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July 6, 2009

Department of Homeland Security
Chief, Regulatory Products Division
111 Massachusetts Avenue, NW
Washington, DC 20529-2210

Re: Comments on New Form I-140
74 Federal Register 20722-23, May 5, 2009

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the proposed modification of Form I-140, Immigrant Petition for Alien Worker, as requested at *74 Federal Register* 20722-23, May 5, 2009.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

Our comments are as follows:

Form I-140 Instructions

- A. **Labor Certification Expiration:** Since an employer must file Form I-140 before the labor certification expires (within 180 days from the date of certification), we request that the Form I-140 instructions remind the petitioner of this

significant deadline. If the labor certification expires prior to the filing of the I-140 petition, the petitioner must restart the entire permanent residence process from the very beginning, which is costly, time-consuming and a burden for the petitioner and/or beneficiary. The inclusion of notice regarding the labor certification expiration in the instructions will remind petitioners of the requirement to file the labor certification prior to its expiration date.

We suggest the following specific language be appended to Paragraph 1 under General Evidence: “Effective July 16, 2007, all labor certifications expire 180 days from the date of certification. I-140 petitions based on approved labor certifications must be received by USCIS before the 180-day validity period has elapsed. In instances where the ending date of the labor certification’s validity period expires on a Saturday, Sunday or legal holiday, petitions will be accepted with the labor certification on the next business day. Petitions filed with expired labor certifications filed after the next business day will be rejected.”

- B. **Page 1 – “Who May File Form I-140?”:** The change in language removing “An alien who, in the three years preceding the filing of this petition” to “A multinational executive or manager, who in the three years preceding the filing of this petition” is misleading and inaccurate because the Beneficiary need not currently be working in a managerial or executive position. Form I-140 is an immigrant petition for a *prospective* position that the alien will hold once the application to adjust status is approved or immigrant visa issued at consulate. It is common to see managers abroad be sent to the United States for non-managerial functions (i.e. in L-1B status) with the expectation that in the future the employee will return to a managerial role. The regulations do not require a person to currently be a manager or executive so the language should not be changed or be changed in a manner that accurately reflects the law. We recommend USCIS keep the language “An alien who, in the three years preceding the filing of this petition.”
- C. **Ability to pay wage:** Failure to satisfy the “Ability to Pay” requirements is a recurring issue with immigrant petitions and we recommend that the instructions include a more thorough explanation of the requirements. Specifically, we recommend that the instructions state that the petitioner must show the ability to pay the proffered wage *from the date of filing of the labor certification*, also referred to as the priority date, through the approval of the adjustment of status application.
- D. **Processing Information Note:** In the section entitled “Processing Information,” the note states that only “an officer or employee of the entity who has knowledge of the facts alleged in the petition, and who has executive or managerial authority to sign documents on behalf of the entity, may sign the petition.” The phrase, “executive or managerial authority” is unnecessary and contrary to existing corporate and USCIS service center practices. Many

petitioners have HR Specialists handling immigration matters who are not necessarily managers, but who have authority to sign on behalf of the company. A representative who is given authority by the company to sign petitions should be permitted to sign. Accordingly, we recommend that the phrase, “executive or managerial authority” be omitted.

Form I-140, Immigrant Petition for Alien Worker

- G.** Under the section “For USCIS Use Only,” the sections regarding “Concurrent Filing (of the I-485 with the I-140)” and “To Be Completed By” (with respect to Attorney or Representative) have been removed. We do not know why these sections have been removed, but we believe these sections to be informative to USCIS personnel and recommend that USCIS keep this information on the front page of the form for easy reference.
- H. Part 2:** The change in Part 2 with the addition of item #1 under the “Petition Type” seems to imply that a new I-140 petition must be filed in order to amend a previously filed petition, with a new filing fee. Under terms of the recently-posted “Questions and Answers: Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker” (<http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fe95463d0fd22210VgnVCM100000082ca60aRCRD&vgnnextchannel=7a827f25ed3f3110VgnVCM1000004718190aRCRD>), a petition that is pending may be corrected prior to adjudication. In addition, the form instructions are silent regarding amending a previously filed petition. Part 2, Item #1 should be revised to read: “To amend a previously-approved petition.

In addition, in Part 2, item #2, the article “the” should be removed.

- I. Part 4:**
- a. We recommend that “Question 3” (writing the beneficiary’s name and address in their native alphabet) be removed. It is burdensome to the petitioner since the beneficiary does not sign the Form I-140 and often does not review it. Often the beneficiary lives abroad. USCIS can and does collect this information elsewhere from the Form G-325A when the beneficiary files an application to adjust status.
 - b. The purpose and usefulness of Question 8 (“Is the petition being filed without an original labor certification because the original labor certification is lost?”) as currently worded is not clear. We recommend that the question be rephrased as follows: “8. If the petition is being filed without an original labor certification, are you requesting that USCIS request a duplicate labor certification from the Department of Labor?”

- J. Part 5:** We appreciate USCIS’s inclusion of the labor certification filing date, but we request that the Form I-140 also include the labor certification expiration date. We believe it would be helpful to pro se petitioners who may need the reminder that the labor certification will expire if an I-140 is not filed within the 180-day deadline, especially in light of the grave consequences for noncompliance. Thus, the listing of the labor certification expiration date on the form would serve as a prominent reminder.
- K. Part 6:** The question in Question 8 “Is this a new position?” is ambiguous and should be rephrased or deleted. The purpose and meaning of this question, in particular the word “new,” is not clear. For example, does “new position” refer to a position not previously occupied by the beneficiary, or a new position that has never been filled by anyone before? Due to the ambiguity in this question, we recommend that it either be deleted from the form or reworded to clearly express the question, such as by asking “Is this a newly-created position?”
- L. Part 7:** Providing “yes” or “no” answers in response to the question about applying for adjustment of status or applying for visa abroad can be confusing, especially for pro se applicants. Many applicants may respond with “Yes” for both questions especially when they do not know which option they wish to select at that time. We question the necessity and purpose of these questions and recommend that these questions be deleted from the form.

Thank you for your time and consideration of our comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION