form of trafficking was at least one "central reason" for the alien's unlawful presence. INA§ 212(a)(9)(B)(iii)(V)

c. The AAO has recognized one situation in which an alien may no longer be inadmissible under 212(a)(9)(B)(i).

1) The alien is inadmissible only if seeking admission within 3 (or 10) years of the alien's departure

2) An application for adjustment is a "continuing" application for admission. *See, e.g., Matter of Alarcon,* 20 I&N Dec. 557 (BIA 1992).

3) If, therefore, the final decision on the Form I-485 happens *more* than 3 years after the alien's departure (or 10 years, if applicable), the alien is *no longer* inadmissible.

4) A sample decision, *Matter of P- T-* is in the materials that accompany this module.

III. SUMMARY

A. Employment Authorization

Employers must verify that each individual, who is hired, is eligible for employment in the United States, even if that individual is a United States citizen. To that end, specific aliens may require employment authorization to work. This application is made by a Form I-765, Application for Work Authorization. 8 C.F.R. 274a.12(c) discusses those aliens who are temporarily in the United States who may require work authorization. 8 C.F.R. 274a.12(a) discusses those aliens who are in the United States and require authorization incidental to their status. Other aliens who are in the United States and authorized to work incidental to status, but may need to apply for work authorization are spouses of E-1/E-2 Treaty Trader or Investors and spouses of L-1 Intracompany Transferees, although these designations are not shown in the regulations. Aliens who are authorized for employment simply by virtue of their Form I-94, Arrival-Departure Record, are listed above.

B. Advance Parole

One consequence of not applying for advance parole while in a removal proceeding is that an adjustment application could be deemed abandoned. A request for advance parole is made on a Form I-131, Application for Travel Document. The issuance of a Form I-512, Advance Parole serves as a travel document, not a visa. Most importantly, parole is not an ***admission*** into the United States. A departure from the United States on advance parole may trigger an unlawful presence bar to adjustment of status.

IV. APPLICATION

A. Laboratory

1. What is the purpose of Form I-765?

For certain aliens to apply for work authorization.

2. Which section of the INA deals with Employment Authorization?

a. 101;
b. 203; or
c. 274A.

3. Which of the following classifications does not require Form I-765?

a. Asylum applicant;
b. H-1;
c. J-2; or
d. Refugee.

4. True or False?

Should an F-1 Nonimmigrant who is eligible for Optional Practical Training file Form I-765 for employment authorization?

TRUE

B. Practical Exercises

1. NONE

V. REFERENCES

A. INA § 274A

B. 8 C.F.R. § 274a

C. INA § 212(a) (9), 212(d) (5) (A), 245

D. 8 C.F.R. § 212.5, 245.1

E. Black's Law Dictionary

F. Definitions: The Course requires a thorough understanding of the following:

TERM	DEFINITION	REFERENCE
Adjustment of status	The formal act of USCIS, or of an immigration judge, changing an alien's status from whatever it had been to the status of an alien lawfully admitted for permanent residence.	INA § 245(a) and (i), Pub. L. 89-732, and numerous other provisions that authorize adjustment of status§
Advance parole	The decision of USCIS, in advance of an alien's travel, that it is likely that the alien will be paroled, if the alien arrives at a port-of-entry into the United States. The decision is evidenced by issuance of a Form I-512.	INA § 212(d)(5)(A); 8 CFR 212.5(f)
Alien	The term "alien" means any person not a citizen or national of the United States.	INA § 101(a)(3)
Form I-131	Application for Travel Document	8 CFR 103.7(b)
Form I-485	Application to Register Permanent Residence or Adjust Status	8 CFR 103.7(b) and part 245
Form I-512	The DHS Form issued to an alien as evidence that the alien's request for advance parole has been granted.	8 CFR 212.5(f)
National of the United States	The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.	INA § 101(a)(22)
Parole	The DHS decision, as a matter of discretion, to permit an applicant for admission to come into the territory of the United States free of formal custody, but without having been admitted.	INA § 212(d)(5)(A)
Parolee	An applicant for admission who has been paroled into the United States under INA 212(d)(5)(A)	

U.S. Citizenship and Immigration Services

BASIC

EMPLOYMENT-BASED PETITIONS

COURSE 213

INSTRUCTOR GUIDE

March 2011

SYLLABUS

COURSE TITLE: Employment-Based Petitions

COURSE NUMBER: 213

COURSE DATE: March 2011

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
4:00	**0:00**	**0:00**	**4:00**	**BASIC**

DESCRIPTION:

This is a 4-hour course of lecture, discussion, and a practical exercise regarding employment-based immigrant petitions.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a file containing an employment-based petition, the officer will identify and assess the employment-based petition, the classification requested, and overall eligibility for approval of the petition.

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO #1: Identify the purpose of employment-based immigration

EPO #2: Identify the purpose of Form I-140, Immigrant Petition for Alien Worker

EPO #3: Identify the purpose and process of the labor certification

EPO #4: Identify the different employment-based immigrant categories and the general eligibility requirements for each category

STUDENT SPECIAL REQUIREMENTS:

Read pages 124-128, 134-139 in *Immigration Law and Procedure in a Nutshell, 5th Edition,* by David Weissbrodt and Laura Danielson.

NOTE: Like other reference guides and textbooks, *Immigration Law and Procedure in a Nutshell* is written by a private author, and is **not** a U.S. Government publication. Accordingly, any opinions expressed in the text are those of the author, and not those of U.S. Citizenship and Immigration Services or the

Department of Homeland Security. This text is being used to provide background information on the law to the student, in order that the student may apply that background to the duties performed by USCIS adjudicators.

Additionally, the Fifth Edition of this book was published in 2005. Since immigration law and policy is constantly changing and evolving, it is always important to verify whether there have been changes to the law or procedures when using this or other reference materials.

METHOD OF EVALUATION:

Multiple Choice Examination.

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I. INTRODUCTION

Employment-based immigration is a significant segment of immigrants and nonimmigrants coming to the United States. United States employers are permitted to file petitions for a number of professions or skills, as discussed in this Course. Congressional mandates restrict the number of visas available for immigrants (restricted by "preference category and country") and nonimmigrants (restricted by numerical "caps" in some instances). The various categories of employment-based immigrants are presented below. The nonimmigrant categories were discussed in Course 207.

II. PRESENTATION

A. EPO #1: Identify the purpose of employment-based immigration

1. The purpose of employment-based immigration is to enable companies to obtain the workers they need when those workers would otherwise be unavailable in the United States.

2. The law classifies such workers into categories, based on the general job requirements, and the perceived benefit to American society.

3. The employer must demonstrate that the job requirements fit into one of these classifications, that United States workers are not available, and that the particular alien worker meets the job requirements.

4. A certification process has been mandated and established by law, to ensure that the hiring of such alien workers will not undercut the wages and working conditions of United States workers similarly employed.

5. Obtaining alien workers is not meant to be an easy process, but one that is available to a United States company when similarly qualified United States workers are not locally available.

B. EPO #2: Identify the purpose of Form I-140, Immigrant Petition for Alien Worker

1. The Immigration and Nationality Act (Act) establishes various immigrant visa classifications, and sets the number of immigrants (other than immediate relatives of citizens and some other special immigrants) who may immigrate under each classification during each fiscal year. One broad category, established under section 203(b) of the Act, is for immigration based on employment in the United States. The Form I-140, Immigrant Petition for Alien Worker, is the form a prospective employer files to classify an alien in one of the employment-based immigrant visa preference categories.

a. In some instances, an alien (or a designated representative) may file this petition on his/her own behalf.

b. If approved, the I-140 is the first step toward the alien's becoming a lawful permanent resident (i.e., LPR) in the United States, giving him/her the right to live and work in the United States permanently.

2. Form I-140 is currently adjudicated at the Texas Service Center and the Nebraska Service Center.

3. Who can file the Form I-140 petition?

   a. The petitioner must usually be *a U.S. employer*.

   b. The employer does not have to be a U.S.-owned company.

      - The company can be foreign-owned as long as it has an office or branch in the U.S.

   c. In some cases, any person, including the alien beneficiary, may file the Form I-140. For example, the alien may self-petition if he or she can demonstrate extraordinary ability in the sciences, arts, education, business, or athletics.

   d. The filing or subsequent approval of a Form I-140 does not authorize the beneficiary to enter or remain in the United States and does not grant employment authorization.

   e. Approval of a petition merely establishes a basis for the beneficiary to apply for an immigrant visa.

      - The approval of a petition does not relieve the alien of establishing to the satisfaction of the consular officer or adjudications officer that the alien is eligible in all respects to receive a visa.

      - An approved petition gives a place in line for a visa behind others who already have approved petitions for the same classification.

4. Determining priority dates.

   a. For petitions which do not require an application for permanent employment certification, the priority date is the date the petition is received by USCIS with proper signature and correct fee.

b. For petitions which require an application for permanent employment certification, the priority date is the date the labor certification (ETA Form 9089) is accepted for processing by the Department of Labor.

5. Employment Requirements

The offer of employment must be for permanent, full-time employment at prevailing U.S. wages.

a. Permanent employment means without a fixed termination point or indefinite.

b. Full-time is not temporary or seasonal.

C. EPO#3: Identify the purpose and process of the labor certification.

1. A significant percentage of employment-based immigrant visa petitions are based on an application for permanent employment certification (ETA Form 9089) approved by the Department of Labor (DOL). In adjudicating such petitions, please note that DOL does not generally review the alien beneficiary's qualifications for the position when adjudicating the application for permanent employment certification; this authority and responsibility rests with USCIS. Thus, the adjudicators must assess these immigrant petitions to ensure that the position offered is the same or similar position that was certified by the DOL and that the alien beneficiary meets the qualifications for the position.

One important goal of the immigration laws is to ensure that employment-based immigration does not adversely affect the wages and working conditions of citizens and resident aliens already in the United States. For this reason, most E21 immigrants, and all E31, E32 and EW3 immigrants, even if qualified for the position cannot immigrate unless the Secretary of Labor certifies that there is a shortage of qualified potential employees.

Priority workers under section 203(b)(1) are not required to be the beneficiaries of approved permanent employment certifications issued by the DOL; however, aliens seeking immigrant visas pursuant to sections 203(b)(2) or 203(b)(3) generally must be the beneficiaries of approved labor certifications.

INSTRUCTOR'S NOTE: Please ask the students to locate the sections of law cited above and explain that each of these sections refers to a classification (in depth discussion below).

The DOL regulations regarding permanent employment certifications are found at 20 CFR 656; this part was amended by the DOL PERM final rule published on December 27, 2004, which took effect on March 28, 2005 (69 FR 77326).

Permanent employment certification applications are approved and issued by DOL only after the U.S. employer has complied with DOL advertising and recruiting

requirements and has established that there are no able, qualified, and available U.S. workers for the position and has rejected any U.S. job applicants for valid job-related reasons.

Prior to filing the permanent employment certification, ETA Form 9089, the employer must request a prevailing wage determination from the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment.

Appropriate recruitment must take place before the filing of the application for labor certification. The type of recruitment depends on whether the position is classified as professional or nonprofessional. At a minimum, two ads must be placed in a Sunday edition of a paper of wide circulation and a job order must be placed with the state employment agency. Professional positions require additional recruitment.

Approved labor certifications issued by DOL are certified with an official DOL certification stamp and may have a Letter of Labor Certification Determination (copy in Forms folder) attached to the front page of the document.

In general, U.S. employers filing EB-2 and EB-3 employment-based I-140 petitions must first obtain an approved labor certification application from DOL on behalf of the foreign worker.

An approved labor certification application demonstrates that:

- The employer tested labor market in the geographic area where the permanent job offer is located to establish that there are no able, qualified, and available U.S. workers who are willing to accept the permanent job offer; and

- The employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. (See 212(a)(5)(A) and (D) and 203(b)(3)(C) of the Act.)

2. There are two basic labor certification methods: individual and blanket.

   a. For an **individual labor certification**, the prospective employer must formally apply through the Department of Labor (DOL) with the Form ETA-9089 (copy in Forms folder). The prospective employer must take steps to attempt to fill the position with someone willing and able to work in the United States. If there is no willing, able and qualified U.S. employee, the Department of Labor approves the labor certification.

   b. For **blanket labor certification (Schedule A)**, the DOL has established that There is a nation-wide shortage of qualified U.S. workers, which include:

- Schedule A, Group I - Registered nurses, and physical therapists
- Schedule A, Group II - Aliens of exceptional ability in the sciences, arts, or performing arts

INSTRUCTOR'S NOTE: Please ask the students to locate the Form ETA 9089 in the Forms folder. Please review the form with the class, and point out the different sections, commenting on the purpose of each section.

Please also direct the students to the Form ETA 750 found in the Forms Folder (these are the old DOL forms that have been discontinued, but adjudicators may encounter these occasionally).

Please also briefly review the sample DOL certification in the Forms folder.

6. When examining permanent employment certifications, the Department of Labor is checking to see if the employer created a job description with minimum or maximum requirements to suit a particular alien and in effect, limit a U.S. job applicant's chances to fill this position.

7. The prospective alien employee must meet all minimum job requirements (i.e., education, training, experience) before the permanent employment certification is filed.

   a. Example: An alien would not be qualified if working towards a degree where a degree is required for the position.

   b. Example: An alien cannot anticipate having the required amount of experience by the time the certification or visa is actually issued. He or she must have the experience as of the filing date.

8. Documentary Requirements for Employment Based Immigrants.

   a. Certain employment-based immigrants are required to have Affidavits of Support (Form I-864) when they immigrate to the United States.

   - A Form I-864 is required if the petitioning employer is a relative of the alien.
   - A Form I-864 is also required if a relative of the alien owns a significant ownership interest in the petitioning company (significant ownership is currently defined as 5% or more).

b. The sponsor who files the Form I-864 Affidavit of Support must be an individual. The Form I-864 cannot be filed by a corporation, organization, or other entity.

INSTRUCTOR'S NOTE: Form I-864, Affidavit of Support will be covered in Course 220, Adjustment of Status.

6. Assessing the Petitioner's Ability to Pay the Required Wage.

INSTRUCTOR'S NOTE: Instructor should reference the May 4, 2004 USCIS Operational Memo in Memo Folder, entitled "*Determination of Ability to Pay Under 8 CFR 204.5(g)(2).*" Only brief coverage of the memo is necessary (suggest that the students read through it on their own time). Point out that this is an example of USCIS Operational policy guidance for employment-based immigrant petitions. The memo guides adjudicators on the issue of assessing an employer's ability to pay the wage offered in the file documents.

a. Any petition which requires a job offer must be accompanied by evidence that the U.S. employer had the ability to pay the proffered wage at the time the permanent employment certification application was filed, and continues to have the ability to pay the proffered wage until the beneficiary obtains permanent residence.

- Establishing that the employer has the ability to pay the proffered wage is different from establishing that the employer is already paying the proffered wage.

b. 8 CFR § 204.5(g)(2) requires that the evidence be in the form of annual reports, federal tax returns, or audited financial statements. In a case where the prospective employer employs 100 or more workers, adjudicators may accept a statement from a financial officer of the organization regarding its ability to pay the proffered wage.

- In appropriate cases the petitioner may submit, or USCIS may request, additional evidence such as profit/loss statements, bank account records, or personnel records. The burden remains on the petitioner to establish its ability to pay the wage.

c. USCIS Operational guidance, "Determination of Ability to Pay under 8 CFR 204.5(g)(2)" dated May 4, 2004 is provided as further background reading in the Memo Folder.

7. Suspect Elements in General Review of Form I-140 Petitions.

a. The following is a partial list of elements to watch for when adjudicating employment based petitions. (Course 237 Benefit Fraud and Material Misrepresentation offers more complete guidance.)

- Overly Specific Job Offer. The language of both the labor certification and the visa petition is overly precise or legalistic, which may indicate that the petitioner catered the petition to a specific alien.

- Marginal Business. The petitioning company for a multinational executive or manager appears to be only marginally doing business, especially if the beneficiary is the owner or major stockholder of the business.

- Experience or Education Not Current. The beneficiary's employment experience or education, which is being used for qualification, occurred many years earlier, and the immediate employment history has been in a completely unrelated job.

- Beneficiary Overqualified. The beneficiary's education substantially over-qualifies him or her for the job offered.

b. In many cases a request for additional evidence by the adjudications officer may resolve questions and avoid the need for a formal investigation.

c. In other cases a referral to the Fraud Detection and National Security Unit (FDNS) may be advisable.

8. Numerical Limits and U.S. Department of State (DOS) Visa Issuance.

a. Every approved immigrant petition has a priority date. The priority date is the date used to determine the availability of an immigrant visa for the beneficiary of an immigrant petition. Visas are issued in the various classifications based upon this priority date.

- For those petitions in which the filing date determines the priority date and the check was returned for non-sufficient funds, the priority date must be adjusted to the date an acceptable remittance was received.

b. The employment based immigrant classifications are divided into five preferences, discussed below, each with a yearly numerical limit prescribed by Congress as found in INA § 201.

c. The availability of visa numbers is announced monthly in the Department of State Visa Bulletin, which includes a chart showing the different preference categories and those countries impacted by the Congressional limits.

- A sample Visa Bulletin is included in the Forms folder.

INSTRUCTOR'S NOTE: Instructor should reference the sample Visa Bulletin found in the Forms folder. Note the structure and content of the bulletin, and explain that it is issued monthly by DOS. It may be helpful to spend some time reviewing the different charts and the meaning of what "current" means, and the priority date system. The students can read through the entire bulletin on their own time.

d. If the alien is in the U.S. and a visa number is immediately available, the alien may file for adjustment of status on Form I-485.

e. If the alien is overseas, the National Visa Center (NVC) will forward the approved petition to the appropriate American consulate for review, interview of the alien, and visa issuance.

9. The original approved Application for Permanent Employment Certification (ETA Form 9089) obtained from the Department of Labor must be submitted with the I-140 along with the following:

- Letter from employer on company letterhead stating employee's job offer at the required salary

- Evidence of alien's education and credentials required to show he or she meets the educational, training, experience requirements of the position

- Proof the employer is able to pay the wages indicated on the ETA 9089

D. EPO#4: Identify the various classifications of employment-based immigrants.

1. First Preference

a. E11 – Aliens with Extraordinary Ability, INA § 203(b)(1)(A);
8 CFR § 204.5(h).

Note: Read as "E-one-one"
E = Employment-Based
1 = 1st Preference
1 = 1st category

- Extraordinary Ability - means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. The extraordinary ability can be in the sciences, arts, education, business, or athletics.

- The alien, or any person on behalf of the alien, may file the Form I-140 petition with the appropriate Service Center.

  - o Permanent employment certification is NOT required for aliens classified as E11.

- The alien must have sustained national or international acclaim and recognition.

- The alien classified as E11 must be coming to the United States to continue working in their respective field, although is not required to have a specific job offer.

b. E12 – Outstanding professors and researchers, INA § 203(b)(1)(B); 8 CFR § 204.5(i).

- The professor or researcher's employment can be in any academic field and must be permanent.

  - o ACADEMIC FIELD - is defined in 8 CFR § 204.5(i)(2) as a body of specialized knowledge offered for study at an accredited United States university or institution of higher learning.

  - o PERMANENT - under 8 CFR § 204.5(i)(2) in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

- Initial Evidence.

  - o Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition.

  - o Evidence the alien has at least three years of experience in teaching and/or research in the academic field.

  - o An offer of employment from a prospective U.S. employer.

- The alien's U.S. employer must file the Form I-140 petition.

  - o Permanent employment certification is NOT required for aliens classified E12.

c. E13 – Certain multinational executives and managers, INA § 203(b)(1)(C); 8 CFR § 204.5(j).

- This classification is similar to the L-1A nonimmigrant classification except that the alien cannot be admitted to open a "new office".

In order to qualify as a multinational executive or manager, the employer must conduct business in two or more countries, one of which is the United States.

- Previous Work Experience.
    - The alien must have been employed as a manager or executive.
    - The alien must have at least one year of this experience within three years preceding the filing of the Form I-140 petition.
    - The experience must be for the same company or a subsidiary or affiliate of the firm or corporation.
- The alien's U.S. employer must file the Form I-140 petition.
    - Permanent employment certification is NOT required for aliens classified as E13.
- The prospective U.S. employer must have been doing business for at least one year.

NOTE: E14 & E15 provisions exist for classification of spouses and children of aliens in these categories.

2. Second Preference: 8 CFR § 204.5(k).

a. E21 – Aliens who are members of the Professions Holding Advanced Degrees or Aliens of Exceptional Abilities, INA § 203(b)(2)(A)

- Definitions:
    - ADVANCED DEGREE means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
    - EXCEPTIONAL ABILITY - in the sciences, arts, or business, means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

- PROFESSION - means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

- The offer of employment must demonstrate that the job requires:
    - a professional holding an advanced degree or equivalent OR
    - an alien of exceptional ability.
- The fact that an alien has an advanced degree will not qualify the alien as an E21 if the occupation does not require an advanced degree.
- The alien's U.S. employer must file a Form I-140 petition.
- Permanent employment certification is required for aliens classified E21.

NOTE: Provisions exists for E22 & E23 for spouses and children of aliens in these categories.

b. E21 – National Interest Waiver, INA § 203(b)(2)(B), 8 CFR § 204.5(k)(4)(ii).

- Certain aliens may be exempt from the requirement of a job offer and thus permanent employment certification.
    - The alien may file the petition on his/her own behalf.
    - Must have exceptional ability in the sciences, arts, or business.
    - Must submit Form ETA 9089 as it relates to the qualifications of the alien.
    - Must submit evidence to support the claim that the exemption would be in the national interest.
- Any alien physician may be granted a national interest waiver if the alien physician agrees to work full time as a physician in a certain area or areas:
    - Designated by the Secretary of Health and Human Services as having a shortage of health care professionals, or
    - At a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

INSTRUCTOR'S NOTE: Please inform the students that the "National Interest Waiver" category is not covered in detail in this course, due to its highly-specialized nature and rare occurrence.

3. In order to promote consistency in decision-making, ISOs will use the two-part approach set forth in the *Kazarian* decision (596 F.3d 1115; copy of decision is in Memo folder), for all petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, or for Aliens of Exceptional Ability.

4. The ISO must first evaluate the evidence on an individual basis to determine if it meets the criteria, and then must consider all of the evidence in totality in making the final merits determination.

5. The standard of proof applied for petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researcher, or for Aliens of Exceptional Ability is the "preponderance of the evidence" standard.

6. Please refer to the August 18, 2010, Policy Memorandum titled, "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (AFM Update AD 10-41).

7. Third Preference

   a. E31 - SKILLED WORKERS, INA § 203(b)(3)(A)(i), 8 CFR § 204.5(1)(3)(ii)(B).

   - SKILLED WORKER means an alien who is capable, at the time of the petition for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

   - The minimum requirements are at least two years of training or experience.

   - The fact that the alien has at least two years of training or experience in an occupation will not qualify the alien as a skilled worker if the occupation does not require two years of training or experience.

   - The U.S. employer must file Form I-140, accompanied by evidence that the alien has the education, training, and/or experience requirements.

   - Permanent employment certification is required for aliens classified E31.

   b. E32 – Professionals, INA § 203(b)(3)(A)(ii); 8 C.F.R. § 204.5(1)(3)(ii)(C).

- PROFESSIONAL means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

- The U.S. employer must file Form I-140 with evidence of the alien's qualifications, and evidence that the offered position requires the minimum of a baccalaureate degree.

- Permanent employment certification is required for aliens classified E-32.

- The petitioner requires the minimum of a baccalaureate degree for the position.

NOTE: Provisions exist for E34 & E35 for spouses and children of aliens in these categories.

c. EW3 – UNSKILLED WORKER (OTHER WORKER), INA § 203(b)(3)(A)(iii); 8 CFR § 204.5(1)(3)(ii)(D).

- OTHER WORKER means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

- Even if the alien has more than two years of training or experience in the occupation, if the occupation does not require at least two years of training or experience for entry, the alien is an "other worker" for purposes of inclusion in this group.

- The alien's U.S. employer must file the Form I-140.

- Permanent employment certification is required for aliens classified EW3.

NOTE: Provisions exist for EW4 & EW5 classifications for spouses and children of aliens classified EW3

8. Fourth Preference

Special Immigrant Workers (Religious Workers, e.g.), INA § 203(b)(4); 8 CFR § 204.5(m).

Provisions for employment of religious workers, and other special immigrants described in INA§ 101(a)(27), are not discussed in this course.

Note that Juvenile Court Dependents, are discussed in Course 215 in Special and Miscellaneous Immigrant Categories.

INSTRUCTOR'S NOTE: Have students cross-reference to 4th Preference Employment-Based Immigrants in the Pocket Field Guide for a quick review of the categories covered in Course 215. Emphasis should be placed on SL6, Juvenile Court Dependent because we do adjudicate these I-360s at the District level.

9. Fifth Preference (Employment Creation Immigrants): INA § 203(b)(5); 8CFR § 204.6.

   a. C51 – Employment Creation, two-year conditional.

      - Aliens classified C51 must invest at least $1,000,000 in any high employment area.
      - High Employment Area means a part of a metropolitan statistical area that at the time of investment is:
        - not a targeted employment area, AND
        - an area with an unemployment rate significantly below the national average unemployment rate.
      - The petitioner must show that a new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees.
      - Must file Form I-526, Immigrant Petition by Alien Entrepreneur.

   b. T-51 Employment Creation, two-year conditional.

      - Aliens classified T51 must invest at least $500,000 in a targeted employment area.
      - Targeted Employment Area means an area which at the time of investment is:
        - a rural area OR
        - an area which has experienced unemployment of at least 150 per cent of the national average rate.
      - The petitioner must show that a new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees.
      - Must file Form I-526, Immigrant Petition by Alien Entrepreneur.

   c. E-51 - Once the conditional status is removed, both aliens previously classified

as either a C51 or T51 will be classified E51.

- Must file Form I-829 Petition by Entrepreneur to Remove Conditions.

NOTE: Provisions exist for C52/T52/E52 and C53/T53/E53 for spouses and children of aliens in these classifications.

III. SUMMARY

Employment-based immigration is a significant segment of immigrants and nonimmigrants coming to the United States. U.S. employers are permitted to file petitions for a number of different professions or skills, as discussed in this segment. Congressional mandates restrict the number of visas available for immigrants (restricted by "preference category and country") and nonimmigrants (restricted by numerical "caps" in some instances).

IV.APPLICATION

1. IDENTIFY THE ALIEN'S CLASSIFICATION

Q1: The University of Texas filed a Form I-140 petition for a German national to immigrate to the United States to continue his research. The German national's expertise lies in the field of genetic cloning. Over the past several years he has written several articles for medical and scientific journals with an international circulation. If the Form I-140 is approved and a visa issued, what classification will he have on his I-551?

E-12

Q2: The alien's 19-year old daughter (see #1) will immigrate with her father. What classification will she derive from her father?

E-15

Q3: A citizen of the United Kingdom was petitioned for by the Yum Yum Sweet Shoppe as a wedding cake decorator. The petitioner stated on the ETA 9089 that they require cake decorators to have three years of experience. The beneficiary has seven years of experience, including her three-year apprenticeship at a premier culinary institute in London. If the petition is approved and a visa is issued what classification will be annotated on her I-551?

E-31

Q4: A Japanese citizen immigrated to the United States. He was granted LPR status based on his plan to invest $895,000 to develop a retail mall in rural Florida. What classification is annotated on his I-551?

T-51

Q5: A French citizen was admitted to accept a job with 'Beautiful Yard Landscaping Company as a laborer. The company had filed a Form I-140 petition and an ETA 9089. What classification was annotated on his I-551?

EW3

Q6: An alien was employed as the Executive Vice President of Advertising for Daimler Chrysler, in Germany, for six years. His division developed several lucrative advertising

campaigns that increased profits in the European market. Six months ago he was permanently transferred to corporate headquarters in New York City. In his new position he is Sr. Vice President of advertising projects for North America. What classification is annotated on his I-551?

E-13

Q7: The Dallas County school system in Dallas, TX, petitioned for Tasha to immigrate to the United States as a Special Education teacher. Tasha has a bachelor's degree in Special Education and has been a Special Education teacher for the past four years. An ETA 9089 was filed with the Form I-140. What classification will be annotated on her I-551?

E-32

Q8: An alien received her Masters Degree in Investment Banking in 1990. Four years later she graduated from law school, and today specializes in corporate law. She was petitioned to work as an investment lawyer for the legal division of a major financial investment firm. An ETA 9089 was filed with the Form I-140. What classification will be annotated on her I-551?

E-21

Q9: The alien's husband (see #8) will immigrate with her. What classification will be annotated on his I-551?

E-22

Q10: An alien owns two nightclub-restaurants in Chile. He recently bought a nightclub in Washington, DC for $2,000,000, and filed an I-526 petition to immigrate to the U.S. to manage his investment. If the petition is approved and a visa is issued what classification will be annotated on his I-551?

C-51

Q11: The alien's 20 year-old daughter (see # 10) will immigrate with her father. What classification will be annotated on her I-551?

C-53

2. ANSWER THE FOLLOWING

Q1: How does USCIS determine the priority dates for employment- based immigrant classifications?

If labor certification is required, the "priority date" is the date the labor certification is accepted for processing by the Department of Labor. If no labor certification is filed, the priority date is the date the Form I-140 is filed with proper signature and correct fee.

Q2: What is the purpose of a labor certification application (ETA 9089)?

To ensure that USCs and LPRs are not displaced by hiring alien workers. It is also to ensure that the prevailing wage is paid.

Q3: Which employment based immigrants require an Affidavit of Support to immigrate?

Only if the petition is filed for a relative of the petitioner or if the beneficiary has a 5% or greater ownership interest in the petitioning entity.

Q4: Which employment-based immigrant classifications do NOT require the submission of an ETA 9089?

The E-11, E-12, E-13 never requires a labor certificate and the E-21 doesn't when it is filed with a National Interest Waiver.

V. REFERENCES

A. INA 101(a)(15)

B. 8 CFR §§204 & 214

C. Nutshell Textbook
Chapter 5 Immigrants (§§5-1, 5-3, 5-4, 5-5)
Chapter 6 Nonimmigrant Visitors and Temporary Workers (§§ 6-2, 6-5, 6-8, 6-12, 6-15, 6-166-18, 6-23)

D. AFM Chapter 20 – Immigrants in General

E. AFM Chapter 22 – Employment-Based Petitions, Entrepreneurs, and Special Immigrants (Significant update occurred on September 12, 2006)

F. Department of State Visa Bulletin
(http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

G. U.S. Dept. of Labor Forms and website
(http://www.foreignlaborcert.doleta.gov/hiring.cfm)

U.S. Citizenship and Immigration Services

BASIC

BURDEN AND STANDARDS OF PROOF

INSTRUCTOR GUIDE

January 2012

SYLLABUS

COURSE TITLE: Burden and Standards of Proof

COURSE NUMBER: 261

COURSE DATE: January 2012

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
1:00	0:00	1:00	2:00	BASIC

DESCRIPTION:

This lesson is designed to introduce the student to the concepts of burden of proof and standards of proof as those concepts relate to the adjudication process. The lesson identifies how an officer determines who has the burden of proof in the application or petition process and describes the different standards of proof

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a field situation involving the adjudication of an application or petition, the officer will be able to determine if the applicant or petitioner has met the burden of proof and verify that applicable standards of proof for the benefit sought have been met.

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO#1: Define burden of proof

EPO#2: Define standards of proof

EPO#3: Explain the relationship between the burden of proof and the standards of proof

EPO#4: Identify additional requirements for meeting the burden of proof and the standards of proof

EPO#5: Apply the burden and standards of proof to an application or petition

STUDENT SPECIAL REQUIREMENTS:

None.

METHOD OF EVALUATION: Written examination/Multiple choice - open book

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OUTLINE OF INSTRUCTION

I. INTRODUCTION

This course presents an overview of the requirements to meet the burden of proof and standard of proof in order to receive a benefit from USCIS. In every decision they make, USCIS officers are called upon to analyze documents and other forms of evidence. In order to establish eligibility for the benefit sought, officers should first confirm which facts the applicant must establish in order to prove eligibility under the law, and then assess whether those facts have been established.

The burden of proof is not the same as the standard of proof. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence, or level of proof, required to prove that fact. The applicant or petitioner bears the burden of proof to demonstrate, typically by a preponderance of the evidence, or sometimes by a higher standard, that the required conditions are present and that disqualifying conditions are not present.

Typically, the standards of proof include: beyond a reasonable doubt (e.g., criminal trial and Adam Walsh determinations); clear and convincing evidence (denaturalization, I-130s based on marriage while in proceedings, and other cases specified by statute); clearly and beyond doubt (admissibility) and preponderance of the evidence (meaning "more likely than not" – most civil and administrative cases). There is also a "reason to believe" standard (analogous to "probable cause") that comes up in limited circumstances, such as selecting charges in a Notice to Appear for Removal Proceedings, or even the adjudication of an I-485. *See* INA §§ 212(a)(2)(C),(2)(I)(3).

II. PRESENTATION

A. EPO#1: Define burden of proof

1. 8 C.F.R. § 103.2(b)(1) addresses the burden of proof in submitting evidence.

   An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

2. The burden is on the petitioner or applicant to establish that he or she is eligible for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

   a. The burden of proof is always on the petitioner or applicant regardless of the type of petition or application.

b. In removal proceedings, the burden of proof is on the government to establish alienage and removability. Once that has been established, the burden of proof is on the alien to establish eligibility for relief from removal (waiver or other benefit).

QUERY: *Luciano has a B-2 Visitor's Visa that is about to expire, and he wants to continue his visit to the United States. He has his Form I-94 and his passport from Brazil. He has properly filed the Form I-539, before his B-2 status expired, to request an extension of his stay in the United States, and has included with the Form I-539 a brief statement that explains the reason for his request to extend his authorized stay and any effects the extended stay may have on his foreign employment or residency. In addition, he submits copies of his return ticket and a financial support statement. Has Luciano established his burden of proof?*

ANTICIPATED RESPONSE: *Luciano has met his burden of proof because he has provided evidence that he is eligible to request this benefit (e.g., he was not admitted for more than the amount of time he is eligible for under his visa category, and he does not fall under the classes of individuals ineligible for an extension of stay), and has provided all the documentary evidence required by USCIS. (See the Adjudicator's Field Manual, Chapter 30.2, Form I-539 instructions, and 8 CFR 214.1(c) for additional guidance).*

B. EPO#2: Define standards of proof

Typically, the standards of proof include: beyond a reasonable doubt (e.g., criminal trial and Adam Walsh determinations); clear and convincing evidence (denaturalization, I-130s based on marriage while in proceedings, and other cases specified by statute); clearly and beyond doubt (admissibility) and preponderance of the evidence (meaning more likely than not – most civil and administrative cases). There is also a "reason to believe" standard (analogous to "probable cause") that comes up in limited circumstances such as selecting charges in a Notice to Appear for Removal Proceedings or even the adjudication of an I-485. *See* INA §§ 212(a)(2)(C),(2)(I)(3).

QUERY: *The majority of cases that USCIS adjudicators encounter in their daily adjudications practice requires the preponderance of evidence standard. In the example of Luciano above, the adjudicator will evaluate all the documentary evidence that Luciano provides and make a decision to extend Luciano's stay or deny his application. Did Luciano provide sufficient evidence to meet the preponderance standard?*

ANTICIPATED RESPONSE: *In this scenario, Luciano has met, by the preponderance of evidence standard, his burden of proof. However, if Luciano were to marry while he was in removal proceedings, he would have to present additional documentation, because the required amount of evidence has become greater, and the standard of proof has now changed to clear and convincing.*

1. Comparison of Standards of Proof

There are four standards of proof that commonly occur[1] during the adjudicative process:

a. **Preponderance of evidence** means more than 50% certainty. It is also commonly expressed as "probably true" or "more likely true than not." This is the most common standard governing USCIS petitions and applications.

Preponderance Examples

- The petitioner has met the burden of proof to warrant an approval *if* the evidence in the record establishes that more likely than not:
    - the applicant possesses good moral character (Form I-360, VAWA)
    - a claimed relationship exists (Form I-130)
    - the requisite education/experience exists (Form I-129)

b. **Clear and convincing evidence** is higher than "preponderance," requiring a higher level of certainty. There are very limited circumstances when petitions will require the adjudicator to apply the "clear-and-convincing" standard, such as the I-130 *bona fide* marriage exemption, which applies to certain cases, such as INA 204(g) cases, and also 204 (a)(2)(A), where an I-130 petition will not be approved unless the petitioner provides clear and convincing evidence of the bona fides of the prior marriage by which he or she attained status, determination of citizenship of children born out of wedlock pursuant to INA § 309(a)(1) and exception to L-1 nonimmigrant visa time limitations.

An alien who claims that he or she was lawfully admitted must also prove that claim by "clear and convincing evidence." INA § 240(c)(2)(B). The alien is entitled to rely on DHS records in meeting that burden.

c. **Clearly and beyond doubt** is the standard that applies to determinations of *admissibility*. INA § 240(c)(2)(A). It also applies in determining whether an adjustment applicant is "admissible" to the United States. *Matter of Silva-Trevino,* 24 I&N Dec. 687, 709 (AG 2008); *Kirong v. Mukasey,* 529 F.3d 800 (8th Cir. 2008).

d. **Beyond a reasonable doubt** is the highest standard of evidence and requires the highest level of certainty such that there exists no reasonable doubt of the applicant's

1 Another standard of proof is the "reason to believe standard" which is akin to a "probable cause standard." The reason to believe standard is less common in day-to-day adjudication of applications and petitions, but may arise in certain limited circumstances such as the adjudication of an I-485 application for adjustment of status where there is "reason to believe" an applicant "is or has been an illicit trafficker in any controlled substance," or "has been a knowing aider, [etc.]." *See* INA § 212(a)(2)(C); *Matter of R-H-,* 7 I&N Dec. 675 (BIA 1958). Similarly, the "reason to believe" standard applies to instances of "money laundering" and a variety of "security and related grounds." *See* INA §§ 212(a)(2)(I) & 212(A)(3) respectively; *Abufayad v. Holder,* 632 F.3d 623 (9th Cir. 2011).

qualification. This standard is generally reserved for criminal proceedings, but is used in Adam Walsh cases (I-130, I-129F, I-600/A, and I-800/A) in determining that the petitioner poses no risk to the beneficiary.[2]

e. The standard of proof applied in most administrative immigration proceedings is the "preponderance of the evidence" standard. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

1. "Preponderance of the evidence" means that it is more likely than not that the beneficiary qualifies for the benefit sought. *See Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989).

2. "Preponderance of the evidence" requires a lesser body of proof than the "*clear and convincing*" standard and the "*beyond a reasonable doubt*" standard used in criminal proceedings.

3. This means "more likely than not" or slightly better than a 50% likelihood.

C. EPO#3: Explain the relationship between the burden of proof and the standards of proof

1. The burden of proof is not the same as the standard of proof. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence, or level of proof, required to prove that fact. The applicant or petitioner bears the burden of proof to demonstrate, typically by a preponderance of the evidence, or sometimes by a higher standard, that the required conditions are present and that disqualifying conditions are not present.

2. Once an applicant has met the initial burden of proof, he or she can be said to have made a "prima facie case." Presenting a prima facie case does not mean that the adjudication is over. An applicant may have established initial eligibility, but it is up to the adjudicator to determine if there are:

a. Any discretionary reasons why an application should be denied, or

b. Any facts in the record which would make the applicant ineligible for the benefit.

c. If such adverse factors do exist, it is again the applicant's burden to overcome these factors. However, 8 C.F.R. § 103.2(b)(16)(i) does require USCIS to notify the applicant/petitioner of any derogatory information that would render him/her ineligible

[2] When making risk determinations in Adam Walsh Act cases, the standard of proof is technically "beyond any reasonable doubt." See Michael Aytes, Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiance(e) under the Adam Walsh Child Protection and Safety Act of 2006 (Feb. 8, 2007), at p. 7.

for the benefit sought and that he/she be given the opportunity to rebut such information.

EXAMPLE: Luciano has logged into the USCIS website to determine the correct form and documents required in order to request an extension of his B-2 visa. He has determined that he needs to file a Form I-539 with the Texas Service Center prior to the expiration of his visa and has to pay a fee of $290.00. He has also determined that he can file the Form I-539 on-line and that USCIS will send him a decision by mail to his local address. He has included a photocopy of his valid passport and his original I-94 which notes the expiration date of his visa. Furthermore, Luciano is filing the Form I-539 for the extension at least 45 days prior to the expiration date on his I-94. He has also included a bank statement that demonstrates he has sufficient financial support while visiting the United States

In addition, Luciano is submitting a written statement explaining:

- *The reason he is requesting an extension*
- *Why the extended stay is temporary, including the arrangements Luciano has made to depart from the United States (e.g., a return ticket home)*
- *A letter from his employer, stating that Luciano's extended stay will have no effect on his foreign employment, and a statement from Luciano stating he has retained his foreign residence.*

Luciano has met the initial burden of proof, and he is said to have made a "prima facie case", meaning that on its face, or on the first appearance, the initial burden of proof has been met, and it is more likely than not that Luciano is eligible for the benefit requested.

D. EPO#4: Identify additional requirements for meeting the burden of proof and the standards of proof

1. Application of the Preponderance Standard

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.

If a petitioner provides supporting documentation that satisfies the regulatory criteria for the benefit sought:

a. *and* such documentation is legitimate (e.g., not forged, not issued in error, not inaccurate, etc.)

b. USCIS cannot unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulatory requirements.

2. Specific Regulatory Requirements

a. Additionally, the "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation.

b. Therefore, if the regulations require specific evidence, the applicant is required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability and listing the types of evidence required).

3. Statutorily Higher Standard

a. The preponderance of the evidence standard of proof, however, does not apply to those applications and petitions where a higher standard is specified by law.

b. The statute provides for a higher standard in some cases, such as the "clear and convincing evidence" standard required to rebut the presumption of a fraudulent marriage pursuant to INA § 245(e) and to determine citizenship of children born out of wedlock pursuant to INA § 309(a)(1).

4. Applying Higher Standards

a. An adjudicator should not require that evidence establish that statutory or regulatory criteria have been met "beyond a reasonable doubt," unless specifically required.

b. Nor should an adjudicator apply the "clear and convincing standard" when adjudicating unless the statute, regulation, or case law specifically requires that standard

5. The "clearly and beyond doubt" standard for admissibility

The "clearly and beyond doubt" standard does not mean that an adjudicator can properly deny adjustment on the basis of a purely hypothetical possibility that the applicant might be inadmissible. There must be at least some evidence that would permit a reasonable person to make a particular factual finding. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

If the evidence of record provides no reasonable basis for concluding that a particular inadmissibility ground may apply, the adjudicator should find that the applicant has met the "clearly and beyond doubt" standard.

Where the "clearly and beyond doubt" standard has the greater significance is in cases in which there is some reasonable evidentiary basis that indicates that the alien may be

subject to a particular inadmissibility ground. For example, the alien may have a criminal record, but whether the offense is a crime involving moral turpitude may be unclear. Or, as another example, the alien may have made some misrepresentation in a prior application, but the willfulness and materiality of the misrepresentation may not be clearly established. In these situations, the "clearly and beyond doubt" standard requires the applicant to produce evidence sufficient to resolve the issue in favor of finding that the alien is not inadmissible. For example, the alien could be asked to submit a complete copy of the record of the criminal proceeding, or could be interviewed under oath concerning the prior misrepresentation. A request for additional evidence could result in three possibilities.

- First, the evidence could establish to the adjudicator's reasoned satisfaction that the inadmissibility ground does not apply. If so, then the adjudicator should find that the alien has met the "clearly and beyond doubt" standard.

- Second, the alien does not produce the requested evidence. If so, the adjudicator would deny adjustment on the ground that the alien has not established "clearly and beyond doubt" that he or she is admissible.

- Third, the alien could submit the evidence, but the evidence may still leave the issue unclear. In this situation, also, the adjudicator would deny adjustment on the ground that the alien has not established "clearly and beyond doubt" that he or she is admissible.

Finally, the "clearly and beyond doubt" standard applies only to the issue of admissibility. The availability of a visa number, and whether to exercise discretion favorably – are governed by the general "preponderance of the evidence" standard.

In an adjustment case, therefore, the standards of proof are:

- Was the alien "admitted" or paroled? Clear and convincing evidence
- Is a visa number available? Preponderance of the evidence
- Is the alien admissible? Clearly and beyond doubt
- Then, if eligibility is established – does the alien merit a favorable exercise of discretion? Preponderance of the evidence

The majority of the adjudications will require application of the preponderance standard. Therefore, adjudicators should be aware that the national Request for Evidence (RFE) templates and Notice of Intent to Deny templates are designed for use with the preponderance standard of proof in mind. USCIS should not be requesting additional evidence if it is already more likely than not that the individual qualifies for the benefit sought. In other words, the purpose of the RFE is not to remove all doubt of ineligibility as that would be an application of a higher standard.

E. EPO#5: Apply the burden and standards of proof to an application or petition

1. Impact of Case Law

a. For each type of adjudication, there may be a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the factors present in a case. Any relevant precedent decisions or case law pertaining to a specific type of adjudication will be included in the corresponding section of the AFM.

b. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent case law.

c. The case law and regulatory guidelines provide a framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom.

d. Regardless of form type, case law consistently supports that the burden of proof is on the petitioner/applicant to establish eligibility.

2. Reviewing the Evidence

a. Adjudicators review the evidence submitted to determine whether the evidence is credible and whether as a whole it satisfies the standard of proof applicable to the particular benefit application.

b. In making this review, adjudicators examine the evidence and perform systems checks to determine whether:

1. There are any signs of possible alterations to the documents
2. There are inconsistencies in documentation and/or testimony
3. Derogatory information has come to the attention of USCIS that would call the evidence into question

3. Derogatory Information

Derogatory information may come to our attention through background and security checks, law enforcement, prior fraud investigations, or other means. As stated earlier, 8 C.F.R. § 103.2(b)(16)(i) requires USCIS to notify the applicant/petitioner of any derogatory information that would render him/her ineligible for the benefit sought and that he/she be given the opportunity to rebut such information.

4. Credibility of the Evidence

Examples of instances where the credibility of the evidence may be called into question include, but are not limited to:

- Late registered birth certificates
- Incomplete or visibly altered documents
- Incomplete transcripts or university documents not issued by authorized individual, etc.
- Inconsistencies in the applicant's immigration history, such as not listing a dependent family member in one immigration filing but listing the family member on other filings.

5. Fraud Concerns

a. Effect of potential fraud concerns on the burden of proof:

1. The burden of proof does not change simply because fraud indicators *may* be present
2. The possibility of fraud makes it more likely that the totality of the evidence will not rise to the sufficient level of proof required
3. Petitioners/applicants are given the opportunity to rebut derogatory information and/or rectify any inconsistencies

b. Note that an inconsistency can be, but is not necessarily in all cases, a fraud indicator

c. To address inconsistencies and/or possible fraud, adjudicators can:

1. Issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID)
2. Refer the case to the Center Fraud Detection Office (CFDO) or the Fraud Detection and National Security (FDNS) officer for further examination/investigation
3. Consult with law enforcement agencies through FDNS
4. Consult with a supervisor or senior officer

6. Making a Decision

If the evidence is credible, then the adjudicator determines whether the evidence meets the level of proof required for establishing eligibility for the benefit sought which will generally be preponderance of the evidence standard. Clear and convincing, clear and beyond doubt, and beyond a reasonable doubt will apply only in limited situations as specified in the laws governing such situations It is important to bear in mind that in assessing the credibility of evidence submitted, adjudicators should not apply the higher standards of proof (such as beyond a reasonable doubt), but rather consider whether it is more likely than not that the evidence is credible. For example if a letter is submitted by an "expert," is it more likely than not that the person writing the letter is an expert? Is it more likely than not that the things said in the letter are true? If so, then the applicant/petitioner has met their burden of proof by a preponderance of the evidence standard.

III. SUMMARY

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

The burden of proof is not the same as the standard of proof. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence required to prove that fact. USCIS officers are required to analyze documents and other forms of evidence in order to establish eligibility.

USCIS officers most often apply the "preponderance of evidence" standard when adjudicating applications and petitions. Other higher standards may be applied, depending upon the benefit sought and the statutes and regulations governing specific benefits.

IV. APPLICATION

A. Laboratory

1. None

B. Practical Exercises- Knowledge Check

1. Describe Burden of Proof.

   ANSWER: An applicant or petitioner has the burden or duty to establish that he or she is eligible for the requested benefit at the time of filing the application or petition.

2. List the four standards of proof.

   ANSWER:
   A. Preponderance of evidence
   B. Clear and convincing evidence
   C. Clearly and beyond doubt
   D. Beyond a reasonable doubt

3. State the difference between burden of proof and standards of proof.

   ANSWER: The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence required to prove that fact.

4. Describe a "Prima facie case".

   ANSWER: Once an applicant has met the initial burden of proof, he or she is said to have made a "prima facie case", meaning that on its face, the initial burden of proof has been met.

5. When is the "clearly and beyond doubt" standard applied?

   ANSWER: In cases in which there is some reason to believe that an alien may be inadmissible, or subject to a particular inadmissibility ground.

C. Practical Exercises – Case scenarios

For each of the scenarios below, provide the following information:

- Which application or petition is required?
- What standard of proof is required?
- What evidence meets that standard?
- Do you have sufficient information to make a final decision?
- If not, what additional documentation is required?
- What is your decision at this point?

1. Meghan is a 31-year-old nurse from Ireland. She has been in the United States for approximately twelve years. She received her permanent resident status after her employer, Atlantis Research and Medical Center, filed an employment-based petition for her. Last year, Meghan became a naturalized United States citizen. Six months ago, Meghan's mother called with the devastating news that Meghan's father had a pulmonary embolism and suddenly passed away. Meghan's mother is not coping very well alone. She has no children in Ireland and no siblings or other close family, as she grew up in the parish orphanage. The parish priest called Meghan two weeks ago to ask Meghan to bring her mother to the United States to live, as he fears for her mother's well-being.

   ANSWER: I-130 Petition for Alien Relative; preponderance of the evidence, see instructions on the I-130 petiton, insufficient evidence at this time; consult the I-130 instructions. RFE for additional information.

2. Dieter is a 29-year-old software engineer from Germany. He is currently employed in that capacity by Calvacade Worldwide Systems in the United States. He received his permanent residence status five years ago, after his employer filed a petition on his behalf. He met his wife, Karla, at work and they have recently returned from their honeymoon in Tahiti. Dieter now wants to become a United States citizen.

   ANSWER: N-400; Application for Naturalization; preponderance of the evidence; see instructions on the N-400, insufficient evidence at this time to make a decision; consult instructions on the N-400 for additional documention; RFE for additional information.

3. Federigo is a native and citizen of Spain. He lives in the United States and works as a research scientist at the National Institute of Health in his field of expertise, autoimmune diseases. He has been in the United States for over 20 years and became a United States citizen five years ago. His favorite sister, Alegria, still resides in Spain, as she was the primary caregiver for Federigo's and Alegria's widowed mother, until she passed away last year. Now, Federigo wants to ask Alegria to come to the United States to live. He has already found housing and employment for her.

ANSWER: I-130, Petition for Alien Relative, preponderance of the evidence; see instructions on the I-130; insufficient evidence at this time to make a decision; consult instructions on the I-130 for additional documentation requirements; RFE for additional information.

4. Lucas is a psychiatrist from Canada who now has a practice in Seattle. He and his wife, Lily, divorced three months ago, after being married for only a year. Lucas received his permanent resident status after Lily filed a petition for him as the spouse of a United States citizen, and the divorce followed within three months. Now, Lucas must appear at the United States Immigration Service Office for his interview to request removal of the conditional status of his permanent residence. However, since Lily and he are no longer married, he must appear alone for his interview.

   ANSWER: I-751, Waiver of Joint Petition to Request Removal of Conditions, preponderance of the evidence; see instructions on the I-751 petition; insufficient evidence at this time to make a decision; consult instructions on the I-751 for additional documentation requirements; RFE for additional information.

5. Andrea is a 29-year-old respiratory therapist from Amsterdam, who now resides in San Diego. She came to the United States eleven years ago to attend the University of Southern California where she obtained her Bachelor of Science Degree, with additional practical training as a respiratory therapist at the University Hospital of San Diego. The University Hospital was so impressed with Andrea's dedication and ability to work with small children as well as adults in respiratory distress that the hospital filed an employment petition on Andrea's behalf. Andrea became a permanent resident five years ago and last month became a naturalized citizen. Andrea's first love, Jordan, recently came back into her life and they have been communicating by email and phone calls. When Andrea returned home for a Christmas visit, Jordan proposed and Andrea accepted. How can Jordan come to the United States to be with the love of his life?

   ANSWER: Andrea should file the I-129 F, Petition for Alien Fiance; preponderance of the evidence; see instructions on the I-129-F Petition; insufficient evidence at this time to make a decision; consult instructions on the I-129-F Petition for additional documentation requirements; RFE for additional information.

V. REFERENCES

1. 8 C.F.R. § 103.2(b)(1)thru(17), 8 C.F.R. § §204.1, 8 C.F.R. §204.5(h)(3)
2. INA § 245, INA § 309(a)(1).

U.S. Citizenship and Immigration Services

BASIC

ADMINISTRATIVE AND JUDICIAL APPEALS

INSTRUCTOR GUIDE

December 2011

SYLLABUS

COURSE TITLE: Administrative and Judicial Appeals

COURSE NUMBER: 236

COURSE DATE: December 2011

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
4:00	0:00	0:00	4:00	BASIC

DESCRIPTION:
This is a 4-hour course of lecture, discussion, and laboratory exercises with emphasis on the administrative and judicial appeals process as it relates to a USCIS decision. Basic guidance on legal citation methods and formats is included.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a USCIS adjudicative decision, the adjudicator will be able to identify the different avenues of administrative and judicial appeal available to the petitioner and/or applicant, and identify the roles of the adjudicator and USCIS counsel in these processes.

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO #1: Define the role, authority and jurisdiction of the USCIS Administrative Appeals Office (AAO).

EPO #2: Define the role, authority and jurisdiction of the Board of Immigration Appeals (BIA).

EPO #3: Identify the different courts in the federal judicial system, the type of lawsuits filed in federal court challenging USCIS decisions, and the respective roles of USCIS counsel and adjudicators during federal litigation.

EPO #4: Define the role of the immigration courts and the removal process in the federal immigration system.

EPO #5: Identify the sources and impact of administrative and judicial case precedent.

STUDENT SPECIAL REQUIREMENTS:

Read pages 307-316 in *Immigration Law and Procedure in a Nutshell, 5th Edition,* by David Weissbrodt and Laura Danielson.

> **NOTE:** Like other reference guides and textbooks, *Immigration Law and Procedure in a Nutshell* is written by a private author, and is **not** a U.S. Government publication. Accordingly, any opinions expressed in the text are those of the author, and not those of U.S. Citizenship and Immigration Services or the Department of Homeland Security. This text is being used to provide background information on the law to the student, in order that the student may apply that background to the duties performed by USCIS adjudicators.
>
> Additionally, the Fifth Edition of this book was published in 2005. Since the immigration law and policy is constantly changing and evolving, it is always important to verify whether there have been changes to the law or procedures when using this or other reference materials.

METHOD OF EVALUATION:

Written Examination – Multiple Choice (Open Book)

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OUTLINE OF INSTRUCTION

I. INTRODUCTION

USCIS is a component of the Department of Homeland Security, responsible for administering immigration benefits. Many USCIS decisions are appealable to administrative appellate entities. USCIS decisions may also be challenged in the federal court system. It is therefore important for adjudicators to understand the administrative and judicial appeals process.

Most USCIS decisions may be appealed through one of two administrative appellate entities: the USCIS Administrative Appeals Office (AAO) or the Board of Immigration Appeals (BIA). The AAO and BIA have jurisdiction over specific types of appeals, which will be discussed in this course. The AAO is an office within USCIS, while the BIA is a part of the Executive Office for Immigration Review (EOIR) within the U.S. Department of Justice.

This course also addresses litigation in the federal court system, as many decisions may also be challenged in federal court. Some decisions of the BIA or AAO are appealed to a federal court, while other cases begin in the federal court system as a challenge to USCIS action or inaction.

Additionally, there may be parallel proceedings before USCIS and the Immigration Court (part of EOIR). As an example, an immediate relative petition may be pending with USCIS while the beneficiary is the subject of removal proceedings before the Immigration Court. Some decisions of USCIS may be reviewed or renewed in removal proceedings, such as the denial of adjustment of status, or termination of conditional resident status. Accordingly, this course provides an overview of the removal process before EOIR and discusses the interaction among EOIR, USCIS, and Immigration and Customs Enforcement (ICE) who represents USCIS in Immigration Court.

Lastly, this Course discusses the sources and importance of precedent case law from the BIA, AAO and the federal courts, since this case law may provide the applicable law in a given case. Precedent decisions are also discussed in BASIC Course 201, *INA, Regulations, Precedents and Policy.*

INSTRUCTOR NOTE: To help students visualize the roadmap of the BASIC curriculum, and to suggest available review materials, Instructors should remind students that other BASIC courses contain additional coverage of the issues and concepts presented in this course, including:

The sources and function of precedent case law, introduced in the BASIC INA, Regs., Precedents, Policies Course 201;

Instruction on the use of case law in USCIS decisions, included in BASIC Legal Decision Writing Course 228;

Instruction on the handling of AAO/BIA motions and appeals, presented in BASIC Requests for Evidence, etc. Course 231;

The interplay between USCIS and ICE in the immigration court and removal process, which will be covered again in the BASIC Notices to Appear (NTA) Course 239.

Purpose, sources, publication and locating of precedent decisions is discussed in BASIC Using Electronic Law Books Course 249.

II. PRESENTATION

A. EPO #1: Define the role, authority and jurisdiction of the USCIS Administrative Appeals Office (AAO).

1. Overview of the Administrative Appeals Office (AAO)

   a. The Administrative Appeals Office (AAO) is the appellate body within USCIS that decides appeals from certain denied immigration petitions and applications and enters the final administrative decision for USCIS.

   b. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security. The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii), as it existed on February 28, 2003. Pursuant to 8 C.F.R. § 2.1, the Secretary of Homeland Security delegated authority to exercise jurisdiction over appellate matters described in 8 C.F.R. § 103.1(f)(3)(iii) to USCIS.[1]

2. AAO Organizational Structure: includes a Chief, a Deputy Chief, Branch Chiefs, Appeals Officers, and Support Staff.

3. AAO Jurisdiction: The AAO maintains appellate jurisdiction over 47 specific case types, originating in all District Offices, Overseas Offices and Service Centers. Case types included in the AAO's jurisdiction include:

   a. Employment-based Immigrant Visa Petitions (including National Interest Waivers, Multinational Managers or Executives, Labor Certification) (Form I-140)

[1] *See Delegation to the Bureau of Citizenship and Immigration Services,* Delegation No. 0150.1, Section II.U.

b. Employment-based Nonimmigrant Visa Petitions (including H-1B, H-2B, H-3, L-1, O, P, Q) (Form I-129)

c. Alien Entrepreneur Petitions (Form I-526)

d. Special Immigrant Religious Worker Petitions (Form I-360)

e. Applications for Certificate of Citizenship (Form N-600)

f. Waivers of Inadmissibility (Form I-601)

g. Permission to Reapply for Admission (Form I-212)

h. Temporary Protected Status (Form I-821)

i. Legalization Applications

j. Orphan Petitions (Form I-600)

k. VAWA Petitions (Form I-360)

l. Fiancé/Fiancée Petitions (Form I-129F)

m. Special Immigrant Juvenile Petitions (Form I-360)

n. Applications for Travel Document (Form I-131)

* AAO jurisdiction does ***not*** extend to decisions on Form I-130, Petition for Alien Relative; Form I-360, Petition for Widow(er); or USCIS decisions regarding waivers of inadmissibility for nonimmigrants under INA § 212(d)(3). The Board of Immigration Appeals (BIA) has jurisdiction over these appeals. (See EPO #2).

4. AAO Filing Procedures for Appeals

a. Appeals to the AAO are filed at the USCIS office that denied the application or petition. The appeal is filed by the person or entity with legal standing in the proceeding.

b. The person appealing may be represented by an attorney or other representative.

c. A brief or statement, and additional evidence, may be submitted with the appeal.

d. The petitioner or representative may also request oral argument. 8 C.F.R. § 103.3(b).

e. USCIS adjudicators should follow local procedures and protocols for the transmittal of appeals to AAO, as well as remand requests and certifications.

f. Since the AAO is an office within USCIS, the Alien Registration File (A-file), a copy of the A-file, or the Receipt File is sent to the AAO. No separate Record of Proceeding is created. In contrast, a Record of Proceeding is created for the BIA, and the A-file/copy is never sent to the BIA.

INSTRUCTOR NOTE: Instructor should remind students of the coverage received in BASIC Requests for Evidence, etc. Course 231 of the processing of Motions & Appeals to AAO.

5. AAO Precedent Decisions

a. AAO "precedent" decisions are published decisions that are binding on all USCIS employees in the administration of the Immigration and Nationality Act. *See* 8 C.F.R. § 103.3(c).

b. AAO decisions that are chosen for publication as "precedent" currently must be approved by the U.S. Attorney General (Dept. of Justice).[2] The source and significance of precedent decisions generally is discussed later in this Course.

6. USCIS may designate AAO decisions as "Adopted Decisions" to serve as precedent in all proceedings involving the same issues. In an "adopted decision," the Director of USCIS will issue an Operational Memo formally adopting the reasoning in the particular AAO decision and instructing all USCIS offices to follow that reasoning in future adjudications.

INSTRUCTOR NOTE: Instructor should reference the following sample decisions in the Training Aid Packet (TAP):

Appendix A: Precedent decision of the Associate Commissioner, Examinations, *Matter of Hsiung*, 22 I&N Dec. 201 (1998). The AAO has not issued a precedent decision since its creation; however, there are published decisions by the AAO's predecessor, the former INS Associate Commissioner, Examinations.

[2] There is a proposal that would allow DHS to designate its own precedent decisions without requiring the approval of the Attorney General.

Appendix B: AAO Adopted Decision, *Matter of IT Ascent, Inc.*

Review the decisions with the students, but only briefly – its purpose here is to make students aware of the format, and *not* the particular legal issue addressed in it. Explain to the students that the rarity of AAO precedent decisions, and the increased number of "adopted" decisions, is a reflection of the protracted DOJ clearance process.

7. AAO Non-Precedent Decisions

   a. The vast majority of decisions issued by the AAO on individual cases are non-precedent (legal holdings are limited to the facts of that specific case).

   b. Petitioners or their attorneys will occasionally submit copies of non-precedent decisions during the adjudication of an application or petition (many AAO non-precedent decisions are available on Westlaw and other online legal research companies). Adjudicators are not bound by non-precedent decisions but are encouraged to discuss the case with their supervisors before issuing a decision that may conflict with the non-precedent AAO decision.

   c. Note that AAO decisions will not include instructions for further appeal, since no further administrative appeal rights are available.

8. The AAO will also accept cases from USCIS that are "certified" for review (called "certifications") in instances with novel or unique legal or factual issues.

INSTRUCTOR NOTE: Instructor should reference the following sample decision in the Training Aid Packet (TAP):

Appendix C: AAO Non-Precedent Decision.

Review the decisions with the students, but only briefly – its purpose here is to make students aware of the format, and *not* the particular legal issue addressed in it.

B. EPO #2: Define the role, authority and jurisdiction of the Board of Immigration Appeals (BIA).

1. Overview of the Board of Immigration Appeals (BIA)

   a. The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization. Besides establishing EOIR as a separate agency within

DOJ, this reorganization made the Immigration Courts independent of the former INS, the agency then charged with enforcement of federal immigration laws.

b. The BIA is the highest administrative body for interpreting and applying immigration laws. It is composed of several Board members including the Chairman and Vice Chairman who share responsibility for BIA management. Generally, the BIA does not conduct courtroom proceedings - it decides appeals by conducting a "paper review" of cases. On rare occasions, however, the BIA does hear oral arguments of appealed cases.

c. The BIA has been given nationwide jurisdiction to hear appeals from decisions of the Immigration Judges who preside over removal proceedings in Immigration Court. All parties to removal proceedings, including the alien and ICE counsel, can appeal a decision of the Immigration Judge to the BIA. The BIA also has appellate jurisdiction over some appeals from USCIS denials (discussed later in this section).

d. BIA decisions are binding on all DHS officers (this includes USCIS adjudicators) and Immigration Judges with respect to that particular case, unless modified or overruled by the Attorney General or a federal court. Published decisions of the BIA are binding on all cases involving similar facts. Non published decisions are binding only on that specific case.

e. BIA decisions may be subject to judicial review in the federal courts (federal courts will be discussed later in this course). Such appeals may be brought only by the petitioner, applicant or alien. Although a federal court has the authority to overturn or disregard administrative precedent decisions, published BIA decisions may carry significant weight as they reflect the official position of the U.S. Government on an issue and may be accorded deference by the federal courts.

f. BIA decisions may be referred to the Attorney General for review upon request of the BIA or DHS.[3]

g. The majority of appeals reaching the BIA involve orders from Immigration Courts, USCIS decisions (limited to NIV waivers, I-130 petitions and some I-360 petitions), fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of BIA decisions previously rendered.

h. The BIA is directed to exercise its independent judgment in hearing appeals for the Attorney General. Board decisions designated for

[3] See 8 C.F.R. § 1003.1(h) for referral of BIA decisions to the A.G.

publication are printed in bound volumes entitled *Administrative Decisions Under Immigration and Nationality Laws of the United States*.

i. The BIA will accept cases "certified" to it for review from the Immigration Judge and USCIS (called "certifications") in cases with novel or unique legal or factual issues.[4]

INSTRUCTOR NOTE: Please review the sample BIA precedent decision, *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), found in Appendix C. Note the volume and page number for publication included at the top of the first page. This BIA decision has been selected not only because it illustrates a BIA precedent decision's format, but also because it is an important BIA precedent decision in the context of marriage fraud and INA § 204(c) adjudications, so please encourage the students read the decision on their own time. Instructor should remind students of the coverage received in BASIC Requests for Evidence, etc. Course 231 covering the processing of Motions & Appeals to the BIA.

2. USCIS-related applications and petitions that fall within the BIA's appellate jurisdiction.

   a. Form I-130 family-based immigrant visa petitions

   b. I-360 Special Immigrant petitions regarding widows/widowers (I-360s for abused spouse/VAWA, Religious Worker and Special Immigration Juvenile petitions are appealed to the AAO)

   c. Decisions of USCIS regarding waivers of inadmissibility for nonimmigrants under INA § 212(d)(3)

3. Non-USCIS matters that fall within the BIA's appellate jurisdiction include:

   a. Decisions of Immigration Judges in removal, deportation, and exclusion proceedings, including decisions pertaining to forms of relief from removal

   b. Decisions of Immigration Judges on motions to reopen where the proceedings were conducted in absentia

   c. Certain bond, parole, and detention decisions

[4] See 8 C.F.R § 1003.1(c) for certifications by the Immigration Judge and 8 C.F.R. §§ 103.4 and 1003.7 for certifications by USCIS.

d. Decisions of Immigration Judges in rescission of adjustment of status cases

e. CBP and ICE decisions involving administrative fines and penalties under 8 C.F.R. § 1280

f. The BIA also exercises jurisdiction over the process of certifying organizations and attorneys who are providers of free legal services ("Accredited Representatives"), and matters relating to discipline and professional misconduct of the private attorneys and accredited representatives practicing before DHS and DOJ.

4. Standard of Review

a. The BIA applies a "de novo" standard of review to all appeals from USCIS decisions, per 8 C.F.R. § 1003.1(d)(3). This means that the BIA will review the factual record as a whole and determine whether the USCIS adjudicator's decision is correct under the facts and the law, as opposed to deciding whether the adjudicator "abused their discretion" in reaching the decision (which is a more deferential, and less strict, standard of review).

5. Format and Publication of BIA Decisions

a. The BIA issues its decisions by either a single Board member, by a 3-member panel, or, in rare instances, by the entire Board. Most appeals decisions on USCIS adjudications are issued by a single Board member.

b. Board decisions are generally released in one of two forms: published and unpublished, which are further described as follows:

1) Precedent (published) decisions: These are binding on the parties to the decision, and also constitute legal precedent that binds the BIA, the Immigration Courts and DHS (including USCIS) in pending and future cases. The vast majority of the BIA's decisions are unpublished, but the BIA periodically selects cases to be published if the decision:

a) resolves, alters, modifies or clarifies an existing rule of law

b) resolves a conflict of authority

c) involves an issue of significant public interest

2) In the past, the Board issued precedent decisions in "slip opinion" or "Interim Decision" form. Since all published cases are now available

in final form (as "I&N Decisions"), citation to "Interim Decisions" are no longer appropriate and are disfavored. *See* BIA Practice Manual, App. J at J-3.

3) The BIA website at http://www.usdoj.gov/eoir/ contains a searchable index of all published (precedent) decisions. In addition, adjudicators can sign up for automatic e-mail receipt of any new BIA precedent decision.

c. Unpublished or non-precedent decisions:

1) These decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases.

2) Occasionally USCIS adjudicators will receive a copy of an unpublished decision from private attorneys, applicants or petitioners who argue that the decision should dictate a particular outcome in a particular case. Adjudicators should remember that only published precedent decisions are considered binding precedent (many BIA non-precedent decisions are available on Westlaw and other online legal research companies).

3) Adjudicators are not bound by non-precedent decisions (although in such situations, adjudicators are encouraged to discuss the case with their supervisors before issuing a decision on a case that may conflict with the non-precedent BIA decision).

4) Like the AAO, BIA decisions do not include instructions for further appeal, since no further administrative appeal rights exist.

INSTRUCTOR NOTE: Instructor should reference sample BIA unpublished decisions found in Appendix D. Note for the students that these decisions were issued without an official volume & page number, which confirms it is a non-precedent decision.

It would be good to read through a couple of these decisions together with the students, because each one highlights common mistakes made by adjudicators in family-based petitions, particularly in the marriage fraud and INA § 204(c) contexts. Encourage the students on their own time to read through the other samples provided.

d. The status of an appeal from an immigration court proceeding is listed on the BIA's automated phone line at **1-800-898-7180**. Visa petition appeal information is *not* included in this system, however.

e. All appeals to the BIA from USCIS decisions are routed through USCIS counsel for briefing and USCIS adjudicators should follow local protocols for this routing process.

INSTRUCTOR NOTE: Instructor should remind the students that the mechanics for forwarding petitioner appeals to the BIA, as well as actions required of USCIS once the appeal is decided, are discussed in further detail in the BASIC Requests for Evidence Course 231.

f. Appeal of BIA's decision:

1) Cases that arise from USCIS and are appealed to the BIA may be challenged in the federal District Court. Removal orders appealed to the BIA may be further reviewed in the Circuit Court of Appeals on a petition for review.

2) Only aliens, applicants or petitioners may seek review of the BIA's decision in federal court. However, once a case is decided in federal court, the U.S. Government also has the right of appeal of an adverse decision.

C. EPO #3: Identify the different levels of federal courts in the federal judicial system, the types of lawsuits filed in federal court regarding USCIS decisions, and the respective roles of USCIS counsel and adjudicators during litigation.

1. Overview of the federal court system

a. The federal courts have jurisdiction to hear nearly all categories of federal civil and criminal cases. In general, jurisdiction over government actions exists when there is a "federal question" at issue, which includes actions involving immigration matters (there are some limits to federal court jurisdiction over certain immigration matters).

b. Under several federal statutes, petitioners and applicants are permitted to seek relief in the federal courts when they are not satisfied with USCIS' decision on their petition, application, or any other action to which they believe they are entitled.

c. The most commonly litigated USCIS adjudications scenarios involve:

1) Lawsuits filed to challenge a USCIS decision, or

2) Lawsuits filed in an attempt to compel USCIS to complete a pending adjudication.

d. Once a lawsuit is filed against USCIS, an attorney from the USCIS Office of the Chief Counsel (OCC) is assigned to coordinate the litigation with an attorney from the U.S. Department of Justice. This is usually an Assistant U.S. Attorney (AUSA) who will defend and represent USCIS in court. In some instances, USCIS will be represented in court from an attorney in the Office of Immigration Litigation (OIL), also part of the Department of Justice. The OCC attorney will typically work with the individual USCIS adjudicator and/or supervisory staff throughout the course of the litigation.

e. The federal court system is divided into trial courts and appeals courts, and each federal judge is considered to be an independent arbiter of justice.

f. The trial courts are generally known as the "U.S. District Courts" while the appeals courts are known as the "U.S. Circuit Courts of Appeals" and the "U.S. Supreme Court."

g. Federal courts have the authority to overturn or disregard administrative precedent decisions; generally however, such administrative decisions carry significant weight as they reflect the official position of the U.S. Government on those particular issues.

2. U.S. District Courts

a. The U.S. District Courts are the trial courts of the federal court system. Every State has at least one District Court; some states have several which are identified by geographic region e.g., the Eastern District of Virginia (E. D. Va.) or the Southern District of New York (S.D.N.Y).

b. The District Court's jurisdiction is established by the Constitution and Congress.

c. Most litigation involving USCIS is filed at the District Court level.

d. Under U.S. law, the regulation of immigration is wholly within the purview of the federal government.

e. The District Court's decision, whether published or unpublished, is limited to the specific case in controversy and is not considered controlling precedent by other judges or courts within a district or in other jurisdictions.[5] Neither does a District Court decision bind USCIS or the BIA (other than in the specific case), although USCIS may use it as *persuasive* authority and give it due consideration.[6] USCIS may also

[5] *See Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457-458 (7th Cir. 2005).
[6] *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

decide as a matter of policy that USCIS offices should abide by a particular District Court decision.

3. U.S. Circuit Courts of Appeal

   a. There are 12 regional Circuit Courts of Appeal that primarily handle appeals from District Court decisions (numbered 1 through 11, plus the D.C. Circuit). There is an additional Circuit Court, the Federal Circuit that has nationwide jurisdiction to hear appeals in specialized cases involving patent law, personnel claims and other federal claims against the United States. Each Circuit Court, with the exception of the Federal Circuit, covers a particular geographic area (e.g., the Second Circuit covers NY, CT and VT).

INSTRUCTOR NOTE: Instructor should review the Circuit Court map found in the TAP materials at Appendix G.

Point out how each Circuit covers a designated number of States, so that every District Court will fall within one of the Circuits. There are a total of 13 Circuit Courts, the 11 circuits plus the D.C. Circuit and Federal Circuit.

   b. Some specific types of lawsuits are filed directly with the Circuit Court of Appeals, rather than with the District Court (e.g., Petitions for Review of BIA decisions).

   c. Published Circuit Court of Appeals decisions are precedent decisions and are binding on cases pending within that particular circuit. The Circuit Court decision binds district courts and government agency decisions within the Circuit's jurisdiction. Unpublished decisions are only binding with respect to the specific case involved.

   d. Adverse precedent Circuit Court decisions present unique problems for government agencies like USCIS. USCIS has offices in each circuit, but only those USCIS offices within the court's jurisdiction are bound by the Circuit Court's published decision.

   e. Occasionally Circuit Courts will reach different conclusions on the same legal issue. This is known as a "split" between the Circuits, and such differing interpretations exist until the U.S. Supreme Court accepts a case on that issue and resolves the matter.

4. U.S. Supreme Court

   a. Final arbiter of any legal controversy;

b. A petitioner, applicant or alien has to file a Petition for Writ of Certiorari to request the U.S. Supreme Court hear a case from a decision of the Circuit Court of Appeals. The U.S. Supreme Court has discretion to deny the Writ and refuse to hear the case. The Government may also seek certiorari from a decision of the Court of Appeals.

c. If the U.S. Supreme Court refuses to accept a case on certiorari, generally the decision of the lower Circuit Court will stand.

d. All USCIS offices, government agencies and lower courts are bound by U.S. Supreme Court precedent decisions.

5. Types of Lawsuits filed against USCIS in federal court:

a. There are several types of lawsuits that are filed against USCIS in federal court. The following is a very brief overview of these different kinds of lawsuits:

1) Mandamus (seeking action on a USCIS delayed adjudication)

a) This is the most common lawsuit for USCIS adjudications, filed to force USCIS to render a decision.

b) Authority for such actions is found in the Mandamus Act which states that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

c) Plaintiff must demonstrate that (1) he/she has a clear right to the relief requested; (2) that the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available.

d) Mandamus relief is only appropriate if the government fails to act within a "reasonable" amount of time. What is "reasonable" will depend upon the individual case and the individual court/judge (note: delay that is not *unusual* by USCIS standards does not mean it is *reasonable* in the eyes of the court).

e) When determining the reasonableness of the agency's action, courts will look at agency regulations, internal operating procedures, and average processing times. *See e.g.*, TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

f) Courts can compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular

manner, nor can it grant the relief the plaintiff seeks from the agency.

g) Every lawsuit must be responded to or USCIS risks an adverse decision, default judgment from the court, and/or payment of attorney's fees, etc.

2) INA § 336(b) - Naturalization Litigation – delayed decisions.

a) The INA provisions for Naturalization permit the applicant to request a hearing in district court if no decision is made by USCIS within 120 days of the examination. INA § 336(b) [8 U.S.C. § 1447(b)].

b) Delays associated with the FBI name check process generated thousands of lawsuits based on INA § 336(b). In many cases the courts have remanded the cases to USCIS with instructions to complete the adjudication within a particular timeframe. Filings in these types of cases have been decreasing.

c) As with any case in litigation in federal court, it is important to consult with USCIS counsel and supervisory staff on naturalization cases that are being litigated or which have been remanded to USCIS by a federal court.

3) INA § 310(c) - Judicial review of denied Naturalization applications. An applicant may seek review of a denied naturalization application after a hearing before an immigration officer pursuant to INA § 336(a) (an appeal from a denial after examination). The review of such denial is before the U.S. District Court. The District Court will hold a "de novo" review and "shall make its own findings of fact and conclusions of law."

4) Declaratory Judgment

a) The Administrative Procedure Act (APA), provides a right to judicial review of agency decisions where a party alleges that he or she has suffered a legal wrong or was adversely affected because of an agency action. 5 U.S.C. § 702.

b) Competing statutes (e.g., the INA) include provisions that prohibit judicial review under the APA, which occasionally sets up legal conflicts over the court's jurisdiction.

c) Declaratory Judgment can be joined with a Mandamus suit and request for injunctive relief.

d) Types of agency decisions subject to declaratory judgment actions include certain visa petition denials and other substantive, non-discretionary USCIS determinations.

e) In worst case scenarios, courts may look beyond the specific petition at issue, and declare an entire agency policy or regulation illegal, enjoin its enforcement, and order affirmative relief.

INSTRUCTOR NOTE: Instructor should reference the following sample decision in the Training Aid Packet (TAP) to illustrate the path of an administrative and judicial appeal.

Appendix H: *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. 2008). This case shows the appeal of a denied I-130 to the BIA and the BIA's decision challenged by the filing for declaratory relief in District Court. An appeal to the Circuit Court followed.

Appendix I: *Top Set International, INC. v. Neufeld* (not a published case in Federal Reporter) (2009 WL 613050, 9th Cir. 2009)). Although not a precedent case, this action shows the administrative and judicial appellate path of the AAO's decision on an I-140 petition challenged in District Court with an appeal to the Circuit Court of Appeals.

Instructor should review the Royal Siam case found in Appendix A. This case serves multiple purposes, educating students on the administrative and judicial appeals process, the interplay between USCIS and ICE proceedings, and some basic adjudications principles (regarding re-adjudication of previously approved petitions, and the importance of discretionary determinations). It also is one example of the multi-stage "lifecycle of an immigrant" through the petitioning process, appeals, removal proceedings, and litigation. Feel free to make your own observations, but the following are worth noting:
(1) USCIS approved this I-129 specialty occupation petition in 1999, but denied the subsequent extension request in 2002. This case involved two adjudicators reaching differing conclusions on whether the position qualified as an H-1B specialty occupation. Students should be aware that a prior approval does not bind USCIS to that finding, and a subsequent adjudicator can reach a different conclusion (although such cases should be raised with supervisory staff for consultation, so that the most appropriate decision is reached).
(2) Note that this Circuit has precedent case law restricting USCIS' ability to revisit prior approvals (the precedent requires that a subsequent denial must include an explanation of why the initial approval was erroneous). Here, the denial did not contain such explanation, and AAO had to re-issue its decision and include an explanation of why the 1999 approval was in error. Not all

Circuits have a precedent of this nature, and it is not AAO's policy to address prior approvals under these circumstances.
(3) When the AAO gathered the alien's A-file in preparation for addressing the prior approval, it was discovered that he had previously been found deportable based on marriage fraud. In 1998, he accepted an order of voluntary departure (a form of relief available in immigration court removal proceedings) and returned to Thailand. However, concurrently with his removal proceedings, USCIS approved his employer's I-129 petition. Therefore, once he arrived back in Thailand, he was able to return to the U.S. almost immediately on the approved H-1B nonimmigrant classification. This was not exactly a case of "one hand not knowing what the other hand is doing" (Footnote 2 in the First Circuit's opinion is incorrect in this regard). The law is not clear in terms of whether a prior marriage fraud precludes approval of a nonimmigrant petition (INA § 204(c) precludes the approval of subsequent "petitions," without distinguishing between immigrant and nonimmigrant petitions). USCIS argued that INA § 204(c) applies to nonimmigrant petitions, but the Circuit Court in Footnote 7 chose not to address that issue. Note that the State Department's U.S. Consulate in Bangkok also approved the issuance of the visa, although it is not clear whether they were aware of the prior marriage fraud.
(4) In this case, the Circuit Court also chose not to address the issue of whether a finding of marriage fraud by USCIS is a discretionary determination insulated from judicial review. Although the substance of the legal discussion section (page 4 – "The Jurisdictional Question") is of an advanced nature, it is critical for adjudicators to understand the importance of reaching a discretionary determination when the INA or regulations provide such discretion. When properly exercised, a discretionary decision can be insulated from judicial review. In *Royal Siam*, the discretionary component was the agency's marriage fraud determination; USCIS argues this component renders the entire adjudication inappropriate for judicial review

5) Class Actions

a) Under the Federal Rules of Civil Procedure (FRCP), groups of plaintiffs may file a class action where: (1) the class is so numerous that including all affected parties is impracticable, (2) there exists common factual and legal questions within the class, (3) the parties' claims or defenses are typical of class members, and (4) the representatives will fairly and adequately represent members of the class. FRCP 23.

b) General principles/reasons why courts permit class actions:

(1) Courts want to avoid risk of inconsistent or varying adjudications

(2) Courts want to avoid risk of harm to legal position of non-parties

(3) Courts want to promote fair and efficient judicial processes

c) Ongoing class actions against USCIS have included judicial review of naturalization/FBI name check delays, issuance of proof of LPR status and other actions.

6) Temporary Restraining Orders (TRO) and Preliminary Injunctions

a) Plaintiffs may seek a Temporary Restraining Order (TRO) or Preliminary Injunction where the court orders the agency to suspend the impact of an agency decision or halt an agency's action or process until both parties are present before a court and the court rules on the action.

b) Injunction requests typically must show: (1) that Plaintiffs will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the Agency; (3) that Plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

c) The TRO is usually filed on an emergency basis, and will generally expire within 10 days if granted. During that time, the agency must respond to the pleadings requesting the emergency relief. A request for Preliminary Injunction is usually field with the request for TRO, and if granted it serves to preserve the status quo until the issue can be fully litigated in court.

7) Freedom of Information Act (FOIA) lawsuits

a) Typically styled as a FOIA violation, this action is designed to obtain a response to a FOIA request or seek information redacted by USCIS under FOIA.

b) Typically filed in conjunction with an existing Mandamus, when the plaintiff's attorney is trying to obtain a copy of the agency's record of the adjudication (i.e., a copy of the A-file or receipt file)

8) Writ of Habeas Corpus lawsuits ("you have the body")

a) "Habeas Corpus" - Constitutional right to challenge detention

b) Most commonly filed against ICE in detention situations where the alien seeks a court order directing an ICE official to bring the alien before a judge in federal court to determine whether the person is lawfully detained by ICE.

c) Unusual for USCIS to be sued in this fashion, unless there is a pending collateral petition or application that could benefit the alien.

d) Consult with USCIS counsel and supervisory staff on pending cases where a Habeas Corpus has been filed by alien applicant.

9) Federal Tort Claims Act (FTCA)

a) FTCA suits are more common for ICE, resulting from apprehension, detention and removal situations involving aliens; occasionally filed against USCIS employees for conduct "outside the scope of their employment"

6. Role of USCIS Office of the Chief Counsel (OCC):

a. USCIS attorneys in the Office of Chief Counsel (OCC) are located in nearly every USCIS District office and Service Center and some field offices. It is recommended that USCIS adjudicators be familiar with their local USCIS attorneys. Inquiries to counsel (e.g., requests for legal opinions or statutory interpretations) should be made through an officer's own supervisory chain to avoid readdressing an issue that has already been addressed locally.

b. OCC's activities in federal court litigation are as follows:

1) OCC attorneys in the field serve as the primary point of contact and liaison between USCIS and the AUSA.

2) OCC will work with the AUSA and adjudicators in District offices, Service Centers and headquarters, recommending ways to defend a USCIS decision/action or to assist in rendering a new decision if the original decision was defective.

3) OCC attorneys assist the U.S. Attorney's office by providing litigation support to AUSAs who represent USCIS in immigration cases in federal court. Many of the AUSAs, who represent the government in any number of civil matters, may lack a familiarity with immigration law, and thus OCC expertise in immigration law is valuable to them.

7. Litigation Issues for Adjudicators to be Aware of:

   a. Filing Deadlines – The Government may face very short litigation deadlines, so USCIS counsel may request expedited assistance from supervisory staff and adjudicators;

   b. Court Motions – The AUSA, through the assistance of USCIS counsel acting as liaison, will need assistance in framing the facts of the case, and may require supervisory staff (and possibly adjudicators) to submit sworn statements or "Declarations" explaining the adjudication history of the case;

   c. Discovery – the Court may order USCIS to turn over file documents and other information during the course of the litigation, which will require the participation and assistance of USCIS supervisory staff and adjudicators. It is important to preserve documents when a case is in litigation; the AUSA will make assertions of privilege where necessary to protect against the release of some documents. You will notice that in class action cases that USCIS posts notices of a "litigation hold" directing all USCIS employees to preserve records (electronic and paper) on issues involving ongoing litigation;

   d. Communication - Effective communication between USCIS adjudicators and USCIS counsel is critical; and

   e. Litigation Alerts: When a case is pending in federal litigation, anyone working within the U.S. government who touches that case should be alerted to the fact that federal litigation is ongoing. Further, any adjudicative action should be vetted or reported to USCIS counsel on any case that is pending in federal litigation.

8. Privileged Communications - For Adjudicators

   a. Do not discuss the actual subject matter of the litigation with the plaintiff/petitioner/applicant, or their attorney. USCIS adjudicators should never attempt to settle a case on their own.

   b. Attorney/Client privilege: OCC and AUSA communication with adjudicators is protected from discovery by the "attorney-client" privilege. However, if USCIS adjudicators discuss that information with the plaintiff/petitioner/applicant, that privilege can disappear, and that discussion may be subject to discovery and thus public disclosure in federal court.

9. EAJA Attorneys Fees (Equal Access to Justice Act (EAJA)):[7]

   a. Permits collection of attorneys fees and costs if plaintiff can show the following:

      1) Plaintiff is the prevailing party in the matter;

      2) The government fails to show that its position was substantially justified or that special circumstances make an award unjust; and

      3) The requested fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A).

   b. Although EAJA Claims are a secondary action, adjudicators should be aware of the circumstances under which EAJA fees are awarded so that they do not create a situation that creates or maximizes liability for EAJA fees.

   c. Prevailing Party - A plaintiff may be awarded EAJA fees if he/she is a prevailing party, which means that he or she won the lawsuit.

      1) There are certain exceptions to what is considering "winning" a lawsuit. For example, if USCIS adjudicates a case as soon as a lawsuit is filed, a plaintiff may argue that he is the prevailing party because his lawsuit caused USCIS to act. Most courts reject this theory, and usually it is only if the court orders USCIS to do something that the plaintiff is considered to be the prevailing party. Issues of prevailing party are technical, legal issues beyond the scope of this course.

   d. Substantial Justification – Even where the plaintiff is the prevailing party, USCIS may still avoid EAJA fees where USCIS's actions have been substantially justified under the applicable law.

   e. Reasonable Fees - Plaintiff is entitled to a "reasonable" amount of fees. 28 U.S.C. § 2412(b). There is a statutory cap for attorney's fees unless a special factor justifies a higher rate. 28 U.S.C. § 2412(d)(2)(A). Fees can be very costly for USCIS, as such fees can reach in excess of $50,000.

10. Litigation Timeline in District Court

   a. When a petitioner/applicant seeks judicial review of a USCIS decision (from an AAO or BIA decision), he or she files a lawsuit with the federal court that has jurisdiction over the case. Lawsuits are initiated with the filing of a specific document called a "Complaint" or "Petition for

[7] See sample immigration case involving EAJA fees: *Alghawi v. Mukasey*, 543 F.Supp.2d 1252 (W.D. Wash., 2008).

Review" (or some action that carries a variation of these terms).

b. The lawsuit is mailed to the various parties named as defendants named in the action (such as DHS, USCIS District Director, or other government agencies).

c. When a USCIS office receives a copy of the action or lawsuit, this document should be forwarded immediately to local USCIS counsel.

d. A typical timeline of federal litigation:

1) If the lawsuit is over an AAO decision that has already been rendered in a case, USCIS counsel and the AUSA will request the case file and review the merits of the adjudication with USCIS supervisory staff and adjudicators.

2) Litigation deadlines unfold on a parallel track with the AUSA monitoring the case in District Court while USCIS is reviewing the case internally (with guidance from USCIS counsel on how to proceed on a case while it is pending in federal court). The AUSA may file motions to continue the case, dismiss the case for legal or technical reasons, or request a ruling in favor of USCIS.

3) During the litigation, USCIS adjudicators should be in close consultation with USCIS counsel. Depending on the advice of USCIS counsel, adjudicators may continue adjudicating or acting on a case or may wait to act if the security check process has not been completed.

4) The District Court will set a briefing schedule, which may include formal "Discovery" (discussed further below). USCIS counsel will advise USCIS adjudicators about the schedule and the impact it may have on the adjudications process.

5) The District Court will ultimately issue a decision on the case. If the Plaintiff prevails, the Plaintiff may thereafter request USCIS to pay attorney's fees (EAJA fees).

11. Points to Remember for Federal Litigation

a. Adjudications may face short timelines by a federal court;

b. Courts often lack familiarity with immigration law and procedure as well as AUSAs placing extra responsibilities on OCC counsel;

c. OCC must serve as the conduit for adjudicative and litigation information and is required to communicate USCIS's position and status to the court

through the AUSA.

d. Adjudicator cooperation and communication with USCIS counsel is essential.

D. EPO #4: Define the role of the immigration courts and the removal process in the federal immigration system.

INSTRUCTOR NOTE Some key points to stress are that USCIS adjudicators must consult with USCIS and ICE counsel if an applicant or beneficiary to a petition is currently in proceedings or some other litigation context. The outcome of the adjudication may impact the litigation strategy of ICE counsel (or ICE counsel may have additional information that is relevant to the USCIS adjudication).

Please also suggest that students visit their local immigration court as an observer in order to increase their familiarity of removal proceedings. Such visits can easily be coordinated through local USCIS counsel, and are invaluable in terms of broadening knowledge of the immigration court system, as well as building bridges with ICE counsel.

The specific process and forms used in the issuance of NTAs will be covered under Course 239.

1. Overview

a. The Office of the Chief Office of the Chief Immigration Judge (OCIJ) is one component of the Executive Office of Immigration Review (EOIR). The OCIJ is responsible for managing the many immigration courts located throughout the United States where Immigration Judges adjudicate individual cases in removal proceedings. In removal proceedings, the Immigration Judge (IJ) determines whether an alien should be admitted to or allowed to remain in the United States, or should be removed. They also have jurisdiction to consider various forms of relief from removal.

b. Immigration Judges are responsible for conducting administrative proceedings and acting independently in deciding the matters before them. Their decisions are administratively final unless appealed or certified to the Board of Immigration Appeals.

2. Initiation of Removal Proceedings

a. In some instances where a petition or application is denied or status is terminated, USCIS may issue a Form I-862, Notice to Appear ("NTA") to institute removal proceedings against an alien. Even though Immigration

and Customs Enforcement (ICE) attorneys handle removal proceedings and all other matters before an Immigration Court, it is important for USCIS adjudicators to be familiar with the removal process.

b. Situations where USCIS may file an NTA include the following: USCIS denies an application for adjustment of status; case is referred to immigration court after Asylum Officer denies asylum or determines alien is ineligible for asylum; alien requests hearing in immigration court upon receipt of Notice of Intent to Rescind status; alien's conditional status is terminated, or alien is present in the U.S. in violation of the immigration laws.

c. In cases where a petitioner or applicant has a case pending with USCIS and is simultaneously placed in removal proceedings, an adjudicator must be mindful that the outcome of the removal proceedings could impact how USCIS adjudicates the petition or application. Conversely, the outcome of the adjudication may impact the ruling of the Immigration Judge in removal proceedings. Hence, it is imperative that USCIS and ICE communicate with one another to avoid conflicting outcomes.

3. Hearings Before an Immigration Judge

a. In a typical removal proceeding, the Immigration Judge may decide whether an alien is deportable or inadmissible under the law, then may consider whether that alien may avoid removal by accepting voluntary departure or by qualifying for the available forms of relief from removal.

1) Removability – The IJ will first make a determination as to whether the alien is removable (i.e., inadmissible or deportable). Typically, this occurs at the "master calendar hearing." If the government does not establish that the alien is subject to removal, then proceedings are terminated. If the alien is found to be removable, then the IJ determines whether the alien is eligible to apply for any relief from removal.

2) Relief from Removal – If eligible to apply for a form of relief from removal, then the application is adjudicated during a "merits hearing." These hearings are of varying duration – anywhere from an hour to several days. The typical merits hearing is scheduled for 2 hours.

3) Decision – At the conclusion of the hearing, whether at the master calendar or merits stage, the IJ will render a decision.

a) As mentioned above, if the alien is found *not* removable, the IJ will terminate the proceedings and enter a final order.

b) If alien is found removable, the IJ will make a decision on any relief application and either grant the application(s) or deny the application(s) and enter an order of removal.

4. Master Calendar Hearing

   a. The alien's first appearance before the IJ is called a Master Calendar hearing where the charges lodged against the alien in the NTA are presented.

   b. The alien is advised of his/her right to be represented by an attorney or BIA-accredited representative (at no expense to the government). At this hearing, the alien may request a continuance to seek counsel, or may admit or deny the charges in the NTA and may make a request for relief. If the alien admits the charges and the IJ makes a finding of removability, relief options will be explored.

5. Merits Hearing ("Trial")

   a. At the merits hearing (which is usually the hearing on the relief application), the IJ considers all applications for relief, hears testimony and collects evidence from the government and from the alien, and then renders a decision. The IJ may consider the following documents, testimony and factual information during the hearing:

      1) Conviction Records;

      2) Immigrant Visa/Passports;

      3) Forms – I-213 (Record of Deportable/Inadmissible Alien);

      4) Sworn Statements;

      5) Background and Discretionary Material; and

      6) Witnesses including government officers or alien's family and friends.

6. Alien's Rights in Proceedings include the following:

   a. Right to counsel, but at no expense to the government;

   b. Right to present evidence on his/her own behalf;

   c. Reasonable opportunity to examine evidence;

   d. Right to cross-examine opposing witness;

e. A complete record of all testimony and evidence produced at the hearing;

f. Right to appeal decision of the IJ to the BIA (The government may also appeal the IJ's decision to the BIA).

7. The scope of the IJ's authority includes:

   a. Removal determinations such as inadmissibility and deportability

   b. Determination of country of removal;

   c. Relief from removal;

   d. Waivers;

   e. Bond and Custody determinations.

   f. Decisions on motions for continuances/postponements;

   g. Ruling on the admission of evidence;

   h. Ordering the taking of depositions if a witness is unavailable;

   i. Issuing subpoenas.

8. Forms of Relief. The following forms of relief may be available to aliens in removal proceedings.

   a. Asylum: This is a discretionary form of relief (meaning that the IJ has the discretion to grant or deny this relief) pursuant to INA § 208. An asylee may apply to adjust status to that of lawful permanent resident after one year.

   b. Withholding of Removal: Similar to asylum and also referred to as "Restriction on Removal." This is a mandatory form of relief (it must be granted to anyone who qualifies) but does not lead to LPR status. INA § 241(b)(3).

   c. Relief under the Convention Against Torture (CAT): Applicant must establish that it is more likely than not he or she would be <u>tortured</u> at the hands of the government (or person with the consent or acquiescence of a public official) in his or her country. This mandatory form of relief does not lead to LPR status. 8 C.F.R. § 208.16(c), 8 C.F.R. § 208.17, 8 C.F.R. § 208.18.

d. Cancellation of Removal for Non-LPRs: Applicant must show 10 years of continuous physical presence and good moral character, and also show exceptional and extremely unusual hardship to the USC/LPR spouse/parent/child of the applicant. If this discretionary application is granted, the applicant becomes an LPR. INA § 240A(b).

e. Cancellation of Removal for LPR's: Applicant must prove five years or more of LPR status, and seven years of continuous residency in the US after having been admitted under any status. Applicant cannot be convicted of an aggravated felony. This is a discretionary form of relief and if granted the applicant retains LPR status. INA § 240A(a).

f. INA § 212(c) waivers (waiver was repealed in 1996):[8] The IJ has the authority to waive the ground of inadmissibility or deportability for crimes the alien pled guilty to prior to April 1, 1997 (making the alien potentially eligible for relief even if he/she has a certain criminal conviction). This waiver is limited to LPRs and, if granted, the alien retains LPR status. Former INA § 212(c).

g. Adjustment of Status: A discretionary form of relief that if granted gives the applicant LPR status. ICE attorneys will occasionally ask USCIS adjudicators to expedite processing of a Form I-130 while a case is pending in immigration court to permit the alien to pursue adjustment relief before an IJ. INA § 245.

h. Voluntary Departure ("VD"): A form of relief granted either by DHS or an Immigration Judge.

    1) DHS may grant VD to an alien in lieu of placing the alien in removal proceedings, or an IJ may, prior to completion of removal proceedings, grant voluntary departure to an alien for a period no longer than 120 days. A voluntary departure bond may be requested. At the conclusion of removal proceedings, the IJ may grant an alien voluntary departure in lieu of a removal order for a period no longer than 60 days. A voluntary departure bond is required. INA §§ 240B(a) & (b).

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[8] Former § 212(c): Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978

2) Failure of the alien to depart while under a VD order results in a civil penalty and ineligibility for several forms of discretionary relief for 10 years. INA § 240B(d).

9. Immigration Judge (IJ) Decision:

The IJ issues a written decision or makes an oral decision on the record (tape recording). The A-file should contain a copy of the written decision or written transcript of the oral decision if the case is appealed.

10. Appeals:

Both the alien and DHS have the right to appeal the Immigration Judge's decision to the BIA.

10. "Hypothetical Lifecycle of an Alien" in the immigration removal process.

a. Alien enters the U.S. on a B-2 visa as a nonimmigrant tourist.

b. Alien overstays her B-2 visa, but marries a U.S. citizen, and the U.S. citizen files an I-130 immigrant visa petition with USCIS on her behalf.

c. While the application is pending, the alien leaves pursuant to advance parole.

d. After the interview, USCIS determines that the marriage was fraudulent, denies the I-130 petition and I-485 application, and issues an NTA charging the alien with fraud and being an intending immigrant, thereby placing the alien into proceedings.

e. The Immigration Judge holds a Master Calendar hearing and schedules a Merits hearing since the alien contests removability for fraud.

f. At the Merits hearing, the IJ hears witness testimony and receives evidence, and finds the alien is removable as charged. The IJ issues a removal order.

g. The alien files an appeal with the BIA, and the BIA dismisses her appeal.

h. Alien files a Petition for Review with the Circuit Court of Appeals, challenging the BIA's dismissal of her appeal.

i. The Circuit Court affirms the BIA's dismissal.

j. ICE executes the removal order and removes the alien from the U.S.

INSTRUCTOR NOTE: If time permits, review the outline of the case located in Appendix J, *Kaur v. Chertoff*, 489 F.Sup.2d 52 (D.C. 2007). The outline is located in Appendix K.

This decision is too long to read in class, but the instructor can provide the outline in Appendix J to demonstrate that while an alien is pending deportation proceedings before an immigration judge, the alien may file applications or petitions with USCIS. Further, this case illustrates that as the alien's case moves through the appellate process and even into district court with a habeas corpus petition, USCIS may be adjudicating the alien's pending applications or petitions.

Some key points to stress are that USCIS adjudicators must consult with USCIS and ICE counsel if an applicant or beneficiary to a petition is currently in proceedings or some other litigation context. The outcome of the adjudication may impact the litigation strategy of ICE counsel or the Assistant U.S. Attorney.

INSTRUCTOR NOTE: If time permits, show video illustration of an immigration court hearing before an immigration judge, "Matter of Lolita Lovebird." (Video)

Video Background: The hearing is set on September 12, 1996, thus pre-IIRIRA law is in effect. An Order to Show Cause was filed in this case and the female alien has been found deportable for entry without inspection pursuant to former § 241 of the INA (currently § 212(a)(6)(A)(i) of the INA). Alien is applying for adjustment of status relief pursuant to § 245(i), but because she married a USC during proceedings she needs a waiver under INA § 245(e)(3) to overcome the restriction of INA § 245(e)(1) (entered into marriage while in deportation proceedings).

The hearing in the video is solely on the § 245(e) waiver portion of the case (a bifurcated case). The video shows opening statements by the alien's attorney, direct and cross examination of applicant and her husband, and the IJ making a short oral decision denying the waiver based on credibility only. The IJ does not reach the merits of a good faith marriage.

Discussion points: Why separate the spouses during questioning? Were the attorney questions effective in demonstrating credibility of the witnesses? Were the questions appropriate? What other questions would you ask? Was the IJ's decision correct?

EPO #5: Identify the sources and impact of administrative and judicial case precedent.

1. Precedent Decisions - Administrative and Federal Court

   a. A precedent decision, by either an administrative body (AAO or BIA) or a court, is considered "binding" on USCIS, and its holding must be followed in subsequent adjudicative decisions. More specifically, a precedent decision by the BIA will be binding on all of DHS and the Immigration Courts, while a decision by the AAO will only be binding on all USCIS officers as well as petitioners/applicants filing for benefits with USCIS. A federal court still has the authority to overturn or disregard administrative precedent decisions, but such decisions carry significant weight, as they reflect the official position of the U.S. Government on the issue.

2. Administrative Decision-Making Bodies

   a. DOJ Board of Immigration Appeals (BIA) (part of EOIR)

   b. USCIS Administrative Appeals Office (AAO)

3. Importance of Following Administrative Precedent Decisions

   a. Precedent decisions reflect legally sound principles, and also may be the genesis for longstanding agency practices;

   b. Adjudicative decisions supported by established precedent law stand a greater chance of being upheld by the courts;

   c. USCIS decisions that are contrary to established precedent are subject to reopening and re-adjudication, consuming significant agency resource;

   d. Such decisions could be reversed if challenged in court, causing unnecessary expenditure of USCIS legal resources and attorneys fees;

   e. Following precedent decisions ensures greater consistency in USCIS adjudications and enhances public predictability and confidence in the process;

   f. Failure to follow precedents could also cause public embarrassment to USCIS and DHS.

4. Types of Actions In Relation to Administrative Precedent Decisions

   a. Precedent decisions may be:

1) Overruled by the issuing authority, where the rationale of a previous decision is found to be no longer pertinent and changed by the same or higher authority;

2) Reaffirmed - where the previous decision rationale is affirmed by same or higher authority;

3) Modified - Slight change in decision rationale by same or higher authority;

4) Superseded - Prior decision is supported but changed because of circumstances of particular case;

5) Distinguished - Different set of circumstances are presented than in the case being cited, and therefore deserve a different outcome.

5. Federal Court Precedent

   a. District court decisions are found in the Federal Supplement (F. Supp.);

   b. The reasoning underlying a district court judge's decision must be given due consideration by other courts, the BIA and USCIS;

   c. However, a District Court decision is not controlling law over the adjudication, other than with respect to the specific case it decided. In other words, even a published District Court decision does not serve as precedent.

   d. Published decisions of a Circuit Court of Appeals are controlling within the jurisdiction of the circuit. Circuit Court precedent supersedes all other decisions made in that Circuit, surpassed only by the U.S. Supreme Court.

   e. Circuit court decisions are found in the Federal Reporter;

   f. The highest federal court is the U.S. Supreme Court;

   g. The Supreme Court does not have to hear a case, and will choose those cases it wishes to hear;

6. Researching Precedent Decisions

   Most USCIS offices have a law library with hard copies of published administrative decisions, although very few have hard copies of federal court decisions. Many offices have subscriptions to various online legal research tools such as Westlaw and Lexis/Nexis. Adjudicators should also

be able to access the BIA's virtual law library without difficulty. Search tips for researching the law include:

a. Consult the BIA's virtual law library;

b. Search the 22 bound volumes of administrative decisions (BIA and AAO) by hand, using the table of cases reported in each volume;

c. By last name of respondent;

d. By numerical listing by Interim Decision number;

e. Use the section of INA discussed;

f. Use index by:

   1) Subject matter such as "marriage"

   2) Cross reference - "divorce"

g. Use free electronic notification system to receive new BIA precedent decisions by email.

7. Citing Precedent Decisions

   a. Most existing decision templates available to USCIS adjudicators will already contain the applicable law. When the INA or 8 C.F.R. provisions dictate the outcome of the adjudication, there is no need for the adjudicator to supplement the decision with judicial or administrative case law. However, in situations that lack clear direction from the INA or 8 C.F.R., and where case law has emerged in the Courts, citation to administrative or judicial precedent (with supervisory consultation) may become necessary.

   b. When a precedent decision governs the action in a case, a reference to that decision should be made by uniform citation.

   c. For an Administrative Decision this citation will include the name of the parties, the location of publication, and the decision making body, such as:

      1) *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)

   d. Or for a Judicial Decision:

      1) *Alleyne v. INS*, 879 F.2d 1177 (3d Cir. 1989)

e. Citations will also include:

1) the number of the volume where each is reported;

2) The name of the publication in which reported;

3) Page number where case begins;

4) Deciding body or official;

5) Year decision was rendered;

6) Interim Decision number, if appropriate;

7) The case name should be underlined or in italics.

III. SUMMARY

Like most federal agencies, USCIS decisions are routinely appealed and adjudicators need to be knowledgeable about the BIA and AAO appeals processes and the jurisdiction of each. USCIS decisions are increasingly the subject of litigation in federal courts, so adjudicators should be familiar with the federal court process and the role of USCIS adjudicator and counsel in litigation. In addition, many USCIS adjudications are also related to ongoing immigration court proceedings involving the applicant, petitioner or an alien beneficiary. Therefore, USCIS adjudicators should maintain an understanding of the different aspects of the administrative lifecycle of a case, including the immigration court system, the removal process, and the possible interplay between USCIS and ICE in the adjudications process. Lastly, Adjudicators need to understand the source and importance of precedent case law from the BIA, AAO and the federal courts, since this case law may provide the applicable law in a given case.

INSTRUCTOR NOTE: If time permits, review Laboratory questions provided under III Application.

III. APPLICATION

A. Laboratory

1. An appeal from a USCIS decision on an I-601 Waiver application should be forwarded to:

a) The Board of Immigration Appeals (BIA)
b) The USCIS Administrative Appeals Office (AAO)
c) USCIS Office of the Chief Counsel (OCC)
d) USCIS Headquarters

ANSWER IS B – I-601 APPEALS ARE WITHIN THE JURISDICTION OF AAO

2. An appeal for an I-360 Special Immigrant Petition for a widow/widower of a USC should be forwarded to:

a) The Board of Immigration Appeals (BIA)
b) The USCIS Administrative Appeals Office (AAO)
c) USCIS Office of the Chief Counsel (OCC)
d) USCIS Headquarters

ANSWER IS A – I-360 WIDOW/WIDOWER APPEALS ARE WITHIN THE JURISDICTION OF THE BIA, WHILE I-360 ABUSED SPOUSE OR RELIGIOUS WORKERS ARE WITHIN THE JURISDICTION OF AAO

3. The BIA and AAO are both administrative appellate offices within the Department of Justice – True or False?

ANSWER = FALSE, AAO IS AN OFFICE WITHIN USCIS

4. A decision issued by the federal District Court for the Southern District of New York is binding on:

a) All USCIS offices nationwide
b) USCIS offices within the jurisdiction of the Southern District of New York
c) All USCIS offices within the State of New York
d) None of the above

ANSWER IS D – NONE OF THE ABOVE. THE DECISION IS BINDING ONLY ON THE PARTICULAR CASE BEING ADDRESSED BY THE DISTRICT COURT ALTHOUGH USCIS MAY DECIDE AS A MATTER OF POLICY THAT USCIS SHOULD ABIDE BY A PARTICULAR DISTRICT

COURT DECISION. ADJUDICATORS WILL OCCASIONALLY RECEIVE SUBMISSIONS FROM PETITIONERS ARGUING THAT A PARTICULAR FEDERAL COURT DECISION IS BINDING PRECEDENT ON A PARTICULAR CASE. ADJUDICATORS SHOULD CONSULT WITH SUPERVISORS AND LOCAL USCIS COUNSEL FOR CLARIFICATION AS TO WHETHER USCIS HAS CHOSEN TO FOLLOW A DESIGNATED DISTRICT COURT DECISION.

5. If a pending petition or application is being litigated in federal court, the Adjudicator should:

a) Avoid direct personal contact with petitioner and their attorney
b) Consult with supervisors and USCIS counsel prior to issuing a decision in a case
c) Alert other government employees, who touch the case, of the federal litigation
d) All of the above

ANSWER IS D – ADJUDICATORS SHOULD DO ALL OF THE ABOVE WHEN A PENDING ADJUDICATION IS IN LITIGATION

IV. REFERENCES

A. **www.usdoj.gov/eoir (includes the website for the Board of Immigration Appeals, its virtual law library with precedent decisions, and its Practice Manual)**

B. **http://www.uscourts.gov/understand03/media/UFC03.pdf (helpful website providing background information on the U.S. federal court system).**

C. **Nutshell Textbook**

1. Chapter 2, section 2-3.2 only (re: the judiciary)
2. Chapter 3, section 3-3 only
3. Chapter 9, section 9-2, 9-3 and 9-4 (re: removal hearings/appeals)

U.S. Citizenship and Immigration Services

BASIC

RESPONSIBILITIES OF EMPLOYERS AND EMPLOYMENT VERIFICATION

COURSE 212

INSTRUCTOR GUIDE

December 2011

SYLLABUS

COURSE TITLE: Responsibilities of Employers and Employment Verification

COURSE NUMBER: 212

COURSE DATE: December 2011

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
1:00	0:00	0:00	0:00	BASIC

DESCRIPTION:

This course addresses the processes, forms, laws, and regulations concerning the responsibilities of U.S. employers.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given an inquiry from the public or a field situation involving the verification of an individual's employment eligibility, the officer will have knowledge of the responsibilities of employers to verify status and employment authorization of employees. Additionally, the officer will develop a familiarity with relevant USCIS documents and databases (Form I-9 and the E-Verify system).

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO #1: Specify the requirements for completion and retention of Form I-9, Employment Eligibility Verification.

EPO #2: Identify the purpose and composition of the employment eligibility verification program known as E-Verify.

STUDENT SPECIAL REQUIREMENTS:

None

METHOD OF EVALUATION:

Multiple Choice Examination

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I. INTRODUCTION

The Department of Homeland Security is primarily charged with enforcing immigration laws as they apply to U.S. employers. Enforcement efforts depend on providing U.S. employers with a mechanism to confirm the employment eligibility of employees. Other agencies have related responsibilities, including the Department of Justice Civil Rights Division (enforcement of penalties against immigration-related employment discrimination), Department of Labor (authority to review Forms I-9 in aid of enforcement of wage and hour laws), and the Social Security Administration (employer wage reporting including matching of employee SSN with SSA records, and participation in E-Verify program).

DEFINITIONS:

1. The Course requires a thorough understanding of the following:

TERM	DEFINITION	REFERENCE
E-Verify	An automated Internet-based system to run employment authorization checks against DHS and SSA databases during the hiring process. E-Verify was formerly known as the Basic Pilot or the Employment Eligibility Verification Program (EEV).	
Form I-9	Employment Eligibility Verification Form	8 CFR 274a
IRCA	The Immigration Reform and Control Act of 1986	INA § 101(a)(22)

II. PRESENTATION

A. EPO #1: Specify the requirements for completion and retention of Form I-9.

1. The requirements for completion of Form I-9, Employment Eligibility Verification.

a. The Immigration Reform and Control Act of 1986 ("IRCA") requires that all U.S. employers document that all employees hired after 11/06/1986 are eligible to work in the U.S., and can prove their identities and work authorization. See also 8 C.F.R. § 274a.2(b).

b. The IRCA requirement is formalized in the I-9 "Employment Eligibility Verification" form. A copy of the Form I-9 is found in the Forms folder, and additional background information is located in the Appendix.

INSTRUCTOR NOTE: Please have the students locate the Form I-9 in the Forms folder and walk through the form top-to-bottom. Please also reference the background information in Appendix, although these latter items do not need to be covered in-depth during the class. Feel free to highlight any information if you would like, but otherwise suggest that the students review the Appendix folder on their own time.

c. Requirements for completion of Form I-9 are as follows:

1) The employee must:

a) Complete Section 1 no later than his/her first day of employment;

b) Present original documentation by the 3rd day of employment.

2) The employer must:

a) Verify that each individual who is hired is eligible for employment in the United States, even if the individual is a United States citizen;

b) Complete and sign Section 2 of Form I-9 within three days of hire with a limited exception of an employer who hires an employee for a duration of less than three days who must complete the Form I-9 (Sections 1 & 2) no later than the date of hire;

c) Complete Section 3 of Form I-9 when updating and verifying the employment authorization of an employee whose previous valid authorization has expired;

d) Verify both the identity and the employment eligibility of the employee;

e) Attest that each presented document reasonably appears on its face to be genuine INA § 274A(b)(1);

f) Every field/blank on Form I-9 must be completed (but note that employee's provision of SSN in section 1 is voluntary unless employer is participating in E-Verify);

g) Retain Form I-9 for possible inspection in the future.

d. The instructions on the Form I-9 list the documents that an employer may accept in order to establish the identity and eligibility of the individual. The employer may not specify which document it will accept. The employee alone can choose document(s) to present from List A *or* List B *and* List C. The types of documents fall under the following three lists:

1) List A includes documents that establish both identity and employment eligibility:

   a) United States Passport or United States Passport Card;

   b) Permanent Resident Card or Alien Registration Receipt Card (Form I-551);

   c) Foreign passport that contains a temporary Form I-551 stamp or Temporary I-551 printed notation on a machine-readable immigrant visa

   d) Employment Authorization Document that contains a photograph (Form I-766)

   e) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.

   f) Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI

2) List B includes documents that establish identity only:

   a) A driver's license or identification card containing a photograph, issued by a state or outlying possession of the U.S., provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address;

   b) An identification card issued by federal, state, or local government agencies or entities; provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address;

   c) A school ID card with a photograph;

   d) A voter's registration card;

   e) A U.S. military card or draft record;

   f) A military dependent's ID card;

g) A U.S. Coast Guard "Merchant Mariner" Card;

h) A Native American tribal document;

i) A driver's license issued by a Canadian government authority; and

j) For individuals under the age of 18 who are unable to present a document listed above:

i. A school record or report card;

ii. A clinic, doctor, or hospital record; and

iii. A day-care or nursery school record.

3) List C includes documents that establish employment eligibility only:

a) Social Security Account Number card, other than one that specifies on the face that the issuance of the card does not authorize employment in the U.S.;

b) Certification of Birth Abroad issued by the Department of State (Form FS-545)

c) Certification of Report of Birth issued by the Department of State (Form DS-1350)

d) An original or certified copy of a birth certificate issued by a State, county, municipal authority, or outlying possession of the United States bearing an official seal;

e) A Native American tribal document;

f) United States Citizen Identification Card (Form I-197);

g) Identification Card for Use of Resident Citizen in the United States (Form I-179);

h) Employment authorization document issued by DHS

4) Documents which used to be but are no longer acceptable, although shown as acceptable on Form I-9 as of August, 2007 (subject to change):

a) Form I-151, Alien Registration Receipt Card;

b) Naturalization Certificate;

c) Certificate of U.S. Citizenship;

d) Unexpired Reentry Permit;

e) Unexpired Refugee Travel Document.

5) Document which is acceptable, although it is not listed on Form I-9 as of August 2007 (subject to change):

a) Form I-766, Employment Authorization Document

6) Receipts for applications of required documents are unacceptable except:

a) Application receipt for lost, stolen, or damaged documents and replacement document presented within 90 days;

b) Receipt is I-94 arrival-departure card with unexpired I-551 stamp; and

c) Endorsed I-94 or other evidence of granted refugee or asylee status valid for 90 days until present further documentation.

2. The requirements for retention of Form I-9, Employment Eligibility Verification.

a. Requirements for retention of Form I-9. 8 CFR 274a.2(b).

1) The employer:

a) Must retain Form I-9 for each employee either for three years after the date of hire or for one year after employment is terminated, whichever is later, in its own files and made available for inspection by DHS, DOJ Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or the Department of Labor (DOL);

b) May sign and store Forms I-9 electronically, in addition to the prior choices of paper, microfilm or microfiche; and

c) May choose to make and keep copies of the Section 2 documents along with Form I-9. However, if this is done, the policy should be applied to all employees.

3. Reverification

All documents must now be unexpired **on the date the Form I-9 is completed** (previously, employers could accept expired US Passports, and expired List B

documents). Documents without expiration dates (such as Social Security cards) are considered to be unexpired. Subsequent expiration of documents such as a US Passport, Permanent Resident Card (Form I-551) or State driver's license does not trigger a requirement to reverify the employment eligibility of an employee. Employees who indicate that they are aliens authorized to work and who originally presented work authorization documents that expire (such as an Employment Authorization Document, Form I-766) must be reverified.

4. Merger or Successor in Interest

If an employer acquires a business and its employees, the employer may choose to keep the previous owner's Forms I-9 for each acquired employee, but the employer is responsible for any errors or omissions in them. To avoid liability, the employer may choose to complete a new Form I-9 for each acquired employee. If so, the employer must do so uniformly for all of its acquired employees, without regard to actual or perceived citizenship status or national origin.

5. Form I-9 Receipt Rule

There are some **exceptions** to the Receipt Rule:

The following visa classifications for nonimmigrants with pending applications to extend their stay are automatically authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay: A-3, E-1, E-2, G-5, H-1, H-2A, H-2B, H-3, I, J-1, L-1, O-1, O-2, P-1, P-2, P-3, TN, and aliens having a religious occupation consistent with 8 C.F.R. 214.2(r). To document this extension, employers or their agents should update the expiration dates in Sections 1 and 2 of the Form I-9. The update should be initialed and dated.

6. When Employers Are Not Required to Complete Form I-9?

- Employees hired for private, casual domestic work on a sporadic, irregular or intermittent basis.

- Independent contractors (Self Employed Persons)
Temp agencies. Responsible for I-9

- COMPANY SUPPLYING SECRURITY GUARDS TO DIFFERENT LOCATIONS
Services for the employer under contract, subcontract, or exchange entered into after 11/6/1986. (In such cases, the contractor, such as a temporary employment agency, is the employer for Form I-9 purposes.)

B. EPO #2: Identify the purpose and composition of the employment eligibility verification program known as E-Verify.

1. E-Verify is:

   a. An automated Internet-based system conducted jointly by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) databases during the hiring process. E-Verify is currently free to employers and is available in all 50 states. E-Verify provide an automated link to query federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security numbers.

   b. An aid to employers in maintaining a legal workforce and protecting jobs for authorized U.S. workers;

   c. Voluntary for all employers with limited exceptions; and

   d. A system which provides information about an individual's employment eligibility, but does not provide information about an individual's immigration status.

2. Employers

   a. Employers can register at https://e-verify.uscis.gov/enroll/StartPage.aspx?JS=YES, which provides instructions for completing the registration process. At the end of the registration process, the employer is required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between the employer, the SSA and USCIS. An employee who has signatory authority for the employer can sign the MOU. Employers can use their discretion in identifying the best method by which to sign up their locations for E-Verify. For example, an employer may choose to designate one site to perform the verification queries for newly hired employees on behalf of the entire company.

   b. An employer who verifies work authorization under E-Verify has established a "rebuttable presumption" that it has not knowingly hired an unauthorized alien. Participation in the program does not provide a "safe harbor" from worksite enforcement, however.

   c. More than 200,000 employers are participating in the E-Verify program.

   d. Employers are encouraged to participate because E-Verify is currently the best means available for employers to electronically verify the employment eligibility of their newly hired employees. The E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.

   e. As a participant in E-Verify, employers are required to verify all newly hired employees, both U.S. citizens and non-citizens. Employers may not verify selectively, and must verify all new hires while participating in the program. The program may not be used to prescreen applicants for employment, go back and

check employees hired before the company signed the MOU, or re-verify employees who have temporary work authorization.

f. 2008 Enhancements to E-Verify include:

1) The addition of DHS naturalization data to verify citizenship status (naturalized citizens who have not yet updated their records with SSA comprise the largest category of workers who receive a tentative non-confirmation employment verification response from E-Verify.

2) The inclusion of real-time data from the Interagency Border Inspection System (IBIS) to reduce the number of immigration status-related mismatches for newly arriving workers who have entered the country legally.

g. Additional background materials on "E-Verify" are located in Appendix.

INSTRUCTOR NOTE: Please have the students locate USCIS Releases regarding "E-Verify" in Appendix. Feel free to highlight any points that you feel should be mentioned, but otherwise suggest to the students that they read these background materials on their own time.

h. New regulations promulgated by our sister agency Immigration and Customs Enforcement (ICE) seeks to increase employer accountability, by working in connection with the routine "no-match" letters issued by the U.S. Social Security Administration (SSA).

1) Every year, the SSA informs thousands of employers via a "no-match" letter those certain employees' names and corresponding Social Security numbers provided on W-2 forms do not match SSA's records.

2) Under that ICE program, any employers issued a "no-match" letter will also receive an accompanying letter from ICE informing employers on how to respond to the SSA letter in a manner consistent with U.S. immigration laws.

3) The new regulations provide specific steps required of any employer receiving a "no-match" letter. The employer must:

a) Verify within 30 days that the mismatch was not the result of a record-keeping error;

b) Request that the employee confirm the accuracy of employment records;

c) Ask the employee to resolve the issue with SSA;

d) Follow the instructions on the SSA "no-match" letter if the first three steps resolve the problem; and

e) If the problem remains unresolved, complete a new Form I-9 without using the questionable SS number, and instead using documentation presented by the employee that conforms to the Form I-9 document identity requirements and includes a photograph and other biographical data.

4) Employers unable to confirm employment through these procedures risk liability for violating the law by knowingly continuing to employ unauthorized persons.

5) These regulations are currently not being implemented, due to ongoing litigation. The regulations are the subject of a preliminary injunction issued October 10, 2007 by the U.S. District Court for the Northern District of California. (See *AFL-CIO, et al. v. Chertoff* (N.D. Cal. Case No. 07-CV-4472 CRB).

III. SUMMARY

Although not routinely a part of an Adjudicator's work, employment verification issues are becoming more relevant in USCIS adjudications processes, as DHS worksite enforcement efforts increase and employers seek greater compliance with the law. Inevitably, public inquiries on the employment verification process will increase, as well. It is important for USCIS employees to maintain a familiarity with the employer verification process. By developing a familiarity with the Form I-9 and the E-Verify, USCIS adjudicators will improve their understanding of the immigrant and nonimmigrant employment systems and the needs of USCIS customers.

It is important to note that Adjudicators should not conduct employment verification at the request of employers. The E-Verify program is the only authorized method for employers to verify work authorization information provided on the Form I-9. Employers may bring suspected unlawful employment or document fraud to DHS attention, and such information should be referred to ICE or other appropriate investigative component.

IV. APPLICATION

A. Laboratory

1. None

B. Practical Exercises

1. None

V. REFERENCES

A. INA § 274A, 274B

B. 8 C.F.R. § 274a

C. www.uscis.gov

U.S. Citizenship and Immigration Services

BASIC

ADJUSTMENT OF STATUS

COURSE 220

INSTRUCTOR GUIDE

SYLLABUS

COURSE TITLE: Adjustment of Status

COURSE NUMBER: 220

COURSE DATE: January 2012

LENGTH AND METHOD OF PRESENTATION:

Lecture	Lab	P.E.	Total	Program
12:00	0:00	0:00	12:00	BASIC

DESCRIPTION:

This course is designed to present eligibility requirements for adjustment of status.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a field situation involving an application for adjustment of status, the officer will be able to determine the applicant's eligibility to qualify for permanent resident status.

ENABLING PERFORMANCE OBJECTIVE (EPOs):

EPO #1: Identify procedures taken prior to an adjustment of status interview

EPO #2: Identify eligibility requirements for adjustment of status under INA §245(a)

EPO #3: Identify the eight bars to adjustment of status in INA §245(c)

EPO #4: Identify the INA §245(k) exception to certain 245(c) bars

EPO #5: Identify eligibility requirements for adjustment of status under INA §245(i)

EPO #6: Identify the bar to adjustment contained in INA §245(d)

EPO #7: Identify eligibility requirements for adjustment of status of refugees and asylees under INA §209

EPO #8: Identify the key provisions of the Child Status Protection Act

EPO #9: Identify when USCIS has jurisdiction over an adjustment application and if any appeal rights exist

STUDENT SPECIAL REQUIREMENTS:

Before class read pages 115 – 118, 143 – 147, 520 - 545 in *Immigration Law and Procedure in a Nutshell, 5th Edition,* by David Weissbrodt and Laura Danielson.

> **NOTE:** Like other reference guides and textbooks, *Immigration Law and Procedure in a Nutshell* is written by a private author, and is **not** a U.S. Government publication. Accordingly, any opinions expressed in the text are those of the author, and not those of U.S. Citizenship and Immigration Services or the Department of Homeland Security. This text is being used to provide background information on the law to the student, in order that the student may apply that background to the duties performed by USCIS ISOs.

Additionally, the Fifth Edition of this book was published in 2005. Since the immigration law and policy is constantly changing and evolving, it is always important to verify whether there have been changes to the law or procedures when using this or other reference materials.

METHOD OF EVALUATION:

Written Examination

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INSTRUCTOR NOTE: While the goal of the course is the successful adjudication of Form I-485, the method used in this course is to walk through the crucial statutes that the officer must know in order to adjudicate the I-485. Practical exercises such as reviewing the form itself, situational hypothetical scenarios are woven into the statutory review. At the end of the course, the student should be able to recite the eligibility requirements for, and restrictions to, adjustment of status.

I. INTRODUCTION

The phrases "adjustment of status" and "to adjust" have specific meaning in immigration law. The phrases are used solely to describe the process of obtaining lawful permanent residence status from within the United States. Evidence of this lawful permanent residence status is commonly referred to as a "green card."

In conceptualizing the path to U.S. citizenship, adjustment of status is the path that takes place between the alien's entry into the United States and becoming a citizen. As such, adjustment of status is among the most significant benefits an alien may obtain.

The vast majority of adjustments are on the basis of family or employment relationships as specified in the INA. Unlike visa petition processing, where the focus is on the relationship between the petitioner and alien beneficiary, adjustment of status primarily examines the alien beneficiary.

II. A. EPO #1: Identify procedures taken prior to an adjustment of status interview

INSTRUCTOR NOTE:

Ask students why a thorough review of the A-File is needed. Can there be more than one A-File for an individual? How will you know if another file exists for that individual? What would you do if there is another file for the same individual?

1. What is an A-File (Alien Registration File)?

   a. An A-File is a series of record maintained on an individual that document their history of interaction with U.S. Citizenship and Immigration Services

(USCIS), Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) as prescribed by the Immigration and Nationality Act (INA) and other regulations regarding immigration benefits.

b. A-Files are permanent records that will be retired. When the retention period is met they will be released to the custody of NARA, at which time, the information in them may become available to the public.

c. Information in an A-File is used to grant or deny immigration related benefits or to support enforcement actions initiated against those who violate immigration laws.

d. A-Files may be classified or unclassified and must be handled accordingly.

e. Each A-File folder is labeled with a unique identifier. This identifier is generally the A-Number and should match the barcode label on the folder.

2. What is an A-Number (Alien Number)?

a. An A-Number is a unique identifier assigned by USCIS, ICE, or CBP to individuals applying for an immigration benefit or who have a pending enforcement action.

b. An example of an A-Number: A123 456 789

3. Not all A-Numbers have a Physical File.

Some A-Numbers are assigned to electronic files. These A-Numbers do not have a physical A-File. These include:

a. Border Crossing Cards (BCC), BCC Denials, Apprehensions, Crewman Desertions In Canada, and Denial Crewman Landing Permits – 80,000,000 to 86,899,999

b. Employment Authorization Documents – 100,000,000 to 199,999,999

4. Who gets an A-File?

Individuals who interact with USCIS, ICE, and CBP with actions prescribed by the INA and other regulatory guidelines. The list below is not comprehensive and is presented to provide examples:

a. People with immigrant status

b. People who break immigration laws

c. People who have derived or acquired citizenship

d. Asylees and refugees

e. Native-born citizens who have relinquished their U.S. Citizenship

5. What is in an A-File?

a. A-Files contain forms, correspondence, certain biometrics, etc., to support the decision to grant or deny immigration-related benefits and provides information that may be used in enforcement actions.

b. A-Files may contain such items such as photographs, newspapers, books, etc., submitted by applicants to support a petition for a benefit.

c. A-Files may also contain items that were seized and held as evidence for possible enforcement actions.

6. Central Index System (CIS) and the National File Tracking System (NFTS)

a. The CIS is a centralized database containing summary data about the existence and status of most aliens known to USCIS, the location of their A-Files, and the location of other information pertaining to an alien in other mission-oriented databases.

b. Most, but not all, assigned A-Numbers are in CIS. Some A-Numbers predate CIS.

c. NFTS tracks the location of A-Files within a local office as well as nationally and internationally.

7. Definition of Record of Proceeding (ROP):

a. A ROP is the official history of any hearing, examination, legal proceeding, order to show cause, or adjudicative action in conjunction with any immigration action taken by DHS.

b. The ROP serves as a comprehensive record of all the information considered when making a decision. This is why it is important to keep proceedings intact – do not disassemble them. The ROP may include:

i. The initiating document – the application, petition, or other initiating document

ii. Supporting documents (i.e., exhibits, motions and briefs)

iii. A transcript of the hearing or interview

iv. DHS decisions

v. Notice of appeal

vi. The EOIR or appellate decision/motion to reconsider or reopen

vii. Documents in support of appeals or motion

c. File Assembly of documents in the A-File

i. The ROP documents can be found on the left side of the file in reverse chronological order (most recent on top). A pink sheet (i.e., the M-175, Cover Sheet-Record of Proceeding) is placed on top of each ROP.

ii. There are often other documents within an A-File that are not part of the ROP. These documents should remain in the A-File since they are still considered official records. Since they are not part of the ROP, these materials will be placed on the right side of the file in reverse chronological order.

d. Setup of Record of Proceeding (ROP) for adjustment of status files, Field Operations Standard Operations Procedure (SOP) Manual for Processing Form I-485, Version 2.1, May 1, 2006

	Left-hand Side of File (top to bottom)	**References/Citations**
A	G-28, Notice of Appearance as Attorney or Accredited Representative (if submitted)	
B	I-485	
C	I-485 Supplement A (245(i) cases only)	
D	I-485 Supporting Documentation (includes, but not limited to the following:	
	Applicant's G-325A, Biographical Information Form	
	Applicant's birth certificate	
	Evidence of lawful entry	8 CFR 101.1
	I-864 Affidavit of Support or I-134 (if applicable), followed by supporting documentation	8 CFR 213a
	I-693 Medical Examination/Immunization Chart	
	Certified Court Dispositions of Arrests	
	Waiver applications (I-601, I-212) followed by supporting documentation	
E	Visa petition approval notice (I797, I-171, Consular Notice of approval) and/or…	
F	Visa Petition	
G	Visa Petition Supporting Documentation includes, but may not be limited to the following:	
	Petitioner's G-325A, if applicable. Must be submitted but is not required to be processed through consulate	
	Documents in support of Visa Petition	
H	Return address portion of original envelope	

	Right-hand Side of File (top to bottom)	**References/Citations**
A	I-485 Processing Worksheet. Processing Review Checklist for AOS I-485s	See Appendix folder
B	A copy of the RFE, if applicable	
C	Record of IBIS Query (ROIQ) and IBIS printouts, if applicable	See Appendices
D	Non-Ident Fingerprint Results	
E	Rap Sheet	
F	FBI Name Check Results	
G	Screen prints	
H	Miscellaneous Correspondence in order of date received	

INSTRUCTOR NOTE:

A thorough review of the file before an applicant is called for his/her adjustment of status interview is crucial. Why? Help focus on issues that must be resolved during the interview. Efficient use of time if you know what and how to obtain testimony for pertinent issues that needs resolution after review of file.

8. Ensure that all security checks have been completed

   a. FBI Name Check

      i. No Record (NR)

      ii. Positive Results (PR)

   b. FBI Fingerprint Check

      All applicants between the ages of 14 and 79 must be fingerprinted as part of the USCIS biometrics services requirement when they properly file the I-485. Biometrics is defined as individual personal data consisting of fingerprints, photograph and signature. USCIS will notify the applicant in writing of the time and location for a biometrics appointment at the nearest Application Support Center to that applicant's home address.

      FBI Fingerprint Check is separate and distinct from the FBI Name Check. The FBI Fingerprint Check provides information relating to the applicant's criminal history primarily within the U.S. Results are transmitted electronically to the FBI's Criminal Justice Information Services (CJIS) Division, queried in the Integrated Automated Fingerprint Identification Systems (IAFIS) and returned electronically.

      i. Non-IDENT ("N")

      ii. IDENT ("I" - RAP Sheet in file)

      iii. Unclassifiable ("R")

   c. IBIS (Interagency Border Inspection System)

   d. All the above security checks will be discussed in Module 235 (National Security) in depth

II. B. EPO #2 Identify eligibility requirements for adjustment of status under INA §245(a).

INSTRUCTOR NOTE:

EPO #2 starts with the most crucial statute in this course - INA Section 245(a). Since section 245(a) is pivotal to a student's understanding of adjustment of status and is used to walk through the Form I-485 itself, it is by far the largest EPO. It is suggested that the instructor spend as much time as necessary ensuring that the students understand the basics of 245(a) in particular.

In order to use different media, it is suggested that the instructor use an easel or white board to write down the key elements for each statute (each EPO) so as to highlight the most important elements in summary fashion.

For EPO #2 it is suggested that the instructor start EPO by writing "245(a)" and each eligibility requirement below it as they appear on the PowerPoint. For example:

245(a)

Inspected and Admitted or Paroled
Makes an application for adjustment
Immigrant Visa Immediately Available at Time Application is Filed
Eligible to Receive an Immigrant Visa
Admissible
Discretion

Section 245(a) of the Immigration and Nationality Act (INA/the Act) is the principal means for seeking adjustment by most aliens.

Section 245(a) of the Act [8 U.S.C. 1255] states in pertinent part:

> *...The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment,(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.*

1. The alien must make an application

The alien must file an application for adjustment. The application for adjustment of status under INA Section 245(a) is Form I-485, *Application to Register Permanent Residence or Adjust Status*. The Form I-485, Instructions, and Supplement A are reproduced in the Forms Folder. The alien applicant must file the Form I-485 according to the controlling form instructions and regulations in existence at the time the application is filed.

The application must be properly filed pursuant to 8 CFR 245.2 and 103.2.

INSTRUCTOR NOTES:

Have students look up the law. Get them into the practice of using the law book so they will feel comfortable. Have students read aloud certain sections of 8 CFR 103.2. Example: 103.2(b)(2)(ii) mentions Department of States Foreign Affairs Manual. Good time to introduce and walk them through the Reciprocity Chart in the Adjudicator's Toolbox. If FAM indicates that a document does not exist, then secondary evidence and affidavits is permitted.

Ask students to look in the Forms folder for the I-485 and follow along with I-485 video clip (approximately 4:15 minutes). Explain any interview techniques particular to adjustment and methods of going over questions on this form.

2. Physical presence in the United States

Adjustment of status is for an alien seeking lawful permanent resident status from within the United States. The alien must be *physically present* in the United States. INA Section 245(a) and 8 CFR 245.1(a)

INSTRUCTOR NOTE:

Good time to remind students that there is "no point something" under the INA.

An alien outside the United States may be the beneficiary of an approved visa petition filed in the United States but cannot file an application for adjustment of status. Instead, the alien would need to seek an immigrant visa from the Department of State. The process from outside the United States is also known as "consular processing."

3. Inspected and Admitted or Paroled

INA Section 245(a) permits only those who have been inspected and then either admitted or paroled to adjust as a threshold eligibility.

However, INA Section 245(a) exempts a VAWA self petitioner from the requirement of having been inspected and admitted or paroled. In other words, a VAWA self petition may have entered without being inspected and remain eligible to adjust under Section 245(a).

It is important to understand the definition of "admission" in the INA. The terms "admission" and "admitted" are defined in INA Section 101(a)(13). In relevant part, the definition reads as follows:

> *(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.*
>
> *(B) An alien who is paroled under section 212(d)(5) or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.*

INSTRUCTOR NOTE:

Ask students what document does an applicant for adjustment of status have to summit to prove that he or she was "inspected and admitted or paroled" into the U.S.? Mention that there is a copy of the I-94 in the file and if the case is approved at the interview, take the original I-94 from the applicant.

4. Immigrant Visa immediately available

An immigrant visa must be immediately available to the alien **at the time the adjustment application is filed**. 8 C.F.R. 245.2(a)(2)(i)(A). But note that concurrent filing rules currently exist. Pursuant to 8 C.F.R. 245.2(a)(2)(i)(B), "If, at the time of filing, approval of a visa petition for certain classifications would make a visa immediately available to the alien beneficiary, the alien's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245."

5. Eligible to Receive an Immigrant Visa

The alien must be eligible to receive an immigrant visa. This means that the alien must be the beneficiary of an approved visa petition and have a visa number currently available on the date of adjudication.

Although an alien may be the beneficiary of an approved petition, he or she may not be eligible to receive and immigrant visa. For example, while most nonimmigrants are eligible

to apply to adjust their status, certain nonimmigrants are not permitted to adjust from nonimmigrant to immigrant categories. This will be discussed in detail when we cover INA § 245(c) (restricted and ineligible aliens).

A) **Family-Based Process**

The qualified family member properly files an immigrant visa petition (Form I-130) for the alien relative to prove or recognize the relationship for immigration purposes. USCIS receives the petition, assigns a priority date, and, if necessary, adjudicates. The process is different depending whether the alien qualifies as an Immediate Relative or a preference alien.

INSTRUCTOR NOTE:

Mention that this is a quick review of Module 214, Family-Based Petitions since the bulk of our adjustment cases are either Family or Employment Based. Show I-130 video clip (approximately 2:47 minutes) for review.

1) Immediate Relatives

INA 201(c) provides that there are no numerical limits on the number of immediate relatives who may immigrate. A visa is always immediately available for immediate relatives. However, the number of immediate relatives who immigrate reduce the number of preference visas available each year.

Immediate Relatives are:

1) The spouse of a USC
2) The child* of a USC
3) The parent of a USC (the USC petitioner must be over 21)

* The word "child" is specifically defined in under INA §101(b) as a person under 21 and unmarried.

Those qualifying as an immediate relative case can file both the Form I-130 and the Form I-485 concurrently because there is no yearly limit on immediate relative adjustments.

There are no "riders" permitted on an immediate relative petition. Each immediate relative must be the beneficiary of a visa petition filed on his or her behalf. For example, the spouse of a USC who has a child (step-child of the USC) would need to

have a separate petition filed by the USC for the child. The child could not "ride" on the biological parent's petition in order to adjust their status.

2) Family Preference Classifications

The INA sets numerical annual limits of visa numbers available for each country by preference category. When more people want to immigrate than the number of available visa numbers, a queue or line develops.

Section 203(a) of the INA sets forth family preference categories as follows:

203(a)(1) - Unmarried son/daughter of a U.S. citizen (known as F1);
203(a)(2)(A) - Spouse/child* of an LPR (F2A);
203(a)(2)(B) - Unmarried son/daughter of an LPR (F2B);
203(a)(3) - Married son/daughter of an U.S. citizen (F3);
203(a)(4) - Brother/sister of a U.S. citizen (F4).

Derivatives- "Riders"

Section 203(d) of the INA entitles the spouse and child of the principal applicant the same status and the same order of consideration, if accompanying or following to join the principal. A derivative may "ride" on their spouse or parent's petition and do not need a separate petition filed for them.

Obviously, when the beneficiary is required to be unmarried to qualify in a particular preference category, she or he cannot have a derivative spouse, but he or she could have derivative children.

3) Priority Date

For family-based immigration, a person's place in the queue is set according to the date on which his or her visa petition was *properly filed.* A derivative person's place in the queue could also be set according to the date on which the principal applicant's visa petition was properly filed. This is called the **priority date**. See 8 CFR 204.1(c).

4) Visa Bulletin

Since the State Department is responsible for issuing visa numbers, it announces or publishes a Visa Bulletin each month. The Visa Bulletin indicates who is eligible to file for an immigrant visa or adjustment of status based on priority dates. The Bulletin is available online at www.travel.state.gov. A visa number is current if the priority date is PRIOR to the cut off date listed on the visa bulletin. An example is reproduced in the Appendix.

INSTRUCTOR NOTE: Go over the Visa Bulleting and explain how to read the Bulletin and how to classify the alien in the appropriate category. For family-based, cover the organization of the chart by class and country. Same for employment-based and DV. Review Visa Bulletin to include any other pertinent aspects.

5) Regression

When an alien's priority date is earlier than the date listed for the appropriate category in the Visa Bulletin, it is referred to as "**current**". **When both the priority date is current and the visa petition (i.e. Form I-130, I-140, and I-360) has been approved, it is said that a visa is available.**

Sometimes the priority dates move backward, which is called **regression.** When a visa regresses it renders an alien, who previously had a visa available, ineligible to receive a visa and also unable to adjust status until the priority date becomes available again. If Form I-485 was already accepted as properly filed, USCIS will hold the adjustment application until a visa becomes available.

6) Chargeability

Visa availability and chargeability are normally determined by the alien's country of birth (in addition to the preference category). Section 202(b) of the INA sets forth rules by which an alien's visa number may be charged to a country of an accompanying spouse's country of birth. A visa cannot be charged to a dependent child's country of birth.

7) Automatic Conversion

In family-based cases, the INA and the regulations allow automatic conversion of a petition without having to file a new petition. Automatic conversion occurs when the petitioner's or beneficiary's status changes based on the occurrence of certain events (i.e. marriage, reaching age 21, parent naturalizes, etc.), as long as there remains a valid classification at all times.

Consequently, a numerically limited, preference-based child of a lawful permanent resident, whose petitioning parent becomes a naturalized U.S. citizen, automatically converts to an immediate relative child of a U.S. citizen if they remain unmarried and under the age of 21. This is advantageous to the child because they no longer have to wait for a visa number to become available to apply for adjustment of status. Just as the above child benefited from the automatic conversion of their petition, if they marry prior to their 21st birthday, their petition will automatically convert to the F3 preference-based category as the married son or daughter of a U.S. citizen. This is

disadvantageous for the child because they now have to wait for a visa number to become available before they can qualify to apply for adjustment of status.

B) **Employment-Based Process**

The Visa Bulletin is published by the Department of State and contains a list of visa preference categories and priority dates for employment-based classifications.

All employment-based categories are preference categories and are divided by skill and qualifications (as opposed to familial relations). As in the case of family-sponsored petitions, the Visa Bulletin further breaks down employment-based categories by the alien's country of origin or "chargeability."

Some employment-based categories require an approved labor certification issued by the Department of Labor as a precondition for filing a Form I-140. For those categories, the priority date is set by the labor certification filing date, not the petition (Form I-140) filing date. The employer is required to meet the requirements of filing a labor certification in order to test the labor market to ensure that employing an alien in that occupational classification would not displace any American workers nor would it negatively effect the wages of American workers in that job classification. This is also known as testing the labor market.

Certain preference classifications are exempt from the labor certification requirement on the premise that the value of the alien's employment contributions outweighs the need to test the labor market. See INA Section 212(a)(5)(D). The initial step toward permanent residence for these aliens is the filing of a Form I-140 immigrant petition with USCIS The priority date is the date the immigrant petition is properly filed with USCIS, as provided under 8 CFR 103.2(a). The classifications that do not require a labor certification include: EB-1 (employment-based first preference) manager/executive (8 CFR 204.5(j)(5)), EB-1 extraordinary ability (8 CFR 204.5(h)(5)), and EB-1 outstanding professors and researchers (8 CFR 204.5(i)(3)(iii)). In addition, petitions filed by or on behalf of certain EB-2 aliens of exceptional ability and advanced degree holders do not require a labor certification, if a waiver of the labor certification would be in the national interest of the United States. See INA section 203(b)(2)(B)(i) and 8 CFR 204.5(k)(4)(ii).

In addition, there are two other employment-based categories that do not require the submission of an approved labor certification: EB-4 (religious workers and certain special immigrants), and EB-5 (alien entrepreneurs). The Form I-140 petition is not used to classify an alien in these categories. Instead, the Form I-360, Petition for Amerasian, Widow/ers and Special Immigrants, is used by EB-4 applicants, while the Form I-526, Petition for Alien Entrepreneur, is used by EB-5 alien entrepreneurs. The priority date for these petitions, which do not require a labor certification, is the date the petition was properly filed with USCIS.

In general, the adjustment applicant must intend to work for the employer who filed the petition subsequent to the approval of the adjustment application. Spyropolos v. INS, 590 F.2d 1 (1st Cir. 1978). However, pursuant to Section 204(j) of the INA, if a first, second or third preference adjustment application is pending for more than 180 days, the underlying **petition "shall remain valid** with respect to a new job if the individual changes jobs or employers if the new job is in the same or similar occupational classification as the job for which the petition was filed." (Also known as "portability" – Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21), Public Law 106-313, 114 Stat. 1251)

C) **Diversity Visa Process**

Section 201(e) of the INA provides a maximum of up to 55,000 diversity visas (DV) each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the U.S. [NOTE: The Nicaraguan Adjustment and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that, beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under section 203 of the NACARA program. This reduction has resulted in the annual limit being reduced to 50,000 for the foreseeable future]. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

The Department of State makes a determination every year as to which countries and regions have been under-represented in immigration to the U.S. and publishes a notification in the Federal Register regarding the DV program for the coming fiscal year. Interested persons from those regions or countries may file for the DV "lottery" in accordance with the Department of State's instructions. Lottery winners are notified by the Department of State of their lottery rank number. The Visa Bulletin, published monthly by the Consular Affairs Office of the Department of State, details which immigrant numbers in the DV category are available to qualified applicants chargeable to all regions and eligible countries. When an allocation cut-off number is shown in the Visa Bulletin, visas are available only for applicants with DV regional lottery rank numbers below the specified allocation cut-off number. Any person seeking information on filing for the DV lottery program should be referred to the Department of State's Kentucky Consular Center (KCC) in Williamsburg, KY where diversity visas are processed.

Most DV lottery winners immigrate through consular processing and issuance of an immigrant visa. Although a large number of persons in the U.S. (in either illegal or nonimmigrant status) apply for the DV lottery, many are barred by section 245(a) or 245(c) of the Act from applying for adjustment. However, those lottery winners in the U.S. who are not subject to the restrictions contained in sections 245(a) and 245(c) may apply for adjustment of status.

Entitlement to adjustment of status under the DV program lasts only through the end of the fiscal year (September 30) for which the applicant is selected in the lottery. (For example, the year of entitlement for all applicants registered for the DV-2001 program ends as of September 30, 2001, and DV adjustments may not be granted to DV-2001 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2001 principals are only entitled to derivative DV status until September 30, 2001). For that reason, it is extremely important that every office carefully monitor its DV adjustment caseload and take appropriate steps to ensure that (to the extent possible) all adjustment applications filed by DV lottery winners and their dependents are adjudicated no later than September 30th of the relevant fiscal year.

6. Admissibility

The alien must be admissible under INA §212(a).

INSTRUCTOR NOTE:

Mention that we will only cover two grounds of inadmissibility and its application in this module. All ten grounds of inadmissibility will be cover in more depth in Module 217 (Inadmissibility, Deportability, and Waivers).

Explain how to utilize the I-864P, Poverty Guidelines (in Forms Folder)

Go over the four types of Affidavits of Support (I-864, I-864A, I-864EZ, and I-864W). You can break up the group into four teams and have them explain the use of each of these four affidavits.

A) <u>Affidavit of Support (Public Charge under INA §212(a)(4))</u>

Unless the alien qualifies for an exception, an Affidavit of Support (Form I-864 or Form I-864EZ) must be filed on behalf of any alien who seeks adjustment of status on the basis of:

- an immediate relative or family-based visa petition (Form I-130, I-129F, or I-600) or
- an employment-based visa petition (Form I-140) if a qualifying relative either filed the Form I-140 as the employer or owns at least 5% of the equity of the for-profit firm that filed the I-140.

Specific details concerning when a Form I-864 is required, when it is not required, and what evidence must be submitted with a Form I-864 is found in 8 CFR part 213a and chapter 20.5 of the Adjudicators Field Manual.

If an Affidavit of Support is required, but no Form I-864 is filed (or the Form I-864 that is filed does not satisfy the requirements of section 213A), then the alien is inadmissible under

Section 212(a)(4)(C) or Section 212(a)(4)(D) of the INA, family-based or employment–based immigration, respectively.

Accompanying spouses and children also need to submit Form I-864s. Each spouse or child must submit a photocopy of the principal's I-864, but they do not need to submit a photocopy of the supporting documentation. A spouse or child is considered to be "accompanying" a principal immigrant if they apply for an immigrant visa or adjustment of status either at the same time as the principal immigrant or within 6 months after the date the principal immigrant acquires LPR status.

Following-to-join spouses and children (those who apply for an immigrant visa or adjustment of status 6 months or more after the principal immigrant) require a new Form I-864 at the time they immigrate or adjust status.

The Affidavit of Support is not a separate application. It is supporting documentation for an adjustment of status application. Correspondence regarding insufficient Affidavits of Support should be sent to the adjustment applicant and his/her legal representative, but not to the sponsor.

1. Purpose of the Affidavit of Support.

   a. To show that the applicant for adjustment of status have adequate means of financial support and that they will not likely to become a public charge

   b. This Affidavit of Support (I-864) is a contract between a sponsor and the U.S. government

   c. Sponsor must show that he/she have enough income and/or assets to maintain the intending immigrant and the rest of sponsor's household at 125 percent of the Federal Poverty Guidelines

   d. By signing the Affidavit of Support, the sponsor is agreeing to use his/her resources to support the intending immigrant named in this form, if it becomes necessary

   e. Submission of the I-864 may make the sponsored immigrant ineligible for certain Federal, State, or local means-tested public benefits because an agency that provides means-tested public benefits will consider the **sponsor's** resources and assets as available to the sponsored immigrant in determining his or her eligibility for the program

   f. If the immigrant sponsored in the affidavit of support does receive one of the designated Federal, State or local means-tested public benefits, the agency providing the benefit may request the sponsor to repay the cost of

those benefits

g. That agency can sue the sponsor if the cost of the benefits provided is not Repaid

2. Exceptions to Who Needs an Affidavit of Support

a. Any intending immigrant who has earned or can be credited with 40 qualifying quarters (credits) of work in the United States

b. Any intending immigrant who will, upon admission, acquire U.S. citizenship under section 320 of the INA, as amended by the Child Citizenship Act of 2000 (CCA)

c. Self-petitioning widow/ers who have an approved Petition for Amerasian, Widow(er), or Special Immigrant, Form I-360; and

d. Self-petitioning battered spouses and children sho have an approved Petition for Amerasian, Widow(er), or Special Immigrant, Form I-360

e. NOTE: If applicant qualifies for one of the exemptions listed above, an I-864W, Intending Immigrant's I-864 Exemption is required instead of Form I-864

3. Who Completes and Signs the I-864?

a. A sponsor completes and signs Form I-864

b. A sponsor is required to be at least 18 years old and domiciled in the United States, or its territories or possessions

c. The petitioning sponsor must sign and complete Form I-864, even if a joint sponsor also submits an I-864 to meet the income requirement

4. What Are the Income Requirements?

a. To qualify as a sponsor, the sponsor must demonstrate that his or her income is at least 125 percent of the current Federal poverty guideline for his or her household size.

b. The Federal poverty line, for purposes of this form, is updated annually and can be found on Form I-864P, Poverty Guidelines (copy in Forms Folder)

c. If sponsor is on active duty in the U.S. Armed Forces, including the Army, Navy, Air Force, Marines or Coast Guard, and is sponsoring spouse or minor child, sponsor only need to have an income of 100 percent of the Federal poverty line for sponsor's household size. This provision does not apply to joint or substitute sponsors

5. How Does A Sponsor Count Household Size?

a. Sponsor's household size includes sponsor and the following individuals, no matter where they live: any spouse, any dependent children under the age of 21, any other dependents listed on sponsor's most recent Federal income tax return, all persons being sponsored in the affidavit of support, and any immigrants previously sponsored with a Form I-864 or Form I-864EZ affidavit of support whom sponsor are still obligated to support

b. If necessary to meet the income requirements to be a sponsor, a sponsor may include additional relatives (adult children, parents, or siblings) as part of your household size as long as they have the same principle residence as sponsor and promise to use their income and resources in support of the intending immigrant(s)

6. What If A Sponsor Cannot Meet the Income Requirements?

If a sponsor's income alone is not sufficient to meet the requirement for sponsor's household size, the intending immigrant will be ineligible for an immigrant visa or adjustment of status, unless the requirement can be met using any combination of the following:

a. Income from any relatives or dependents living in sponsor's household or dependents listed on sponsor's most recent Federal tax return who signed a Form I-864A;

b. Income from the intending immigrant, if that income will continue from the same source after immigration, and if the intending immigrant is currently living in sponsor's residence. If the intending immigrant is sponsor's spouse, his or her income can be counted regardless of current residence, but it must continue from the same source after he or she becomes a lawful permanent resident.

c. The value of sponsor's assets, the assets of any household member who has signed a Form I-864A, or the assets of the intending immigrant;

d. A joint sponsor whose income and/or assets equal at least 125 percent of the Poverty Guidelines.

7. How Can Relatives and Dependents Help A Sponsor Meet the Income Requirements?

   a. A sponsor may use the income of his or her spouse and/or any other relatives living in sponsor's residence if they are willing to be jointly responsible with sponsor for the intending immigrant(s)

   b. If sponsor have any unrelated dependents listed on his or her income tax return sponsor may include their income regardless of where they reside

   c. The income of such household members and dependents can be used to help sponsor meet the income requirements if they complete and sign Form I-864A, Contract Between Sponsor and Household Member, and if they are at least 18 years of age when they sign the form

8. Does Receipt of Means-Tested Public Benefits Disqualify A Sponsor From Being A Sponsor?

   a. Receipt of means-tested public benefits does not disqualify anyone from being a sponsor

   b. Means-tested public benefits cannot be accepted as income for the purposes of meeting the income requirement

9. How Can A Sponsor Use Assets to Qualify?

   Assets may supplement income if the consular or immigration officer is convinced that the monetary value of the asset could reasonably be made available to support the sponsored immigrant and converted to cash within one year without undue harm to the sponsor or his or her family members. Sponsor may not include an automobile unless sponsor shows that sponsor own at least one working automobile that sponsor have not included.

   a. Documentation of assets establishing location, ownership, date of acquisition and value

   b. Evidence of any liens or liabilities against these assets

   c. In order to qualify based on the value of sponsor's assets, the total value of assets must equal at least five times the difference between sponsor's total household income and the current poverty guidelines for sponsor's household size

d. If the sponsor is a U.S. citizen and sponsoring his or her spouse or minor child, the total value of sponsor's assets must only be equal to at least three times the difference

e. If the intending immigrant is an alien orphan who will be adopted in the United States after the alien orphan acquires permanent residence, and who will, as a result, acquire citizenship under section 320 of the Act, the total value of sponsor's assets need only equal the difference

10. What Is A Joint Sponsor?

a. If the person who is seeking the immigration of one or more of his or her relatives cannot meet the income requirements, a "joint sponsor" who can meet the requirements may submit a Form I-864 to sponsor all or some of the family members

b. A joint sponsor must be person, and may not be a corporation, organization, or other entity. A joint sponsor can be any U.S. citizen, U.S. national, or lawful permanent resident who is at least 18 years old, domiciled in the U.S., or its territories or possessions

c. Willing to be held jointly liable with the petitioner for the support of the intending immigrant

d. A joint sponsor does not have to be related to the petitioning sponsor or the intending immigrant

e. There may be no more than two joint sponsors

f. Even if one or more I-864s are submitted for an intending immigrant, the petitioning sponsor remains legally accountable for the financial support of the sponsored alien along with the joint sponsor(s)

11. What Is a Substitute Sponsor?

a. A substitute sponsor is a sponsor who is completing a Form I-864 on behalf of an intending immigrant whose original I-130 petitioner has died after the Form I-130 was approved, but before the intending immigrant obtained permanent residence

b. The substitute sponsor must be related to the intending immigrant in one of the following ways:

i. spouse

ii. parent

iii. mother-in-law or father-in-law

iv. sibling

v. child (at least 18 years of age)

vi. son or daughter

vii. son-in-law or daughter-in-law

viii. brother-in-law or sister-in-law

ix. grandparent

x. grandchild

xi. legal guardian

c. The substitute sponsor must also be a U.S. citizen or lawful permanent resident

d. A substitute sponsor must indicate that he or she is related to the intending immigrant in one of the ways listed above and include evidence proving that relationship

e. The beneficiary must file the I-864 along with a written statement explaining the reasons why the Form I-130 visa petition should be reinstated, having been revoked following the petitioner's death

f. The beneficiary must also include a copy of the Form I-130 approval notice

12. How Long Does A Sponsor's Obligation Continue?

a. Sponsor's obligation to support the immigrant(s) sponsored in the affidavit of support will continue until the sponsored immigrant becomes a U.S. citizen, or can be credited with 40 qualifying quarters of work in the United States

b. Forty (40) qualifying quarters of work generally equate to ten years of work

c. The obligation ends if the sponsor or sponsored immigrant dies or if the sponsored immigrant ceases to be a lawful permanent resident and departs the United States

d. Divorce does not end the sponsorship obligation

13. Does A Sponsor Have to Submit a Separate Affidavit for Each Family Member?

a. Sponsor must submit a Form I-864 affidavit of support for each intending immigrant he or she is sponsoring

b. Sponsor may submit photocopies if sponsor is sponsoring more than one intending immigrant listed on the same affidavit of support. Often a spouse or minor children obtain visas or adjust status as dependents of a relative based on the same visa petition. If sponsor is sponsoring such dependents, sponsor only need to provide a photocopy of the original Form I-864, as long as these dependents are immigrating at the same time as the principal immigrant or within six months of the time he or she immigrates to the United States. Sponsor do not need to provide copies of the supporting documents for each of the photocopied Forms I-864.

c. Separate affidavits of support are required for intending immigrants for whom different Form I-130 family-based petitions are filed. For instance, if you are sponsoring both parents, each will need an original affidavit of support and accompanying documentation since sponsor was required to submit separate Form I-130 visa petitions for each parent.

d. To be valid, Form I-864 and all supporting documentation must be submitted within one year of when the sponsor signs the I-864

14. Does A Sponsor Have to Report A Change of Address?

a. Federal law requires that every sponsor report every change of address to the USCIS within 30 days of the change

b. Sponsor should complete and submit Form I-865, Sponsor's Change of Address, to the Service Center having jurisdiction over sponsor's new address only when the address sponsor indicated on the original I-864 has changed

c. The above requirement does not relieve a sponsor who is a lawful permanent resident from submitting Form AR-11 within ten days of a change of address

15. Is There A Filing Fee?

    a. USCIS does not charge a fee for the I-864

    b. Department of State does charge a fee when the Affidavit of Support is reviewed domestically. This does not apply when the Affidavit of Support is filed abroad

16. What Must A Sponsor Submit Along With the I-864?

    a. Proof of U.S. citizen, national or lawful permanent resident status

    b. Proof of current employment or self employment

    c. A photocopy or an Internal Revenue Service (request made on IRS Form 4506-T) issued transcript of sponsor's complete Federal income tax return for most recent tax year or a statement and/or evidence describing why not required to file

    d. W-2s and/or 1099 forms

17. Other types of Affidavits of Support

    a. I-864A, Contract Between Sponsor and Household Member

       i. Is an attachment to Form I-864

       ii. A household member is promising to make his or her income and/or assets available to sponsor to help support the sponsored immigrant(s). A "household member" is a relative who has the same principal residence as the sponsor and is related to the sponsor as a spouse, adult child, parent, or sibling. Can also be a relative or other person whom the sponsor has lawfully claimed as a dependent on the sponsor's most recent Federal income tax return even if that person does not live at the same residence as the sponsor. The intending immigrant, in certain circumstances can be a household member.

       iii. Must be submitted simultaneously with Form I-864

       iv. The combined signing of this form constitutes an agreement that the household member is responsible along with the sponsor for the support of the individual(s) named in the form

v. Form I-864A may only be used when a sponsor's income and assets do not meet the income requirements of Form I-864 and the qualifying household member chooses to combine his or her resources with the income and/or assets of a sponsor to meet the poverty guidelines requirements

vi. The obligations of the household member under this contract terminate when the obligations of the sponsor under the Affidavit of Support terminate

b. I-864EZ, Affidavit of Support Under Section 213A of the Act

i. Is a shorter version of Form I-864

ii. Use this form if all the following conditions apply: sponsor is the person who filed or is filing the Form I-130, the relative being sponsored is the only person listed on the I-130, and the income sponsor is using to qualify is based entirely on sponsor salary or pension and is shown on one or more Forms W-2 provided by sponsor's employer(e) or former employer(s)

c. I-864W, Intending Immigrant's Affidavit of Support Exemption

a. An intending immigrant who has or can be credited with 40 quarters of work.

b. An intending immigrant who will, upon admission, acquire U.S. citizenship under section 320 of the Act, as amended by the Child Citizenship Act of 2000 (CAA); and

c. A self-petitioning widow(er) or qualifying battered spouse or child

B) Medical Reports (Health Related grounds of inadmissibility under INA §212(a)(1))

8 CFR 245.5. of the regulations reads as follows:

Pursuant to section 232(b) of the Act, an applicant for adjustment of status shall be required to have a medical examination by a designated civil surgeon, whose report setting forth the findings of the mental and physical condition of the applicant, including compliance with section 212(a)(1)(A)(ii) of the Act, shall be incorporated into the record. A medical examination shall not be required of an applicant for adjustment of status who entered the United States as a nonimmigrant spouse, fiance, or fiancee of a United States citizen or the child of

such an alien as defined in section 101(a)(15)(K) of the Act and § 214.2(k) of this chapter if the applicant was medically examined prior to, and as a condition of, the issuance of the nonimmigrant visa; provided that the medical examination must have occurred not more than 1 year prior the date of application for adjustment of status. Any applicant certified under paragraphs (1)(A)(ii) or (1)(A)(iii) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter. (Amended 8/14/01; 66 FR 42587)(Amended effective 4/1/97; 62 FR 10312)

Generally, all applicants filing for adjustment of status to that of a lawful permanent resident must submit Form I-693, Report of Medical Examination and Vaccination Record, completed by a designated civil surgeon. Form I-693 is used to report results of a medical examination to the U.S. Citizenship and Immigration Services (USCIS). The examination is required to establish that an applicant is not inadmissible to the United States on public health grounds.

The report must be received in a sealed envelope and must be an original, completed and signed by the applicant and a designated civil surgeon. This report must have been executed no more than one year before the date of filing the Form I-485; however, USCIS issues policy memoranda periodically extending the validity of endorsements on Form I-693 due to application backlogs. For example, see Form I-693 (in Forms Folder) and current memo in the Appendix.

1. Medical Grounds of Inadmissibility:

   a. Communicable diseases of public health significance, INA 212(a)(1)(A)(i)

      i. The civil surgeon is required to perform specific tests for TB, syphilis

      ii. The medical exam also indicates an evaluation for other sexually transmitted diseases and Hansen's Disease (leprosy)

      iii. If applicant is found to have a communicable disease of public health significance, the civil surgeon will advise applicant how to obtain any necessary treatment

      iv. It also may be necessary for applicant to apply for a waiver of inadmissibility

      v. Note: As of January 4, 2010, HIV was removed from CDC's list of communicable diseases of public health significance. Therefore, as of this date, having HIV infection will no longer make a foreign national inadmissible to the United States.

b. Lack of required vaccination, INA 212(a)(1)(A)(ii)

i. The required vaccines for the immigration population are recommended by the Advisory Committee on Immunization Practices (ACIP). The role of the ACIP is to provide advice that will lead to a reduction in the incidence of vaccine preventable diseases in the United States.

ii. The civil surgeon will review an applicant's vaccination history to determine if he or she have all the required vaccination

iii. If applicant does not have the documents proving he or she had received all the required vaccines, the civil surgeon can administer these vaccines to applicant

iv. If the civil surgeon certifies that it is "not medically appropriate" (e.g, the vaccine is not recommended for applicant's specific age group; not safe for applicant because of allergies to eggs and yeast, hypersensitive to prior vaccines; unable to complete entire series of a required vaccine within a reasonable amount of time; or for the influenza vaccine, it is not the flu season) for applicant to have one or more of the missing vaccine(s), USCIS may grant applicant a waiver based on the civil surgeon's certification on the vaccination supplement.

v. If applicant objects to receiving the recommended vaccinations because of a sincerely held religious beliefs or moral convictions, applicant may apply for a waiver of these requirements.

c. Physical or mental disorders with harmful behavior, INA 212(a)(1)(A)(iii)(I) and 212(a)(1)((A)(iii)(II)

i. The emphasis is more on the behavior associated with the physical or mental disorder, instead of the physical or mental disorder itself.

ii. The civil surgeon must determine that there is behavior associated with the disorder that is harmful either to applicant, to others, or to property.

iii. A history of a physical or a mental disorder must be associated with harmful behavior that is likely to recur in order for applicant to be considered inadmissible.

iv. May apply for a waiver according to the terms, conditions, and controls determined necessary by USCIS in consultation with U.S. Department of Health and Human Services (HHS).

d. Drug abuse or addiction, INA 212(a)(1)(A)(iv)

i. Civil surgeon will review applicant's medical history during the medical exam and ask questions necessary to determine whether applicant is currently using or have used in the past any drugs or other psychoactive substances.

ii. The medical guidelines for determining drug abuse and drug addiction are determined by HHS.

iii. If the civil surgeon determines applicant have a medical condition of drug addiction/abuse, applicant is **not** eligible to apply for a waiver **unless** applicant is applying for adjustment of status one year after he or she was admitted as a refugee, or if applicant is applying for adjustment of status one year after he or she was granted asylum.

iv. If applicant is ineligible to apply for a waiver, but is later found by the civil surgeon to be in remission from the drug abuse or drug addiction (as determined by HHS), applicant may proceed with his or her adjustment-of-status application, if eligible.

INSTRUCTOR NOTE: Go over Form I-693 and Memo.

C) <u>G-325A, Biographic Information</u>

The Form instructions for the Form I-485 require that the applicant submit a completed Form G-325A if the applicant is between 14 and 79 years of age.

USCIS will use the information provided on this from to process applicant's application or petition.

D) <u>Interview</u>

8 C.F.R. 245.6 provides:

Each applicant for adjustment of status under this part shall be interviewed by an immigration officer. This interview may be waived in the case of a child under the age of 14 ; when the applicant is clearly ineligible under section 245(c)of the Act or § 245.1 of this chapter; or when it is determined by the Service that an interview is unnecessary.

USCIS has criteria in existence for waiving certain interviews. Current guidance waives interviews on many employment based applications. See attached January 5, 2005 memo entitled Revised Interview Waiver Criteria for Form I-485 Application to Register Permanent Residence or Adjust Status which can be found in the Appendix.

7. Alien must merit a favorable exercise of discretion

INSTRUCTOR NOTE: In describing discretion it might be good to contrast with the adjudication of a petition where there is no discretion. For example, if a Petition for Alien Relative was filed for a criminal and/or other threatening person, we must approve it as long as we believe the relationship is valid. With adjustment, the focus shifts to the alien and even if the alien is admissible, the application could be denied as a matter of discretion based on his or her criminal or other threatening behavior (assuming there was a reasonable, articulable basis for the discretionary finding).

Section 245(a) provides that an alien may be adjusted by the Attorney General "***in his discretion.***" Therefore, the Immigration Services Officer (ISO) must determine whether the adjustment applicant merits a favorable exercise of discretion. **This is a separate determination from other eligibility factors, including admissibility.**

For example, an alien with 10 convictions for driving while intoxicated may still be admissible, but a director may deny adjustment as a matter of discretion if the he or she determines that the 10 convictions do not merit a favorable exercise of discretion.

Determining whether the alien merits a favorable exercise of discretion entails weighing positive and negative factors. The factors to be weighed include immigration status and history (repeated immigration violations being a negative factor, Mamoka v INS, 43 F3d. 184), length of residence in the United States (only time in a legal status may be considered a positive discretionary factor), family ties in the United States, humanitarian concerns, criminal history, current or past cooperation with law enforcement authorities, honorable U.S. military service, community attention, and preconceived intent (preconceived intent to immigrate to United States at the time of entry on a nonimmigrant visa being a negative factor). Jain v. INS, 612 F.2d 683 (2d Cir), cert. denied, 446 U.S. 937(1980); Ameeriar v INS, 438 F2d 1028 (3d Cir.), cert. denied 404 U.S. 937 (1971); Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981) [former 5th preference petition] but not in the case of an immediate relative; Matter of Cavazos, 17 I&N. Dec. 215 (BIA 1980)).

The following two paragraphs could be used in a discretionary denial:

The grant of an application for adjustment of status under Section 245 is a matter of administrative grace. Von Pervieux v. INS, 572 F. 2d 114, 118 (3d Cir. 1978); Ameeriar v. INS, 438 F.2d 1028, 1030 (3d Cir. 1971); Matter of Marques, 16 I&N Dec. 314 (BIA 1977).

An applicant has the burden of showing that discretion should be exercised in his favor. Matter of Patel, 17 I&N Dec. 5997 (BIA 1980); Matter of Leung, 16 I&N Dec. 12 (BIA 1976); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). The applicable statute does not contemplate that all aliens who meet the required legal standards will be granted adjustment of status to that of a lawful permanent resident since the grant of an application for adjustment is a matter of discretion and of administrative grace, not mere eligibility. Matter of Ortiz-Prieto, 11 I&N Dec. 317 (BIA 1965). Where adverse factors are present in any given application for adjustment of status under Section 245, it may be necessary for the applicant to offset these by showing unusual or even outstanding equities. Id. Generally, favorable factors such as family ties, hardship, length of lawful residence in the United States, etc., can be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970). However, an absence of major adverse factors alone does not warrant the grant of adjustment of status. Matter of Blas, 15 I&N Dec. 626 (BIA 1974). The extraordinary discretionary relief provided in Section 245 can only be granted in meritorious cases and is not designed to supersede the regular consular visa issuing process. Id.

Further explaining Section 245, the Regional Commissioner, in Matter of Tanahan, 18 I&N Dec. 339 (Reg. Comm. 1981), stated, in part, that "[T]he determination to grant permanent residence status under Section 245 ... lies entirely within the discretion of the Attorney General [now Secretary of Homeland Security]. An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief." Id. Additionally, the Attorney General in Matter of Jean, 23 I&N Dec 373 (A.G. 2002), stated, "From its inception, the United States has always been a nation of immigrants; it is one of our greatest strengths. But aliens arriving at our shores must understand that residency in the United States is a privilege, not a right."

II. C. EPO #3: Identify the eight bars to Adjustment of Status in INA §245(c).

INSTRUCTOR SUGGESTION: Use easel to write the key components of INA Section 245(c) as listed below

8 CFR identifies categorizes of restricted aliens and eight classes of aliens ineligible for adjustment. Note that VAWA self petitioners are **exempted**. It is important to differentiate between an alien's actual "status" for Section 245 purposes and "unlawful presence" for 212(a)(9) purposes. See memorandum dated March 27, 2003 entitled "Interpretation of 'Period of Stay Authorized by the Attorney General' in Determining 'unlawful presence' under INA section 212(a)(9)(B)(ii)," found in the Appendix.

Sec. 245. [8 U.S.C. 1255]:

(c) Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to

(1) an alien crewman;

*(2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H), (I), (J), or (K)) **who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry** into the United States;*

(3) any alien admitted in transit without visa under section 212(d)(4)(C);

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217; (Section 217 pertains to Visa Waiver Program).

(5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S);

(6) an alien who is deportable under section 237(a)(4)(B);

***(7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status**; or*

(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa

INSTRUCTORS NOTE: Emphasize that 245(c)(2) restrictions do not apply to immediate relatives.

Immediate relatives and special immigrants are exempted from the (c)(2) restrictions. This means that an alien who overstays the period of admission on a nonimmigrant visa, is employed in the United States without authorization, or who continuously fails to maintain their lawful status since entry into the United States, but later marries a United States citizen is not prohibited by 245(c)(2) from adjusting their status to that of a permanent resident.

Any alien who was employed without authorization in the United States prior to filing the application for adjustment of status is prohibited from adjusting. See 8 CFR 245.1(b)(4). Additionally an alien who is not in a lawful immigration status on the date of filing his or her application for adjustment of status is barred from adjusting. See 8 CFR 245.1(b)(5).

The regulations define "lawful immigration status" at 8 CFR 245.1(d)(1). In examining any period where an application for extension of stay (EOS) or change of status (COS) was ultimately approved, whether or not timely filed, the period during which the EOS or COS had been pending would be considered, in retrospect, a period in which the alien was in a lawful nonimmigrant status; the period would not be disqualifying for Section 245(c) purposes.

Section 245(c)(2) permits a finding that a failure to maintain status was through "no fault of the applicant or for technical reasons" shall not serve to preclude the applicant from qualifying for the provisions of INA Section 245(a). The regulations define such technical reasons in 8 CFR 245.1(d)(2), including where an applicant establishes that he or she properly filed a timely request to maintain status and USCIS has not yet acted on that request as of the time the adjustment application was filed. A period found to be a "technical violation" as described in 8 CFR 245.1(d)(2) does not invoke the 245(c)(2) bar.

Nevertheless, the period during which the alien's approved nonimmigrant stay has expired, even if a timely filed but denied application for extension of stay or change of nonimmigrant status remains pending, does not constitute, in and of itself, a period in which the alien is in a lawful "status." Moreover, neither the filing nor the fact that an application for adjustment of status is pending accords a lawful "status" on an alien who is not otherwise maintaining a valid nonimmigrant status. If an alien had previously been denied adjustment of status since the date of last lawful admission, the period during which the denied adjustment application was pending will count as a period of unlawful status unless the alien otherwise maintained lawful nonimmigrant status.

USCIS interprets the phrase "since entry" in 245(c)(2) to mean all entries, not just the most recent entry to the United States. As such, adjustment is barred if the alien failed to maintain continuously a lawful status at any time in the United States. Letter from R. Michael Miller, Deputy Assistant Commissioner for Adjudications, January 29, 1990. 67 NO. 5 Interpreter Releases 120, 151.

****INA is interpreted in 8 CFR as follows:*

Sec. 245.1 Eligibility

(a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an

immigrant visa is immediately available at the time of filing of the application. A special immigrant described under section 101(a)(27)(J) of the Act shall be deemed, for the purpose of applying the adjustment to status provisions of section 245(a) of the Act, to have been paroled into the United States, regardless of the actual method of entry into the United States.

(b) Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and § 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in § 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:

(1) Any alien who entered the United States in transit without a visa;

(2) Any alien who, on arrival in the United States, was serving in any capacity on board a vessel or aircraft or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon;

(3) Any alien who was not admitted or paroled following inspection by an immigration officer;

(4) Any alien who, on or after January 1, 1977, was employed in the United States without authorization prior to filing an application for adjustment of status. This restriction shall not apply to an alien who is:

(i) An immediate relative as defined in section 201(b) of the Act;

(ii) A special immigrant as defined in section 101(a)(27)(H) or (j) of the Act;

(iii) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991; or

(iv) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989), and has not entered into or continued in unauthorized employment on or after November 29, 1990.

(5) Any alien who on or after November 6, 1986 is not in lawful immigration status on the date of filing his or her application for adjustment of status, except an applicant who is an immediate relative as defined in section 201(b) or a special immigrant as defined in section 101(a)(27) (H), (I), or (J);

(6) Any alien who files an application for adjustment of status on or after November 6, 1986, who has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously a lawful status since entry into the United States, except an applicant who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in section 101(a)(27)(h), (I), or (J) of the Act;

(7) Any alien admitted as a visitor under the visa waiver provisions of § 212.1(e) of this chapter; (Amended 7/23/97; 62 FR 39417);

(8) Any alien admitted as a Visa Waiver Pilot Program visitor under the provisions of section 217 of the Act and part 217 of this chapter other than an immediate relative as defined in section 201(b) of the Act;

(9) Any alien who seeks adjustment of status pursuant to an employment-based immigrant visa petition under section 203(b) of the Act and who is not maintaining a lawful nonimmigrant status at the time he or she files an application for adjustment of status; and

(10) Any alien who was ever employed in the United States without the authorization of the Service or who has otherwise at any time violated the terms of his or her admission to the United States as a nonimmigrant, except an alien who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in section 101(a)(27)(H), (I), (J), or (K) of the Act. For purposes of this paragraph, an alien who meets the requirements of § 274a.12(c)(9) of this chapter shall not be deemed to have engaged in unauthorized employment during the pendency of his or her adjustment application.

(c) Ineligible aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

(1) Any non-preference alien who is seeking or engaging in gainful employment in the United States who is not the beneficiary of a valid individual or blanket labor certification issued by the Secretary of Labor or who is not exempt from certification requirements under § 212.8(b) of this chapter;

(2) Except for an alien who is applying for residence under the provisions of section 133 of the Immigration Act of 1990, any alien who has or had the status of an exchange visitor under section 101(a)(15)(J) of the Act and who is subject to the foreign residence requirement of section 212(e) of the Act, unless the alien has complied with the foreign residence requirement or has been granted a waiver of that requirement, under that section. An alien who has been granted a waiver under section 212(e)(iii) of the Act based on a request by a State Department of Health (or

its equivalent) under Pub. L. 103-416 shall be ineligible to apply for adjustment of status under section 245 of the Act if the terms and conditions specified in section 214(k) of the Act and Sec. 212.7(c)(9) of this chapter have not been met;

(3) Any alien who has nonimmigrant status under paragraph (15)(A), (15)(E), or (15)(G) of section 101(a) of the Act, or has an occupational status which would, if the alien were seeking admission to the United States, entitle the alien to nonimmigrant status under those paragraphs, unless the alien first executes and submits the written waiver required by section 247(b) of the Act and part 247 of this chapter;

(4) Any alien who claims immediate relative status under section 201(b) or preference status under sections 203(a) or 203(b) of the Act, unless the applicant is the beneficiary of a valid unexpired visa petition filed in accordance with Part 204 of this chapter; (Amended effective 4/1/97; 62 FR 10312)

(5) Any alien who is already an alien lawfully admitted to the United States for permanent residence on a conditional basis pursuant to section 216 or 216A of the Act, regardless of any other quota or non-quota immigrant visa classification for which the alien may otherwise be eligible;

(6) Any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless:

(i) In the case of a K-1 fiance(e) under section 101(a)(15)(K)(i) of the Act or the K-2 child of a fiance(e) under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K-1 fiance(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiance(e) pursuant to § 214.2(k) of this chapter;

(ii) In the case of a K-3 spouse under section 101(a)(15)(K)(ii) of the Act or the K-4 child of a spouse under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K-3 spouse to the United States citizen who filed a petition on behalf of the K-3 spouse pursuant to § 214.2(k) of this chapter;

(7) A nonimmigrant classified pursuant to section 101(a)(15)(S) of the Act, unless the nonimmigrant is applying for adjustment of status pursuant to the request of a law enforcement authority, the provisions of section 101(a)(15)(S) of the Act, and 8 CFR 245.11;

(8) Any alien who seeks to adjust status based upon a marriage which occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto.

II. D. EPO # 4: Identify the INA §245(k) exception to certain 245(c) bars.

INSTRUCTOR NOTE: Write "245(k) on easel. Under it write "Only for EB cases". Under that, write "(c)(2), (c)(7), or (c)(8) violations of less than 180 days waives 245(c) restriction.

Section 245(k) is not an independent basis for adjustment but instead is an exception to certain restrictions to **employment-based** adjustment. An alien for whom section 245(k) will benefit will be seeking to adjust under section 245(a).
Sec. 245 (k) reads as follows:

> *An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if--*
>
> *(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;*
>
> *(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days--*
>
> *(A) failed to maintain, continuously, a lawful status;*
>
> *(B) engaged in unauthorized employment; or*
>
> *(C) otherwise violated the terms and conditions of the alien's admission.*

As discussed above, in general, Section 245(a) allows an admissible alien who was inspected and admitted or paroled into the United States to apply for permanent resident status from within the United States if the alien is the beneficiary of an approved immigrant visa petition and has an immigrant visa number immediately available.

Section 245(c) establishes eight (8) restrictions to adjustment under Section 245(a). However, for certain employment-based adjustment of status applicants, Section 245(k) renders three (3) of the restrictions inapplicable -- 245(c)(2), (c)(7) and (c)(8).

Specifically, certain employment-based adjustment of status applications may be granted, pursuant to Section 245(a), despite the alien having: a. failed to maintain, continuously, a lawful status, b. engaged in unauthorized employment; or c. otherwise violated the terms and conditions of the alien's admission, for an aggregate period of 180 days or **less** since the date of his or her last lawful admission and prior to the filing of the Form I-485, Application to Register Permanent Residence or Adjust Status. An Alien's last entry on advance parole does not constitute a lawful admission.

Section 245(k) does not cure ineligibility for adjustment based on any other ground(s), such as entry without inspection or any other ground of inadmissibility.

a. Employment-based immigrant classifications eligible for consideration under Section 245(k).

Aliens qualifying for one of the following employment-based immigrant classifications may be eligible for consideration under Section 245(k):

1) EB-1: aliens of extraordinary ability, outstanding professors and researchers, and certain multinational managers and executives;
2) EB-2: aliens who are members of the professions holding advanced degrees or aliens of exceptional ability;
3) EB-3: skilled workers, professionals, and other workers;
4) EB-4: religious workers only. In the fourth employment-based visa classification the scope of Section 245(k) is limited to religious workers under section 101(a)(27)(C).

b. Employment-based immigrant classifications not eligible for consideration under Section 245(k)

1) EB-4: All special immigrants, other than religious workers;
2) EB-5

Application procedures

To benefit from the provisions of Section 245(k), an alien must properly file an application for adjustment of status under Section 245(a) in accordance with 8 C.F.R. § 245.2 and §103.2. Adjustment applicants invoking Section 245(k) are not required to submit additional application forms or pay a penalty surcharge. Thus, it is the responsibility of USCIS to determine applicability of Section 245(k) based on the evidence submitted in support of the adjustment application. To the extent that such evidence is deficient or absent, USCIS may issue request(s) for evidence or notice of intent to deny asking for specific evidence in support of eligibility for relief under Section 245(k).

Derivative Applicants

Each member of a family unit must be eligible for adjustment of status. If a principal alien is ineligible to adjust, then the derivative(s) will have no qualifying principal from whom to derive eligibility. However, derivative adjustment applicants who have, for an aggregate of 180 days or less, failed to maintain continuously a lawful status, worked without authorization, or otherwise violated the terms and conditions of admission, may apply for adjustment of status pursuant to Section 245(a) by virtue of Section 245(k), regardless of whether the principal applicant requires such relief.

Calculating time against the 180-day period

It must first be determined whether the alien is subject to any of the restrictions to adjustment of status set forth in INA sections 245(c)(2), (c)(7), or (c)(8). If any of these restrictions apply, a Section 245(k) analysis must be undertaken to determine whether the aggregate period in which the alien failed to continuously maintain lawful status, worked without authorization, or otherwise violated the terms and conditions of the alien's admission since the date of alien's last **lawful** admission to the United States is 180-days or less. If such aggregate period is 180 days or less, the restrictions under 245(c)(2),(7), or (8) will not apply.

a. General Considerations in Calculating Days in the 180-Day Period.

1) Do not count against the 180 day period any violations that occurred before the alien's last lawful admission prior to the filing of the adjustment application being adjudicated.

2) Calculate the aggregate period of all violations described in Section 245(k)(2) to determine whether the alien is eligible for relief under Section 245(k) noting that an alien may have triggered one or more of the three restrictions to adjustment of status described in Section 245(k)(2) to accumulate time against the 180-day period.

3) Recognizing that an alien may be subject to more than one bar or violation described in Section 245(k)(2) at the same time, focus the analysis on the total number of days in which any of the violations is in effect. For example, an alien in B-2 status who worked without authorization will have also failed to continuously maintain a lawful status, and each day in which these two conditions existed concurrently is counted only once against the 180 day period.

Failure to Maintain, Continuously, a Lawful Status

The period to be examined, when counting days during which the alien has failed to continuously maintain lawful status, commences on the date of the alien's last lawful admission's expiration date and ends on the date the pending application for adjustment of status under Section 245(a) was properly filed. The period after the pending adjustment application was filed is not counted against the 180 day period defined in section 245(k)(2).

For 245(c) purposes, the regulations define "lawful immigration status" in 8 CFR 245.1(d)(1). In examining any period where an application for extension of stay (EOS) or change of status (COS) was ultimately approved, whether or not timely filed, the period during which the EOS or COS had been pending would be considered, in retrospect, a period in which the alien was in a lawful nonimmigrant status; the period would not be disqualifying for section 245(c) purposes; and the period would not count against any 180 day period under section 245(k).

Section 245(c)(2) permits a finding that a failure to maintain status was through "no fault of the applicant or for technical reasons." The regulations define such technical reasons at 8 CFR 245.1(d)(2), including where an applicant establishes that he or she properly filed a timely request to maintain status and USCIS has not yet acted on that request as of the time the adjustment application was filed. A period found to be a "technical violation" as described in 8 CFR 245.1(d)(2) does not invoke the 245(c)(2) bar; thus, a period of unlawful status resulting only from a technical violation does not count against the 180 clock under section 245(k).

Nevertheless, the period during which the alien's approved nonimmigrant stay has expired, even if a timely filed but denied application for extension of stay or change of nonimmigrant status remains pending, does not constitute, in and of itself, a period in which the alien is in a lawful "status." Moreover, neither the filing nor pendency of an application for adjustment of status accords a lawful "status" on an alien who is not otherwise maintaining a valid nonimmigrant status. If an alien had previously been denied adjustment of status since the date of last lawful admission, the period during which the denied adjustment application was pending will count against the 180 day clock unless the alien otherwise maintained lawful nonimmigrant status. An alien who has failed to maintain status, even through "no fault of the applicant or for technical reasons," is technically susceptible to removal notwithstanding the filing of an application for adjustment of status, but normally prosecutorial discretion works in favor of adjudicating the adjustment application first.

In most cases, any of the following that occurs before the application for adjustment of status is filed will start the 180 day clock in a manner that will not have stopped until the filing of the application for adjustment of status: expiration of nonimmigrant status without timely filing for extension of stay or change of status; violation of status through failure to continue in required activities (such as termination of L-1 employment or failing to maintain a full course of F-1 study); or engaging in unauthorized employment. This is because expiration or violation of status puts a nonimmigrant out of status, and the alien remains out of status until some adjudication restores status or the alien departs.

Again, for section 245(k) purposes, the period(s) of time examined for having failed to maintain, continuously, a lawful status, will only be the period of time preceding the filing of the pending adjustment application.

Otherwise Violated the Terms of a Nonimmigrant Visa

As stated on page 3 of the May 1, 1997 memorandum entitled "Processing of section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications" (attached), an alien will not be deemed to have "otherwise violated the terms of a nonimmigrant visa" merely by properly filing an application for adjustment of status, provided the filing occurred prior to the expiration of the alien's nonimmigrant status. Thus, when counting days during which the alien has otherwise violated the terms of a nonimmigrant visa, end the count as of

the date on which the pending application for adjustment of status under Section 245(a) was properly filed.

Again, the pendency of the application for adjustment does not accord status or cure any violation of the terms of a nonimmigrant visa that occurs during that period. As a result, such period could be considered a period of violation of the terms of a nonimmigrant visa in the context of future adjudications or actions if the pending application were denied. On the other hand, a grant of reinstatement of J-1 or F-1 status cures a violation, so that the period of violation leading up to the reinstatement does not count against the 180 day clock.

Engaged in Unauthorized Employment

All periods of unauthorized employment since the alien's last lawful admission are to be counted until the date of adjudication of the pending application. Thus, the filing of the adjustment application will not have "stopped the clock" for counting the period(s) of unauthorized employment. For example, an alien who, since the date of last lawful admission, worked without authorization and failed to maintain status for an aggregate of 100 days prior to filing for adjustment of status, and who continued to work without authorization for an additional 85 days after filing for adjustment of status, will have accumulated 185 days against the 180-day period. The alien would be ineligible for relief under Section 245(k).

In addition, an alien who works without authorization after filing for adjustment of status will not have stopped the clock by departing the United States and re-entering pursuant to a valid advance parole document. Pursuant to Section 245(k), an alien can begin to accrue time against the 180-day period for violations that occurred on or after the date of the alien's last lawful admission to the United States. In such a situation, an alien who entered the United States pursuant to an advance parole document is not "lawfully admitted", but rather paroled, and therefore cannot benefit from a new 180-day period.

Pursuant to 8 CFR 274a.12(c)(9), "for purposes of 245(c)(8)", an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) while his or her properly filed Form I-485 application is pending final adjudication, if the alien has obtained permission from USCIS pursuant to 8 CFR 274a.12 to engage in employment. This is also true if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization did not expire during the pendency of the adjustment application."

The Section 245(k) memo is in the Appendix Folder

INSTRUCTOR NOTE: Distribute VSC decisions and discuss. Set up fact pattern as stated in "Facts" section of decision. First application was denied for abandonment. Key to second decision was that the alien was paroled and not admitted which is a requirement for 245(k).

II. E. EPO #5: Identify eligibility requirements for adjustment of status under INA §245(i).

INSTRUCTOR NOTE: On easel write "245(i)" and under it write for 245(a) EWI or any 245(c) restrictions waived if Form I-130 / 140 or ETA-750 was filed before April 30, 2001 and paid $1000.

In general, Section 245(i) of the INA allows certain admissible aliens, who are eligible to receive an immigrant visa and to whom an immigrant visa is immediately available, to adjust status upon payment of a $1,000 surcharge. These aliens are able to adjust status even though the alien entered the United States without inspection in violation of section 245(a) or is barred by Section 245(c).

In order to be able to use Section 245(i) to adjust, the applicant must be found to be a "grandfathered alien" as defined at 8 CFR section 245.10(a)(1)(i). For Section 245(i) purposes, an alien must be the beneficiary of an immigrant visa petition or application for labor certification that is filed on or before April 30, 2001 and meets applicable statutory and regulatory requirements.

Sec. 245(i) reads as follows:

(i) (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of--

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney

General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who-

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. and

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

Section 245(i) was first enacted in 1994 and permitted certain aliens who were otherwise ineligible for adjustment of status to pay a penalty fee for the convenience of adjusting status without leaving the U.S. The statute called for the filing of the adjustment application by a certain date in order to qualify.

In 1997, Section 245(i) was amended and the mechanism by which to qualify for adjustment changed from the filing of the adjustment application to the date on which the visa petition or application for labor certification was filed. In 2000, that date was again moved from January 14, 1998 to April 30, 2001 and there was an added component of physical presence on the date the LIFE Act (i.e. December 21, 2000) was enactment for those adjustment applications filed subsequent to April 30, 2001.

<u>The "Alien-Based" Reading of Section 245(i) of the INA</u>

The United States Citizenship and Immigration Services (USCIS) "alien-based" reading of Section 245(i) of the INA means that for purposes of adjustment under Section 245(i), the

alien is grandfathered by the filing of a qualifying visa petition or application for labor certification. Once the alien is a grandfathered alien, the alien is not limited to seeking to adjust based upon the visa petition or application for labor certification which grandfathered him or her; the grandfathered alien may also seek to adjust by any other proper basis. 8 C.F.R. 245.10(a)(1)(i); 245.10(h).

For example, if an alien is properly grandfathered as the beneficiary of a qualifying employment-based visa petition that was filed on or before April 30, 2001, the alien would also be eligible to seek to adjust status under Section 245(i) if he or she later marries a United States citizen.

**Note that winning the diversity lottery does not grandfather an alien. (8 CFR, 245.10(h).

<u>**General Requirements for Grandfathering**</u>

To be considered grandfathered, an alien must demonstrate the following:

a. He or she was the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) of a qualifying immigrant petition or application for labor certification filed on or before April 30, 2001 pursuant to 245.10(a)(1)(i)

b. The qualifying petition or application for labor certification was "properly filed" and "approvable when filed" pursuant to 245.10(a)(2); 245.10(a)(3).

Approvable when filed is defined at 245.10(a)(3) as meaning:

...that as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on circumstances that existed at the time the qualifying petition or application was filed.

Ultimate denial, substitution, revocation or withdrawal of the visa petition or application for labor certification that is sought to be the petition or application that grandfathers the alien does not necessarily mean that the petition or application will not be treated as a grandfathered. See 8 CFR 245.10(a)(3), 245.10(i); 245.10(j); and 245.10(k). Note 8 CFR 245.10(j) states, "Only the alien who was the beneficiary of the application for the labor certification on or before April 30, 2001, will be considered to have been grandfathered for purposes of filing an application for adjustment of status under section 245(i) of the Act." When an alien is substituted onto another alien's labor certification, the first alien's priority date is reassigned to the second alien making it appear, from the priority date, that the second alien is a grandfathered alien. A thorough comparison of the names and dates on the labor certification

must be made with the names and dates on the Form I-140 to verify that the alien on the I-140 is the same individual named on the labor certification application. If a substitution has been made, and the Form I-140 was filed after April 30, 2001, the second alien is not considered to be a grandfathered alien.

The law explains that if a petition was denied, withdrawn or revoked due to circumstances that arose ***after the time of filing*** (emphasis added), the alien beneficiary's grandfathered status will be preserved. Circumstances that arise after filing, which qualify for preserving an alien beneficiary's grandfathered status are outlined in Title 8, Code of Federal Regulations, section 205.1(a)(3)(i) or (a)(3)(ii). Title 8, CFR, section 205.1(a) discusses circumstances that result in the automatic revocation of an approved petition. These conditions include: the withdrawal of the petition by the petitioner, the death of the beneficiary, the approval of a petition pursuant to Title 8, CFR, section 204.2(i)(1)(iv), the legal termination of a marriage between the petitioner and beneficiary, the remarriage of a spouse of an abusive petitioner, a child reaching age 21, the marriage of a child, the marriage of a person accorded preference status as a son or daughter of a United States citizen or lawful permanent resident, the termination of the employer's business in an employment-based preference, or invalidation pursuant to 20 CFR part 656 of the labor in support of the petition.

Typically, unless USCIS has evidence of fraud, or other non-meritorious employment relationship, applications for labor certification will be found to meet the approvable when filed standard so long as it was properly filed. See May 15, 2001 letter from Pearl Chang, Director of INS' Residence and Status Branch, reprinted in Interpreter Releases June 4, 2001.

It is important to note that the circumstances found in Title 8, Code of Federal Regulations, section 205.1(a)(3)(i) or (a)(3)(ii) do not apply to a petition that was denied or revoked based on statutory ineligibility. On April 14, 1999, the former Immigration and Naturalization Service (INS) published, "Accepting Applications for Adjustment of Status Under Section 245(i) of the Immigration and Nationality Act. The policy memo explains that when a petition has been denied, revoked, or withdrawn, ISOs must determine whether it was "approvable when filed" and the reason for the denial, withdrawal, or revocation. The memo states, "In situations in which the adverse action takes place because of a change in circumstances (e.g. petitioner goes out of business, petitioning spouse dies, derivative child ages out), the filing is likely to have been approvable when filed. However, in cases where there is no change in circumstances, then the reasons for denial are likely to relate to eligibility at the time of filing and will likely preclude a finding that the petition was approvable when filed." Therefore, an alien who had a visa petition or labor certification filed on his or her behalf, but such petition was denied based on statutory ineligibility (i.e. the alien did not possess the required education) and not a circumstance that arose after the petition was filed, the alien would not be considered grandfathered.

The topic of adjusting status pursuant Section 245(i) of the INA has since been addressed in an Interim Rule published in the Federal Register on March 26, 2001 and the United States Citizenship and Immigration Services March 9, 2005 memorandum, "Clarification of Certain

Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act". Both publications reiterate the information cited above and do not provide any guidance that conflicts with the interpretation of the definition of "grandfathered". The Interim Rule specifically discusses the effect of a denial or revocation of an immigrant visa petition based on ineligibility. The Interim Rule states, "When the Service has denied an immigrant visa petition (or has revoked a prior approval) based on ineligibility at the time of filing, the petition does not qualify to grandfather the alien beneficiary for the purposes of section 245(i)."

Physically Present. The **principal** alien was physically present in the United States on December 21, 2000, if the alien's qualifying immigrant visa petition or application for labor certification was filed between January 15, 1998 and April 30, 2001 pursuant to 245.10(a)(1)(ii). This is established primarily through documentary evidence which establishes in the mind of the ISO that the principal applicant was physically present in the United States on December 21, 2000. A list of acceptable documentation to demonstrate physical presence on December 21, 2000, can be found at 8 CFR, 245.10(n)(2).

Admissibility.

Like section 245(a) in order to adjust status using Section 245(i), an alien must be admissible. However, USCIS will not apply INA section 212(a)(6)(i) (present without inspection) to an alien seeking to adjust under section 245(i). See Memorandum from Office of General Counsel to Michael Aytes, February 19, 1997, "Request for Legal Opinion; The Impact of the 1996 Act on Section 245(i) of the Act.

II. F. EPO #6: Identify the bar to adjustment contained in INA §245(d)

INA §245(d) Alien admitted for permanent residence on conditional basis; fiancée or fiancé of citizen.:

The Attorney General may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216 [8 USC § 1186a]. The Attorney General may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 101(a)(15)(K) [8 USC § 1101(a)(15)(K)] except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 [8 USC § 1186a] as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K) [8 USC § 1101(a)(15)(K)].

Under section 245(d) of the Act, an alien who is a permanent resident on a conditional basis under section 216 of the Act is not eligible for adjustment of status under section 245(a) of the Act if that alien fails to marry the citizen who filed the

petition. The implementing regulation is 8 CFR 245.1(c)(5) . In Matter of Stockwell, 20 I & N Dec. 309 (BIA 1991), the Board of Immigration Appeals adopted a narrow interpretation of 8 CFR 245.1(c)(5). Under this narrow interpretation, the prohibition against adjustment of status no longer applies if USCIS has terminated the alien's conditional LPR status. In 1996, the Attorney General proposed an amendment to the regulation, so that a conditional permanent resident would remain ineligible for adjustment of status even after termination of conditional LPR status. 61 Fed. Reg. 43,028 (1996). Until the Department of Homeland Security publishes a final rule, and the final rule enters into force, however, USCIS officers are bound to follow Matter of Stockwell. If an officer has a case in which an alien, whose conditional LPR status has been terminated, is seeking adjustment of status under section 245, the officer should consult with district or service center counsel concerning whether the 1996 proposed rule has been made a final rule.

II. G. EPO 7: Identify eligibility requirements for adjustment of status of refugees and asylees under INA Section 209.

Refugee and Asylee Adjustment under Section 209 of the Act.

(a) Eligibility.

(1) Refugees. Pursuant to section 207(a) of the Act, a person who has been physically present in the U.S. as a refugee for an aggregate period of one year is required to apply for permanent residence. Because the refugee's quota number was allocated at the time of his or her approval for admission to the U.S. as a refugee, there are no numerical restrictions on the number of persons who may adjust from refugee status to LPR status each year. Technically, a refugee does not "adjust status," instead he or she returns to the position of being an applicant for inspection and admission to the U.S. as an immigrant. The process is almost universally referred to as a "refugee adjustment."

(2) Asylees. A person who has been physically present in the U.S. as an asylee for an aggregate period of at least one year may apply for adjustment of status to that of LPR.

(3) Others permitted to apply for adjustment under Section 209 of the Act by statute or regulation. Historically, other persons have been granted status, which is similar to the current refugee and asylee categories. These persons are also eligible to apply for adjustment of status under section 209 of the Act once certain conditions have been met. These persons include:

(A) Pre-April 1, 1980 Conditional Entrants. Prior to April 1, 1980, section 203(a)(7) of the Act allowed persons from communist or communist-dominated countries and persons from countries in the general area of the Middle East to be admitted as "conditional entrants" under the seventh preference category. The conditional entrant cases

corresponded to today's refugee cases. Subsections (g) and (h) of section 203 of the Act allowed conditional entrants to become permanent residents after a specified period (initially two years, later reduced to one year) in the U.S.

(b) Filing Requirements.

(1) Refugees and other persons permitted to apply for adjustment under Section 209(a) of the Act by statute or regulation. A qualifying refugee (or other person described in paragraphs (a)(3)(A) through (a)(3)(C)) may apply for adjustment by filing a Form I-485 (without fee) with the Nebraska Service Center. See 8 CFR 209.1 .

(2) Asylees. A qualifying asylee may apply for adjustment by filing Form I-485 (with fee) with the Nebraska Service Center.

(c) Medical Examination Reports.

(1) Refugees and others covered under section 209(a). Since a refugee normally receives a medical examination before traveling to the U.S., he or she is not required to submit a complete medical examination report as part of the adjustment application. This is standard unless the record shows that the alien did not receive a medical examination prior to entry or there were medical grounds of inadmissibility at the time of entry. [One notable exception relates to an alien who received derivative refugee status through the Form I-730 process while in the U.S. under some other status (e.g., nonimmigrant or entry without inspection). Because such persons typically have their status changed to that of a refugee without receiving a medical examination, the report of medical examination must be submitted as part of this process. Contrast this with the Form I-730 beneficiary who is outside the U.S. and must submit a medical report to the consulate before being given travel authorization to come to the U.S.] See 8 CFR 209.1(c) and Chapter 23.3 of this *field manual.*

However, any refugee adjustment applicant who did not present evidence of vaccination during the refugee approval and admission process must do so as part of the adjustment process.

Furthermore, if the refugee obtained a waiver of inadmissibility on medical grounds, which required follow-up action after the refugee's arrival in the U.S., it is imperative that before granting adjustment of status, you verify that the refugee complied with such follow-up requirements. For example, if a refugee suffering from tuberculosis received a waiver which required that he or she receive treatment through his or her county health department, he or she should be required to submit a letter from that health department verifying that he or she has complied (or is complying) with such requirements.

(2) Asylees. With limited exceptions, all asylee adjustment applicants must obtain full medical examinations and vaccination certificates as part of the adjustment process (see 8

CFR 209.2(d) and Chapter 23.3 of this *field manual*). There are some exceptions to the requirement to submit medical examination reports including:

- Certain Iraqi nationals who were evacuated to the U.S. through Guam were granted asylum status and received medical examinations as part of that process.

- Persons who received derivative asylum status through the Form I-730 process and received a medical examination before being issued travel authorization by a consular officer. (Note: this does not apply to persons whose status was changed to derivative asylee based on an I-730 petition approved while the beneficiary was in the U.S.; such persons must submit medical examination reports as part of the adjustment process.)

(d) Adjudication.

(1) General . With few exceptions (such as the need for a medical report for most asylees), the adjudication of Form I-485 for refugees and asylees is quite similar. The issues are whether the alien is still entitled to refugee or asylee classification and whether the alien is admissible to the U.S. If the answer to both these question is "yes," the application may be approved. If there is reason to believe that the alien is no longer (or never was) entitled to refugee or asylee classification, and if the alien does not fall within the provisions discussed in paragraph (2), consult with the Office of International Affairs before proceeding. If it appears that the alien is inadmissible to the U.S., refer to paragraph (3).

(2) Treatment of Certain Persons Who Are No Longer Entitled to Classification as Asylees. Under 8 CFR 209.2(a)(2) persons who were granted asylum prior to November 29, 1990, may have their status adjusted to LPR under section 209 of the Act even though they no longer have a bona fide fear of persecution. They need only apply for adjustment and establish that they have not been resettled in another country and are not inadmissible to the U.S. (see paragraph (3)). There is no need to consult with the Office of International Affairs before approving such cases.

(3) Exemption from and Waiver of Inadmissibility Grounds. Pursuant to section 209(c) of the Act, sections 212(a)(4), (5) and (7)(A) of the Act do not apply to asylee and refugee adjustment applicants. Furthermore, with the exception of sections 212(a)(2)(C), 212(a)(3)(A) , 212(a)(3)(B) , 212(a)(3)(C) , and 212(a)(3)(E) of the Act, those grounds which do apply may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. (Normally, waiver applications for refugees are handled overseas before the person is approved for refugee classification. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process.) A refugee or asylee uses Form I-602 to apply for a waiver of inadmissibility.

In adjudicating the waiver application, you should apply discretion as you would in any other case, bearing in mind that the alien establishing a well-founded fear of persecution is an extremely strong positive discretionary factor. Accordingly, unless there are even stronger negative factors, the waiver application should be approved. Since the approval of the adjustment application will indicate the approval of the waiver application, there is no need for a separate approval notice. Simply stamp the Form I-602 approved, check the block labeled "Waiver of Grounds of Inadmissibility is Granted," and make the appropriate endorsements in the space labeled "Basis for Favorable Action."

If the alien is statutorily ineligible for a waiver (i.e., he or she is inadmissible under section 212(a)(2)(C), 212(a)(3)(A), 212(a)(3)(B), 212(a)(3)(C) or 212(a)(3)(E) of the Act) or if there are sufficient negative factors to warrant denial of the waiver application, check the block labeled "Waiver of Grounds of Inadmissibility is Denied," and write "See Form I-291" in the space labeled "Reasons." The denial of the waiver should be fully discussed in the denial of the adjustment application. While there is no appeal for the denial of the Form I-602 waiver application, the immigration judge may consider the waiver application *de novo* when he or she considers the renewed adjustment application during removal proceedings.

(4) Effective Date of Residence. When a refugee or an asylee is granted adjustment of status, the effective date of his or her residence is not the date of approval. The effective date of residence (which establishes such things as the date of eligibility to apply for naturalization) is determined by the following roll-back provisions of the law:

- When a refugee adjusts under section 209(a) of the Act, he or she is entitled to LPR status as of the date on which he or she was originally admitted as a refugee. See 8 CFR 209.1(e).

- When an asylee adjusts status under section 209(b) of the Act, he or she is entitled only to a rollback of one year from the date on which the adjustment application is approved. See 8 CFR 209.2(f).

(5) Denial. If the refugee or asylee's adjustment application cannot be approved, it should be denied and the alien should be placed in removal proceedings under section 240 of the Act. The denial order should set forth all the reasons for the denial in clear language which can be understood by the applicant. There is no appeal from the denial of the application, but the alien may renew the application for adjustment in his or her removal proceedings before the Immigration Court. See 8 CFR 209.1(e) and 8 CFR 209.2(f).

II. H. EPO #8: Identify the key provisions of the Child Status Protection Act.

As discussed above, if an alien is seeking to adjust as an immediate relative or preference classification child (as a direct beneficiary on an immediate relative or preference petition or for purposes of 'riding' on a parent's family or employment based petition), it is necessary

that the alien meet the definition of "child in Section 101(b) of the Act. Section 101(b) of the Act defines a child as unmarried and under the age of 21. This means that if the alien is over the age of 21 he or she may not adjust status as a child.

On August 6, 2002, the Child Status Protection Act (PL 107-208, 116 Stat. 927) ("CSPA," reproduced as Exhibit G) amended certain sections of the INA. These added sections of the INA direct how to determine the age of the alien for the purposes of 101(b) INA. The effect of the CSPA is that more aliens are able to retain classification as "children" for immigration purposes, despite the fact that their age is greater than 21.

Immediate Relatives

Section 2 of the CSPA added section 201(f) of the Act. Section 201(f) addresses eligibility for retaining classification as an immediate relative

Section 201(f) reads as follows:

Rules for determining whether certain aliens are immediate relatives.—

*(1) **Age on Petition Filing Date**.*
Except as provided in paragraphs (2) and (3), for purposes of subsection (b)(2)(A)(i), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using the age of the alien on the date on which the petition is filed with the Attorney General under section 204 to classify the alien as an immediate relative under subsection (b)(2)(A)(i).

*(2) **Age on Parent's Naturalization Date**.*
In the case of a petition under section 204 initially filed for an alien child's classification as a family-sponsored immigrant under section 203(a)(2)(A), based on the child's parent being lawfully admitted for permanent residence, if the petition is later converted, due to the naturalization of the parent, to a petition to classify the alien as an immediate relative under subsection (b)(2)(A)(i), the determination described in paragraph (1) shall be made using the age of the alien on the date of the parent's naturalization.

*(3) **Age on Marriage Termination Date**.*
In the case of a petition under section 204 initially filed for an alien's classification as a family-sponsored immigrant under section 203(a)(3), based on the alien's being a married son or daughter of a citizen, if the petition is later converted, due to the legal termination of the alien's marriage, to a petition to classify the alien as an immediate relative under subsection (b)(2)(A)(i) or as an unmarried son or daughter of a citizen under section 203(a)(1), the determination described in paragraph (1) shall be made using the age of the alien on the date of the termination of the marriage.

*(4) **Application to self-petitions.**—*
Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

Thus, for immediate relative petitions, the age of the alien beneficiary is frozen on the date of the filing of the immediate relative petition, parent's naturalization date (initially filed as F2A), or divorce of beneficiary (originally filed as an F3).

Preference Classifications

Sections 3 and 6 of the CSPA added section 203(h) of the INA.

In marked contrast to treatment of immediate relatives, the CSPA requires preference aliens to continue to age, but gives credit for the amount of time it took for USCIS to adjudicate the beneficiary's petition so long as the alien seeks to adjust within one year of visa availability.

Section 203(h) of the Act reads as follows:

(h) Rules for Determining Whether Certain Aliens are Children—

(1) In General.—
For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions Described.—
The petition described in this paragraph is—
(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

(3) Retention of Priority Date.—
If the age of an alien is determined under paragraph (1) to be 21 years of age or older

for the purposes of subsections (a)(2)(A) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.
(4) Application to self-petitions.—
Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

Direct Beneficiaries (Family Based)

Section 3 of the CSPA addressed whether certain aliens will be able to adjust as a "child" of a lawful permanent resident (LPR) even if they are no longer under the age of 21. The beneficiary's age is to be calculated for CSPA purposes by first determining the age of the alien on the date a visa number becomes available. If the priority date is not current upon approval of a preference petition, the date that a "visa number becomes available" is the date the priority date becomes current subsequent to petition approval (which is the first day of the month of the Department of State (DOS) Visa Bulletin which provides the availability of visa numbers for that month). Of course, if upon approval of the I-130, the priority date is current according to the DOS bulletin, the date that a visa number becomes available is the approval date of the Form I-130. From that age, subtract the number of days that the Form I-130 was pending, provided the beneficiary filed a Form I-485 within one year of such visa availability. The "period that a petition is pending" is the date that it is properly filed (receipt date) until the date an approval is issued on the petition.

Derivatives (Family and Employment-Based)

Just the same as direct beneficiaries, adjustment of status for derivative beneficiaries is based upon the approved Form I-130 or Form I-140, (and other immigrant petitions filed under section 204 of the Act for classification under sections 203(a),(b), or (c) of the Act). The beneficiary's age is to be calculated by first determining the age of the alien on the date that a visa number becomes available to the principal beneficiary. The date that a visa number becomes available is the approval date of the immigrant petition if the priority date is/was current on that date according to the DOS Visa Bulletin. If, upon approval of the immigrant petition, the priority date is/was not current according to the visa bulletin, then the date for determining age is to be the first day of the month of the DOS Visa Bulletin which makes the priority date current. From that age, subtract the number of days that the petition was pending, provided the beneficiary files a Form I-485 within one year of such visa number availability.

The "period that a petition is pending" for the Form I-140 is the date that the I-140 is properly filed (receipt date and ***not*** priority date) until the date an approval is issued on the petition. For Forms I-140, we do not use the priority date because it is often established when a labor certification is properly filed and not the Form I-140.

Diversity Visa (DV) Applicants

Because the DV application and adjudication process differs substantially from the application and adjudication process for preference categories, the treatment of DV derivatives will also be somewhat different. For the purpose of determining the period in which the "petition is pending," use the period between the first day of the DV mail-in application period (for the program year in which the principal alien has qualified) and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien's age on the date the visa became available to the principal alien.

Sought to Acquire

Section 203(h) requires that the alien may benefit from its section 3 if the alien "sought to acquire" the status of a LPR within one year of visa number availability. The filing of the Form I-485 within one year of the immigration petition approval date (or priority date being current subsequent to petition approval date, whichever is later) has been determined by USCIS to meet that definition. This is the case since CSPA language requires the alien to have "sought to acquire" LPR status subsequent to visa availability, which necessitates petition approval. An alien has no control over the filing of a labor certification application or the Form I-140 (as those filings are made by the employer). Measuring when the alien is "seeking to acquire" the status of an LPR within one year of visa availability has nothing to do with the determination of the age of the alien for immigration purposes. It is a separate eligibility factor.

Retention of Priority Date

Section 6 of the CSPA added 203(h), which formalized prior INS policy of permitting a beneficiary to retain their priority date when the petition was automatically converted to a new classification. USCIS interprets this to mean that the automatic conversion must be of the same petitioner and same beneficiary.

Regression

If a visa availability date regresses and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the Service should retain the Form I-485 and note the priority date was current at the time the Form I-485 was filed. Once the priority date for that preference category becomes current again, determine whether the beneficiary is a "child" using the visa availability date marked on the Form I-485. If, however, an alien did not file a Form I-485 prior to the visa availability date regressing, the alien's "age" should be determined using the subsequent visa availability date.

Inapplicability of the CSPA

NACARA, HRIFA, Family Unity, Special Immigrant Juveniles, Cuban Adjustment Act and most V visa applicants and/or derivatives will not benefit from the provisions of section 3 of the CSPA.

Section 6 "Opt Out" Provision

Section 6 of the CSPA amended Section 204 of the INA to add provisions at INA 204(k) whereby an alien initially the beneficiary of an F2B petition may automatically convert to an F1 petition when the petitioning parent naturalizes. However, the automatic conversion "does not apply if the son or daughter files with the Attorney General a written statement that he or she elects not to have such conversion occur ...." This provision has nothing to do with determining whether an alien qualifies as a "child" as the provisions previously discussed do.

USCIS guidance on the CSPA is contained in various memoranda. Two important memoranda are reproduced in the Appendix.

INSTRUCTOR NOTE: Go over these two memoranda

II. I. EPO #9: Identify when USCIS has jurisdiction over an adjustment application and if any appeal rights exist.

1. Jurisdiction over most applications for adjustment of status rests exclusively with USCIS. However, where an alien is in removal proceedings before the immigration court and is **not** an arriving alien, jurisdiction over the adjustment application rests exclusively with the immigration court. 8 CFR 1245.2(a). Thus, if a court charging document is in the A-file, such as a "Notice to Appear," and the form does not indicate that the alien is an arriving alien, USCIS may not adjudicate the application; only the immigration judge may adjudicate the application in such instances. For arriving aliens, USCIS guidance is contained in a memorandum issued January 12, 2007 which is reproduced as Appendix. A Notice to Appear (NTA) is reproduced in Appendix.

INSTRUCTOR NOTE: Tell students that they will be going over NTA in another module

2. It is important to note that if an alien married while in removal proceedings, further restrictions apply pursuant to INA §245(e). In these instances, the petitioner's burden in meeting the standard of proof is increased to the clear and convincing evidence standard.

3. It is not necessary to issue a Notice of Intent to Deny (NOID) prior to issuing a denial. If the application is to be denied, a written decision must be issued and the decision must state the reasons for the denial 8 C.F.R. 245.2(a)(5)(i). However, the regulations require

that if we have information of which the alien is unaware, we must alert him or her to it and provide an opportunity to rebut. 103.2(b)(16). As well, there are circumstances where it would be a good idea to issue a NOID, especially where the applicant might be able to provide further information or insight into the matter.

5. Be sure that any ground of denial is documented on paper in the file.

6. When writing a denial be sure to write for more than the applicant and attorney. Write the decision such that someone not familiar with immigration law will be able to understand the decision and reasons.

7. The regulations provide that there is no appeal of a denied application for adjustment of status for an alien who is applying under to Section 245 of the INA. If the alien is placed in removal proceedings and is not an arriving alien, the alien may seek to renew the application before the immigration judge. 8 CFR 245.2(a)(5)(ii).

8. An alien may file a motion to reopen under 103.2(b)(15).

9. The mere fact that an alien has an application for adjustment of status pending does not in and of itself accord the alien a status. It is the general practice of USCIS not to place an alien who has a pending application for adjustment in removal proceedings. Policy Memo 602-0050 contains further guidance on the issuance of a Notice To Appear (NTA) when it appears that an alien is removable from the United States (which would be the situation in most adjustment denials). PM-602-0050 is reproduced in the Appendix.

INSTRUCTOR NOTE: PM-602-0050 will be cover in depth in NTA module.

III. SUMMARY

Adjustment of status is one of the most important benefit applications an officer will adjudicate. Eligibility for adjustment of status is either under Section 245(a) or Section 245(i). Under either section, the alien must be admissible, must be the beneficiary of a visa petition that is immediately available, and must merit a favorable exercise of discretion.

Section 245(c) lists eight restrictions to adjustment under Section 245(a). The most commonly encountered of these restrictions is overstaying or otherwise violating a nonimmigrant visa and working without employment authorization.

Section 245(k) waives certain 245(c) restrictions for employment-based applicants if the violation is 180 days or less since the alien's last lawful admission.

Section 245(i) permits certain aliens who do not meet the requirements of section 245(a) to adjust their status if they are a "grandfathered alien" and pay a sum of $1000 among other requirements.

Section 216 requires that an alien, who adjusts on the basis of a marriage that is less than two years must, be adjusted as a conditional resident.

Section 245(d) prohibits a conditional resident who entered on a K nonimmigrant visa from adjusting status under section 245(a) of the Act except on the basis of a marriage to the petitioner who provided the basis for the K nonimmigrant visa.
INA §209 provides the sole and exclusive procedures for adjustment of status for refugees and asylees.

The Child Status Protection Act amended the INA with special provisions for determining whether an alien can meet the definition of child under INA §101(b) for adjustment of status purposes.

There are no appeal rights on a denied adjustment of status application, but if the alien is not an arriving alien, the alien may renew his or her application before an immigration judge in removal proceedings.

REFERENCES

A. Form I-485 and Instructions (available on line at www.uscis.gov)

B. Department of State (DOS) visa bulletin (available on line at www.state.gov)

C. Section 245 of the INA

D. 8 C.F.R. 245

E. 8 C.F.R. 216

F. 8 C.F.R. § 103.2(b)(1)

G. DAO Toolbox