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Re: 60-Day Notice of Information Collection Under Review: Form I-129, Petition for Nonimmigrant Worker; OMB Control Number 1615-0009

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following in response to the request for public comment from the Department of Homeland Security on its Notice of Information Collection, proposing revisions to Form I-129, Petition for Nonimmigrant worker 75 Fed. Reg., No. 25, pages 6212-6213 (February 8, 2010).

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 U.S. citizens, lawful permanent residents, and foreign nationals in proceedings with DHS. We appreciate the opportunity to comment on the Interim 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.

While AILA welcomes some of the changes in the proposed revisions to Form I-129 that may clarify the information required to be provided by petitioners, AILA believes that, in many respects, the proposed information request exceeds the information necessary for USCIS to properly perform its functions in adjudicating petitions for nonimmigrant workers filed by US employers, and that the agency's estimates of time to complete the revised form considerably understates the time necessary for petitioners to prepare the revised form.

These comments are organized by page number of the form and relevant supplements. Comments on the instructions are incorporated in the comments on the form.

General Filing Comment - Required Duplicate Filing

AILA believes it is unnecessary and wasteful to require a complete duplicate filing. We understand that documents are sent to the Department of State's Kentucky Consular Center, which scans selective items, and shreds a massive quantity of paper daily. We urge USCIS to coordinate with the Department of State and amend the instructions to request duplicates of only those documents actually scanned into the PIMS system by DOS.

Form I-129, Page 1: Elimination of "G-28 Attached" Block

On Form I-129 (rev. 12/04/09 and previous editions), there was a G-28 block on the bottom right-hand side of page 1. There is no Form G-28 block on the proposed new Form I-129. AILA is concerned that the elimination of the G-28 block could result in increased instances of USCIS not acknowledging an attorney of record for a filing, and recommends that the G-28 block be retained. As Page One is the first page viewed by the mailroom, the indication of a G-28 attached on that page will assist in ensuring that USCIS communicate with petitioners only through their designated counsel, in conformity with Section 292 of the Immigration and Nationality Act and 5 USC §500(a).

Form I-129, Page 2: Part 2 Item 2 – Basis for classification

The classification (a) 'new employment' and (e) 'change of employer' are confusing. On the face of the form, it is not clear which one should be used since both appear appropriate for a change of employer situation. The instructions state that 'new employment' is to be used when the beneficiary is outside the U.S. and holds no classification, OR is to begin employment for a new U.S. Employer, regardless of the nonimmigrant classification that the alien currently holds, OR will work for the same employer in a different nonimmigrant classification. This instruction would imply that you can check this box if the petition is for a new U.S. employer, even where the beneficiary is changing employers within the same classification. The instructions for 'change of employer' state to check this box if the beneficiary will work for a new employer in the same nonimmigrant classification that the beneficiary currently holds. This appears to be redundant with 'new employment' classification since that states it can be used 'regardless of' the classification the alien holds. We recommend that the instructions state more clearly when the "new employment" category should be used.

Further, the classification (c) is confusing as it refers to "a non-material change" to previously approved employment. AILA suggests there is no need to file a new petition in such a situation, unless an extension of status is also requested. The instructions should be clarified to reflect this fact.

Form I-129, Part 3 Item 2.f.

To ensure consistency with item 2.e. we recommend the addition of the following italicized words: Employment Authorization Document (EAD) Number *(if any)*

Form I-129, Part 3 Item 2.i. and related instructions

USCIS correctly requests information regarding the beneficiary's passport and its expiration date on Part 3 Item 2.i. In the related instructions, however, on Page 4 - initial evidence, AILA notes that the Service is requesting a passport valid through the validity of the requested stay. While many beneficiaries will have passports valid for five or ten years, it is not uncommon for a beneficiary to have a passport that is expiring one to two years into a three-year petition. Many countries do not allow their nationals to renew a passport more than one year or even six months before expiration, and passport validity is not necessary for a nonimmigrant petition to be valid. We recommend that the instructions clearly indicate that if the passport will expire during the period of validity of the petition, the beneficiary must renew it; however, USCIS should make clear that the petition validity will not be limited to the validity of the passport.

Form I-129, Part 4: Processing Information

Question 11 asks whether the beneficiary has *ever* held status as a J-1 nonimmigrant, and requires any applicant who has held status as a J-1 nonimmigrant to provide evidence of that status. While AILA understands that the information sought with this question is relevant to determining whether the beneficiary may be inadmissible to the United States under Section 212(e) of the Act, such a determination is not necessary for adjudication of a Petition for Nonimmigrant Worker, which only deals with the eligibility of the position and beneficiary for the classification being sought. Even in those situations where Form I-129 is also seeking a change of status on behalf of a beneficiary, the information requested is either redundant (because those beneficiaries seeking a change of status from J-1 to another status will provide the information regarding their current J-1 status in order to demonstrate eligibility for a change to the new status), or it is irrelevant (because beneficiaries not currently holding J status are not ineligible for a change of status to H or L nonimmigrant, even if they are still subject to INA §212(e)).

Further, in the interest of identifying the small percentage of individuals subject to INA §212(e) who may be seeking changes of status to the H or L classification, this question poses a large and burdensome requirement on *all* beneficiaries who have *ever* held J-1 status, irrespective of whether INA §212(e) ever even applied or was in fact already complied with.

Even the instructions to the proposed new form recognize that *only* a "J-1 exchange visitor subject to the foreign residence requirement who has not received a waiver of that requirement" is ineligible to change status. *See* Proposed Form I-129 Instructions (Rev 01/27/10)N at p. 4 In light of this very clear and correct instruction, questions 11a and

11b are unnecessary. The question does not limit itself to relevant inquiry into J-1 status, and so should be eliminated.

Form I-129, Part 5: Basic Information About the Proposed Employment and Employer

Item 3 – Item 3 requests the NAICS Code. The NAICS Code reporting requirement was established for H-1B petitions under ACWIA. The form should indicate the NAICS code is only required for H-1B petitions.

Item 5 – Item 5 requests: Name and Title of Contact Individual at Place of Employment. It is not clear what information the Service is seeking here and there is no regulatory authority to require a contact person at the place of proposed employment. Many employers wish all of their contact with Immigration to be through a specified employee, often in the Human Resources or General Counsel's office. Universities may coordinate all filings for multiple campus locations through a single International Office. By designating a signatory, the employer has provided the Service with a contact person for all matters relating to the petition. By requiring the employer to designate multiple points of contact within its organization, the Service is going beyond the information required to perform its statutory function of determining the petitioner and beneficiary's eligibility for the nonimmigrant classification being sought.

Item 6 – Item 6 requests a phone number "at the work site." It is not clear whether the form is requesting the general phone number of the employer at the work site, or the phone number of the individual listed in Item 5. As noted above, there is no authority to require the employer to designate multiple points of contact, and this information request exceeds the Service's authority under the Paperwork Reduction Act.

Part 6 Additional Information About Employment Under a Third Party Contract

This is a new section and request for information that is confusing and difficult to complete for an employer seeking to petition for nonimmigrant status. The question asks whether the beneficiary will be employed "off-site," and the general instructions do not define what is meant by "off-site." Nothing in the question limits its applicability to occasional off-site work, as when an L-1 manager must attend a professional conference or an H-1B physician must perform rounds at a local hospital. The off-site work may have little or no relevance with respect to most beneficiaries, or may be addressed by specific requirements applicable only to certain classifications sought using this form (e.g. the LCA requirement for H-1B and E-3 nonimmigrants; the labor certification requirement for H-2A and B nonimmigrants; and the itinerary requirement for O and P nonimmigrants). For example, a huge number of fashion industry O-1 petitions involve third party contracts. The typical scenario involves a modeling agency petitioning for a fashion model with whom it has a contract for services. The agency enters contracts for the model's services with various companies throughout the course of the model's authorized period of stay. Often, O-1 fashion models are in high demand and have a

large number of work locations and third party arrangements over the course of their authorized period of stay. Supplying the information in Part 6 at the time of the petition is both unduly burdensome to the petitioner and irrelevant to the petition, because these arrangements, in the O context, are outside the reach of the Neufeld Memo.

Since the question is of limited general applicability, it should be eliminated from the basic I-129 form, and only included on the supplements seeking classification where location of employment is relevant (e.g. H-1B), if at all. If the question is asked on the general form, it should be significantly re-drafted to narrow the scope of the inquiry so that petitioners will not believe they have to answer "yes" because their employees' duties will occasionally take them out of the employer's own premises.

Part 7 Deemed Export Attestation

AILA is very concerned with the proposed addition of this attestation to Form I-129. AILA is concerned that the instructions and questions do not accurately state the law and that it is difficult or impossible even for law-abiding petitioners whose work involves controlled technologies to comply with applicable deemed export regulations. Also of concern is the significant additional burden it places on all employers, not just employers involved with technology subject to the deemed export rules of the Department of Commerce and other government agencies. These concerns are addressed in detail below.

A. This Section and its Instructions Incorrectly State the Relevant Export Control Rules

The Instructions state:

"Certain H-1B, L-1 and O-1A nonimmigrant beneficiaries must have a Deemed Export License issued by the U.S. Department of Commerce to be eligible for the employment being sought through the submission of a Form I-129."

This statement is incorrect in that it suggests that the Department of Commerce Deemed Export License requirements apply only to "[c]ertain H-1B, L-1 and O-1A nonimmigrant[s]." Deemed Export License requirements apply to all foreign nationals who are not permanent residents of the United States or "protected person" under 8 U.S.C. 1324b(a)(3). [See: http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html#1]. Additionally, Deemed Exports occur not only under Department of Commerce Regulations, but under export controls administered by other government agencies, such as the State Department's ITAR regulations. As discussed further below, should the Service feel that promoting compliance with export control licensing is necessary, they should alert petitioner on the form of the requirements, but should not try to summarize another agency's rules on a USCIS form.

This statement in the instructions is also incorrect to the extent that it implies that issuance of a Deemed Export License is required for all employment with a petitioner whose business involves a controlled technology. An employer must obtain a Deemed Export License for a foreign national employee prior to providing that employee with access to certain technologies in the course of his or her duties; however, even the Department of Commerce requirements are not pre-conditions to employment per se, nor to employment in a specialty occupation with that employer. For example, an engineer may be employed by an employer whose business includes controlled technologies, but assigned to engineer a part of the technology which is not controlled while awaiting approval of an export control license to work on the controlled part of the technology.

The form goes further than the instructions, and appears to require a license as a pre-condition for approval of an I-129 petition. The questions in Part 7 require a petitioner to provide a license number as part of the I-129 petition, as if any employment of the beneficiary required issuance of the license. As noted above, this is not correct, as there is no regulation that requires the issuance of a Deemed Export License prior to the approval of an I-129 petition, nor even to employment of a nonimmigrant in positions that do not involve access to controlled technologies.

The requirement to provide a license number also imposes a "Catch-22" on petitioners whose business includes controlled technologies: they must obtain a license for a person overseas prior to filing the petition, but in order to obtain the license, they must show that the person is in the United States and employed lawfully in a capacity where they will have access to that technology.

B. This Section and its Instructions Impose an Undue Burden on All Petitioners

The questions in Part 7 must be answered by all petitioners seeking beneficiaries in certain classifications. Because of this question, a petitioner filing a petition for any employee – an H-1B physical therapist or an O-1 violinist, for example, whose positions clearly cannot involve access to any controlled technologies – must spend time determining how to answer this question correctly. If the petitioner wants to be sure that "no" is the correct answer to check, the petitioner must go to the instructions. Those instructions provide some background on the question, but then refer the petitioner to the web site of another government agency for information on how to determine the correct answer to that question. The referenced website does not clearly indicate what technologies are covered, without extensive reference to the regulations linked on that site. Even where the petitioner concludes that it can accurately answer "no," the question still requires the petitioner to determine the EAR classification of any technology to be used by the employee, even if that technology is physical therapy equipment or a violin. The time necessary to make a correct determination of "yes" or "no" to this question will, by itself, in some cases exceed the 2 hour and 45 minute OMB form completion burden estimate, and will normally require petitioners to consult experts in the area of export control law in order to correctly answer the question. Indeed, this burden will fall most

heavily on small business and on larger businesses that only occasionally petition for nonimmigrant workers.

A detailed discussion of Section 7's requirement and how most petitioners will have to determine their answers may help illustrate this burden. Section 7 requires the petitioner to answer "Yes" or "No" to whether a Deemed Export License is required. If the petitioner answers "No," the form requires them to complete four additional questions (1a through 1d). A petitioner with no prior experience with Deemed Export Licenses will not know how to complete these questions.

"1a. Is the technology subject to the Export Administration Regulations (EAR)"

What technologies are subject to the EAR? The instructions do not say. Moreover, the Department of Commerce regulation cited in the instructions also does not include a definition of what technologies are subject to the EAR. The instructions also include a link to a webpage of the Department of Commerce Bureau of Industry & Security (BIS), entitled "Deemed Export Resources." This webpage includes some FAQs regarding Deemed Export Licenses and instructions for applying for such licenses but also does not define what technologies are subject to the EAR. Therefore, to properly complete this question, a petitioner would need to conduct significant legal research.

"1b. List the Export Control Classification number for the technology"

The form itself requires the petitioner to complete this item, regardless of whether a license is actually required. ("If Box 1 is checked, complete a, b, c, and d"). Neither the form nor instructions provide any information as to what this number is or where such a number is to be found. Do all technologies have an Export Control Classification number whether or not they are subject to the EAR? That is to say, is an Export Classification Control number assigned to every field of technology much as an NAICS number is assigned to every field of commercial endeavor? Or is an Export Control Classification number something assigned only to technologies subject to the EAR? Because of this ambiguity, employers whose positions do not involve controlled technologies will have to spend significant time researching this issue.

"1c. Did you self-classify this technology?"

"1d. Did the U.S. Department of Commerce classify the technology?"

The instructions do not explain what "self-classify" and "classify" mean. The inclusion of an option for "N/A" further confuses these questions. Most petitioners are not going to be able to understand and answer these questions.

Assume, for example, a petitioner who publishes a magazine called "Fine Dining," which is a typical food article and recipe magazine, petitions for an Editor. The petitioner assumes that they are not involved in any technologies that require export controls,

because they just publish a magazine. Based on their assumption, the petitioner answers question 1 and 1a as "No." Are these answers correct? How do they know? Should this petitioner leave question 1B blank, or write "Not applicable"? By assuming that they are not subject to the EAR, has the petitioner self-classified its "technology," requiring the answer to 1c to be "Yes"? Of is "self-classification" something else entirely, a specific act pursuant to Department of Commerce regulations that this petitioner know nothing about and the correct answer to question 1c is "N/A"?

As drafted, this entire Section will make no sense to most petitioners and will require them to conduct significant legal research into the regulations of the Department of Commerce to intelligently complete. This creates an overly burdensome requirement on petitioners, and thus violates the Paperwork Reduction Act.

C. This Section Collects Non-Relevant Information

Aside from the significant burden of time on all petitioners in responding to these questions, the deemed export attestation also requires petitioners to provide USCIS with information not relevant to USCIS's delegated authorities. Rather, these questions are clearly directed at ensuring employer's compliance with another government agency's regulations. USCIS's request for information regarding export control requirements is no different than a question regarding an employer's compliance with employment tax withholding with respect to its employees, or to environmental permitting necessary for its facility to operate, or local zoning necessary to operate the employer's work site – like those examples, questions regarding an employer's compliance with another government agency's licensing requirements seek information not relevant to the performance of USCIS's statutory function of determining whether to grant a petition seeking to classify a particular foreign national as eligible to be granted status as a nonimmigrant.

AILA proposes that a better balancing of the interests USCIS is trying to promote (compliance with an export control regime that applies to many, but not the majority, of nonimmigrants) is not to ask questions such as those listed on Part 7. Rather, USCIS should simply provide a notice of these requirements, much as they have added a notification of Selective Service registration requirements to the I-485 form. We propose the following notification be included on the I-129, if USCIS wishes to address this issue on its form:

Deemed Export Licensing for Certain Nonimmigrants

Certain technologies and source codes are subject to U.S. Department of Commerce export control. Technologies subject to the EAR are those listed on the Commerce Control List, which is located at 15 CFR 774 Supplement 1. The transmission of such technologies and source codes to foreign nationals employed in the United States is deemed to be an export of these technologies and source codes and is, therefore, subject to export control regulations. The Export Administration Regulation (EAR) of the U.S. Department of Commerce is located at 15 CFR 730 through 15 CFR 780.

The petitioner is advised that if its operations involve technologies subject to the U.S. Department of Commerce's Export Administration Regulations, the activities of a foreign national employee may require the issuance of an Export Control License. Violations of the Export Administration Regulation are subject to civil and criminal penalties (See 15 CFR 764.3).

Part 8 Signature Block and Acknowledgement of USCIS Authority

The proposed Form I-129 includes the following language preceding the signature block:

> I certify under penalty of perjury that this petition and the evidence submitted with it is true and correct to the best of my knowledge. I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. **I authorized the release of any information from my records, or from the petitioning organization's records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought. I also recognize that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to on-site compliance reviews.**

(emphasis added).

AILA believes that the addition of this language is an attempt by USCIS to amend, without notice and comment, regulations regarding the adjudication of petitions and petitioner's right to counsel. As form instructions are given the power of regulation by USCIS's regulations at 8 CFR Part 103, changes to forms which are substantive changes to agency procedures are subject to notice and comment rulemaking pursuant to the Administrative Procedures Act. Because these proposed amendments also may be construed as a waiver of petitioner's constitutionals right against warrantless searches, as well as petitioner's constitutional and statutory rights to counsel, AILA advises that USCIS should not attempt to make these changes merely in the process of revising a form.

The instructions to the proposed Form I-129 assert that the Service has a right to verify information related to a petition through a number of methods, including: "review of public records and information; contact via written correspondence, the Internet,

facsimile, or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews." USCIS cites as its authority 8 USC 1103, 1155, 1184 and 8 CFR Parts 103, 204, 205, and 214.

However, nothing in any of these statutory and regulatory provisions explicitly gives USCIS the authority to a) execute a warrantless search of the petitioner's records or premises, or b) carry on communications in any form with a petitioner who is represented by counsel in the absence of counsel.

In light of the serious regulatory, statutory and constitutional concerns raised by the proposed language, AILA recommends that the Service first amend its relevant regulations through the Notice and Comment process, rather than trying to expand its regulatory authority by amending its petition forms.

Comments on Supplements: I-129 Supplement FT

Section 1 Item 1.e. Free Trade, Other – AILA is not clear as to the purpose of this option. The instructions state that there are only 2 stand alone Free Trade classifications (TN & H-1B1), so why is "other" listed on the form? If this is a reference to the E-3 classification, since the E-3 classification is covered in the E supplement to the I-129 form, we recommend the removal of this item.

Section 1 Item 1.f. – This section adds a new item concerning H-1B1 Chile & Singapore classification and asks whether the petition is a "sixth consecutive request." This item is written using "I am" implying the beneficiary will sign this supplement. The FT Supplement, however, is signed by the petitioner. In addition, since there is no limit on the years allowed in H-1B1 status, AILA is not clear as to why this question is even being asked. It should be removed.

Comment on I-129 Supplement H

Introductory Section, Item 3. This section requests a summary of all prior periods of stay in H or L status and copies of all relevant documentation. There are many circumstances where the documentation may not be available, so we request the following additional language in the NOTE: Submit photocopies of Forms I-94, I-797, and/or other USCIS issued documents, if available, noting these periods of stay in the H or L classification.

Comment on I-129 H-1B Data Collection Supplement

Form I-129 H-1B Data Collection Supplement is an additional form required for all H-1B petitions. The purpose of the form is to help USCIS gather information on the petitioner's H-1B dependency status, the beneficiary's educational background and whether or not the petitioner is subject to certain filing fees as well as the H "Cap.". In particular, Parts C & D of the Supplement are new. Part C has been added to help USCIS establish whether an H-1B case is subject to the H-1B "Cap."

A. Requiring the Beneficiary's Signature

As a general concern, the form requires the beneficiary's signature; however, the beneficiary, as a matter of law, is not a party in interest on the I-129 except as to a request for a change or extension of status. A beneficiary of a petition is not a recognized party in the petition portion of the combined I-129 as provided by 8 CFR 103.2(a)(3). AILA believes that to require the beneficiary's signature is not only extra-legal but also serves no purpose since no portion of the Supplement – other than sections dealing with the education of the beneficiary - relates to or is a representation or affirmation of the beneficiary. Information related to the beneficiary's education is already independently verified through the submission of credentials and thus no further action by the beneficiary would serve a legal purpose.

Legacy INS proposed, 10 years ago, to add a requirement that the petitioner obtain the beneficiary's signature on the I-129, and ultimately declined to do so. AILA's comments from that time retain their force as powerful justifications as to why requiring the beneficiary's signature would violate the Paperwork Reduction Act:

> The proposed H-1B supplement sheet contains an unprecedented, unnecessary, burdensome, and duplicative new requirement: the H-1B beneficiary's signature. This signature is meant as the beneficiary's certification that "all information relating" to the beneficiary is "true and correct". The INS has provided no explanation as to what end the beneficiary's signature would be used, or why it should be necessary when the State Department already poses a similar question to H-1B petition beneficiaries when they apply for their actual H-1B visas. This burdensome new requirement would impose an unworkable logistical problem for petitioners, resulting in significant delays in H-1B petition preparation.
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> . . . .
>
> Requiring a beneficiary's signature is unduly burdensome, and the INS has not provided an accurate estimate of the time burdens imposed upon petitioners by the proposed collection of information. The very process of obtaining a beneficiary's signature would slow H-1B petition preparation times dramatically. The logistics of getting an H-1B beneficiary to affix his or her name to a completed H-1B petition is unduly slow and costly. This is because H-1B beneficiaries are often half-way around the world from the U.S. petitioner. Simply acquiring the beneficiary's signature would require the use of an overnight courier (e.g., FedEx, DHL, etc.) to ship the entire H-1B petition to the beneficiary's residence abroad. Depending upon where in the world the package is to be shipped, the cost of such a shipment – one way – often exceeds $50.
>
> If a company wishes to file a petition on behalf of a foreign worker who resides in, say, India, or China, or Zimbabwe, it would literally take days for even the fastest airborne couriers to ship a complete H-1B petition package to the

beneficiary. Once the beneficiary received the package, the beneficiary would have to spend at least some time reviewing the entire H-1B petition package, and all evidence to be submitted with the petition. It is hard to estimate exactly how much time a beneficiary would need to review and verify an entire H-1B petition (and all supplemental evidence to be submitted). However, given that the beneficiary faces a potential perjury charge for signing off on a form INS may later deem to contain "incorrect" information, it is reasonable to assume a beneficiary will not sign off without a thorough – and necessarily time-consuming – review. Once that review is complete, the beneficiary must then figure out a way to ship the package back to the United States petitioner.

Assuming the beneficiary has equal access to the sorts of international "overnight" courier services available to U.S. employers, the package will still take a number of days to return to the United States. Assuming the beneficiary does not have access to such private international "overnight" courier services, or cannot afford to use such services, then the return of the H-1B petition to the employer will take much more time. Depending upon the reliability of the overnight service used, it is predictable that some packages will be lost en route from one end of the globe to another. Should this happen, at least some employers will find their entire H-1B petition gone, and will have to re-prepare a new petition from scratch. As the very purpose of the H-1B visa category is to allow U.S. employers to quickly fill a temporary position, it is inconceivable that the practical utility INS hopes to gain (if any) is justified by the enormous burden such a signature requirement places upon petitioning employers.

For these reasons, AILA recommends that the beneficiary signature requirement be eliminated from the H-1B Data Collection, so that the H-1B Data Collection matches all of the other supplements for the other nonimmigrant categories.

B. Comments Regarding Parts A-C, General Information, Fee Information and Numerical Limitation Information

AILA notes the following concerns with the indicated questions in this section:

Part A, Item 1.d. The TARP language implies a petitioner should mark 'yes' if the petitioner has received TARP funding and should provide an explanation on an addendum if the petitioner has repaid the TARP funding. However, the recent USCIS guidance posted on the USCIS website on February 4, 2010 on TARP repayment states to check 'no' to Question A.1.d if you have repaid your obligations, then answer "No" to Question A.1.d. AILA recommends that the question be worded as follows: "Has the Petitioner received TARP funding, and not yet repaid that funding?"

Part A, Item 5: The H-1B Data Collection Form changes "LCA code" to "DOT code." There are several problems with this change. First, DOT codes are more than 3 digits, and the Department of Labor has essentially discontinued its use of the Dictionary of

Occupational Titles, replacing it with SOC codes. Second, the DOL has previously used a specific list of three-digit LCA codes that do not include all DOT industry codes (the 3 digit prefix to the full DOT codes), and sometimes those LCA codes do not match the DOT prefix for a specific occupation. *See* http://www.lca.doleta.gov/h1bcl_oc.pdf As the Office of Management and Budget has mandated the SOC codes as the standard for all federal data collection purposes, if this blank is left on the form, it should request the SOC code listed on the LCA.

Part A, Item 6: the H-1B Data Collection Form Table of Changes state that the NAICS code field is removed, but it is still on the draft form.

Part B NOTE – We recommend the inclusion of the following italicized words in the second to last sentence of the note: *This $500 fee must be paid by separate check.* Although the instructions state the requirement of the separate check it would help remind petitioners of this requirement. We understand that the instructions also contain this language but since failure to comply with this requirement often results in rejection we feel it would be useful to include the requirement directly on the form.

Part C, Item 3: There is a typographical error in the first sentence. The sentence should state, "If you answered 1d CAP Exempt you must specify the reason this petition is exempt *from* the numerical limitation for H-1B classification." The word "from" is missing from the first sentence and should be added.

Part C, Item 3.b.: We recommend the following clarifying language which comes directly from the DHS regulations: "The petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education as defined in the Higher Education Act of 1965, 20 U.S.C. 1001(a). Please see the language from the regulations at 8 CFR 214.2(h)(19)(iii)(A)." As presently worded, the middle clause of the sentence is redundant and does not accurately reflect the actual regulatory language.

Part C, Item 3.d. While AILA notes with appreciation the addition of a question to help identify when an H-1B petition may be exempt from the H-1B cap due to the employment occurring "at" a cap-exempt institution, we note with concern the inclusion of language from the June 6, 2006 Michael Aytes Memo on "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on Section 103 of the American Competitiveness in the Twenty-First Century Act of 2000." That language purports to limit the availability of the cap exemption beyond the regulatory and statutory language. Therefore, AILA recommends that sentence be modified by deleting everything after the words "The petitioner will employ the beneficiary to perform job duties at a qualifying institution (see a-c above)."

Part C, Item 3.g. AILA recommends item 3.g. be divided into three separate line items to help clarify which situation(s) the beneficiary falls into in determining whether the beneficiary is subject to the H "Cap." Currently, item 3.g. presents three situations. It is not clear when item 3.g. should be checked. Should the box be checked when the

beneficiary qualifies for one or two or all of the situations described? Sometimes the beneficiary may qualify only for the first situation and other times the beneficiary may qualify for both the first and second or first and third situations indicated. By separating each of the three scenarios into three different line items, each situation that applies to the beneficiary can be appropriately marked. Please see below for the division of Item 3.g. into three separate line items.

> i. The beneficiary of this petition was previously granted status as an H-1B nonimmigrant in the past 6 years.
>
> ii. The beneficiary of this petition is applying to reclaim the remaining portion of the six years. - *[We have removed the reference 'from abroad' because a beneficiary is not required to be abroad in order to request the recapturing of any unused H-1B time.]*
>
> iii. The beneficiary of this petition is seeking a 7th year or later extension based upon AC21 and the beneficiary's previous H-1B petitioner/employer was not a CAP exempt organization as defined above in a, b and c. *[We have added the term 'or later' for clarity.]*

Comments to Part D, Attestation Regarding Off-Site Assignment

AILA also has a number of concerns respecting Part D of the I-129 H-1B Data Collection Supplement. Part D, as a general matter, is confusing. Unlike the rest of the Form, the questions are not numbered, making reference difficult. In addition, since there is only one box provided (except for the Itinerary question), it is unclear whether checking that box means "yes" or means "no," or carries with it some other unexpressed legal consequence. This is especially true given that the section is entitled "Attestation."

AILA believes that the Service is attempting to highlight for the petitioner the legal obligations undertaken by an employer when the employer elects to hire an H-1B worker – especially if that work is not physically located at a site controlled by the petitioning employer - but the attestations on the form are inappropriate and overly-inclusive.

As a preliminary matter, many of these attestations seem to impermissibly intrude into and seek to enforce regulations that are within the purview of the Department of Labor (DOL) respecting Labor Condition Applications (LCA). As noted in 20 CFR 655.700(a)(4), the INA establishes a system wherein "the DOL is authorized to determine whether an employer has engaged in misrepresentations or failed to meet a condition of the LCA." Under this structure, USCIS retains enforcement authority only as it relates to requirements of the INA in Section 212(n) and not the LCA as administered by DOL. USCIS recognized this division of responsibility in a guidance memorandum issued in 1995 by Michael Aytes respecting the use of the H-1B visa by consulting companies: "In the case of an H-1B petition filed by an employment contract, Service officers are reminded that all prospective H-1B employers have promised the Department of Labor

through the labor condition application process that they will pay the alien the appropriate wage even during periods of time when the alien is on travel or between assignments. Since the contractor remains the employer and is paying the alien's salary, this constitutes employment for the purposes of the H-1B classification. If the contract fails to comply with the provisions of the labor condition application with respect to the terms of the alien's employment, the Service may initiate revocation proceedings pursuant to 8 CFR Section 214.2(h)(II)(iii)." Finally, this position is also reflected in 20 CFR 655.705(b), which describes the responsibilities of USCIS as limited to revoking the H-1B if the employer failed to met certain conditions of the LCA set forth in INA Section 212(n).

A. Attestation re: Existence of Offsite Placement

The first "attestation" is not problematic in the sense that it is certainly fair for the Service to inquire respecting any intent to assign the alien to an off-site location; however, the lack of specificity means that any number of correct and incorrect conclusions could be drawn from checking this box. It could be concluded that the employee may spend a few days off site, or it could be concluded that the employee will be primarily placed at a location not controlled by the petitioning employer. Between those two extremes there are a host of other permutations. Different legal consequences attach depending on the answer.

For example – 20 CFR 655.715 indicates that peripatetic off-site placement does NOT require the filing of a new LCA and is not considered a "work site." An employer who checks this Box for a peripatetic worker may, at minimum, receive an RFE when it plans to engage in conduct that is perfectly permissible under applicable regulations and which does not place extra requirements on the employer. If this question is included at all, it should be refined to mirror the regulatory exceptions for peripatetic employment contained in 20 CFR 655.715 as well as the rules respecting short term employment contained in 20 CFR 655.735. AILA recommends that the better practice would be to insert a discussion of these concepts in the instructions to the Form, or a warning to the employer that its signature represents its awareness of its obligations with respect to LCA compliance for off-site placements.

B. Attestation re: Off Site Placement to Beneficiary and Acceptance by Beneficiary of Conditions of Employment and Off Site Placement.

As noted, the only reference in the INA respecting the LCA requirement is Section 212(n). This section does not require either that the employer notify the beneficiary that there will be an off-site placement, nor does it require the beneficiary to attest that he or she accepts the terms and conditions of such placement. Likewise, there is no reference in 8 CFR to any requirement related to advising the beneficiary or obtaining the beneficiary's consent to accept off-site placements. The only LCA reference in 8 CFR is at 8 CFR 214.2(h)(1)(i)(B)(1), which simply notes the need for an LCA prior to approval of an H-1B visa. In fact, this off-site notification and acceptance requirement is also not

part of the DOL's regulatory scheme. As far as AILA is aware, so long as the petitioning employer files an LCA for all work locations that require an LCA, and provides the beneficiary with a copy of said LCA in compliance with 20 CFR 655.734(a)(3), there is no separate requirement to communicate the intent to place the beneficiary off site or obtain the beneficiary's consent to such placement anywhere in the law. Inclusion of this extra-regulatory requirement, therefore, violates both the Administrative Procedures Act and the Paperwork Reduction Act.

C. Attestation re: Employer Will Comply with H-1B Statutory and Regulatory Requirement

This statement is fine as far as it goes since – as a matter of law reflected in the INA and the relevant implementing regulations by USCIS and DOL – all Petitioners are required to comply with all statutory and regulatory requirements of the H-1B program; however, it seems redundant given that the Petitioner already binds itself to do so vis-a–vis USCIS by making the application in the first place and vis-à-vis the DOL by signing the LCA. AILA does not understand what is gained by this extra attestation. To the extent that this statement obligates the petitioning employer to guarantee the conduct of anyone at the off-site location of which the petitioning employer is unaware, this attestation would impose an extralegal burden.

D. Attestation re: Beneficiary Will Be Paid Prevailing Wage

Petitioners are required to pay the prevailing wage and the INA prohibits benching. This attestation is redundant given that the Petitioner already binds itself to do so vis-a–vis USCIS by making the application in the first place and vis-à-vis the DOL by signing the LCA. AILA does not understand what is gained by this extra attestation, especially since even in cases of off-site placement, the petitioning employer is the entity required to pay the prevailing wage, and is considered the actual employer by regulation. Perhaps it is appropriate to insert a reminder into the instructions to Form I-129 that unless the employee has requested a leave or otherwise departed employment, the prevailing wage must be paid at all times and at all work locations, but inserting an additional attestation in the form specific to off-site employment seems to serve no useful purpose, when employers already agree on the H supplement to comply with the terms of the LCA.

E. Attestation re: Itinerary

This item concerning the inclusion of an itinerary appears to be in the wrong location on Form I-129 Data Collection Supplement because the regulation concerning itineraries does not actually deal with off-site placement or placement at a location other than a location controlled or owned by the petitioner. As stated on Page 2 of the instructions, this question pertains to the itinerary requirement for multiple work locations contained in 8 CFR 214.2(h)(2)(i)(B). Including this question in Part D of the H-1B Data Collection Form creates the misleading impression that anytime a beneficiary is placed at work site that is not controlled by the petitioner an itinerary is required, even if there is

only one work location. In order to avoid confusion to the petitioner concerning the actual regulatory requirement AILA recommends moving this question to Part A of the Data Collection Supplement, if it is included at all (see above – Part A comments).

Comment on I-129 H-1B O and P Supplement

With the O and P Supplement to the proposed Form I-129, DHS/USCIS seeks to implement a new signature requirement in which a petitioner agrees to pay the beneficiary's return transportation if the beneficiary is dismissed from employment before the end of the authorized period of stay. It is unclear why DHS/USCIS seeks to implement this signature requirement, because the return transportation is already included in the regulations. See 8 CFR § 214.2(o)(16) and § 214.2(p)(18). Nevertheless, the language accompanying the signature requirement is confusing:

> I certify that I, the petitioner, and the employer whose offer of employment formed the basis of status will be jointly and severally liable for the reasonable costs of return transportation of the beneficiary abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay.

Although an agent petitioner in the O and P context must be authorized to act on behalf of the employer, the language of the signature requirement makes it sound as if the signatory is both the petitioner and the employer, which might not be the case. Instead, if DHS/USCIS persist in this new signature requirement, AILA suggests that the following language be substituted:

> I certify that the employer whose offer of employment formed the basis of the nonimmigrant status sought herein and the petitioner will be jointly and severally liable for the reasonable costs of return transportation of the alien abroad if the alien's employment terminates for reasons other than voluntary resignation during the authorized period of stay.

This revised language more closely mirrors the language of the regulations and also makes clear that the employer and the petitioner may be different entities.

Comment on I-129 R-1 Classification Supplement

AILA makes the following comments on the I-129 R-1 Classification Supplement:

Employer Attestation Section

1.a *Number of members of the petitioning organization.*

The term "members" is not defined in either the regulations or the form. Petitioning organizations will therefore interpret the meaning differently based on what the

organization is and how it defines a member. It is possible the term is intended to refer to believers in a denomination when the petitioner is a religious organization such as a worshiping congregation, but not all members of a denomination would necessarily be members of a petitioning organization. In the case of an affiliated organization such as a religious school, medical facility, or social organization, it is difficult to see how a petitioner would answer this question, since membership is not a relevant term for most affiliated organizations. This numbered section would be improved if its applicability were limited to petitioning organizations that were religious organizations, and not organizations affiliated with religious organizations. It is recommended that a non-applicability box be included to reflect this nuance.

1.c. *Number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past 5 years.*

While the holder of R-1 classification has nonimmigrant religious worker status, immigration law has no legal concept of special immigrant "status" for an alien who has acquired permanent resident status as a "special immigrant" as that term is defined in INA section 101(a)(27). Clearer terminology would contribute to better data accumulation. If 1.c. seeks information on the number of aliens holding nonimmigrant religious worker status and the number of permanent resident employees who acquired residence as special immigrants through the petitioner and who are currently employed or employed within the past 5 years, it should be reworded to reflect this meaning accurately.

2. *Has the beneficiary or any of the beneficiary's dependant family members previously been admitted to United States for a period of stay in the R visa classification for the last 5 years?*

Immediately below this attestation, the form seeks information concerning periods of R stay of a beneficiary during the last 5 years. Use of the word "during" in the sentence rather than the word "for" prior to "the last five years" would be clearer. As presently worded, the attestation confuses two different concepts: whether a beneficiary has been present in the U.S. in R-1 status for any period (even if less than 5 years) and whether the beneficiary has already exceeded the 5 years of permitted R-1 stay. The current wording seems to imply a "yes" answer solely if the applicant has completed 5 years in R classification, while the intention of the question would appear to require disclosure of any period in R classification.

4. *Describe the relationship, if any, between the religious organization in the United States and the organization abroad of which the beneficiary is a member.*

It is recommended that the word "organization" in the phrase "organization abroad" be replaced with the word "denomination." Membership in a religious organization abroad is not a legal requirement for R-1 status. Denominational membership related to the petitioning organization is a requirement, and the question on the form should provide the

means for the Service to ensure that the regulation requirements are met. Moreover, the recommended draft of the question would necessarily include any information pertaining to the relationship between the religious organization in the US and the organization abroad, since this is a lesser and included term.

8. *If the beneficiary worked in the United States during the two years immediately before the petition was filed, the beneficiary received verifiable salaried or non- salaried compensation or provided uncompensated self-support.*

The relevance of this question is unclear, given that two years of work immediately prior to filing a petition is not a requirement for R-1status. The two-year experience requirement only pertains to the special immigrant category. It appears that this attestation is based on the regulations at 8 CFR §214.2(r)(12), which pertain solely to an extension of stay petition. In addition, this regulation appears to apply regardless of the period of time in prior R-1 classification, whether two years or other. Therefore, this attestation would be more accurate if it matched the regulation by reading "If the beneficiary worked in the United States in R-1 classification immediately before the petition was filed …."

9. *If the position is not a religious vocation, the beneficiary will not engage in secular employment and the petitioner will provide salaried or non-salaried compensation. If the position is a* [sic.]*traditionally uncompensated and not a religious vocation, the beneficiary will not engage in secular employment, and the beneficiary will provide self-support.*

The language of attestation 9 is confusing and it is difficult for petitioners to understand and properly answer. The wording of this attestation uses two compound sentences, one of which contains a double negative. Attestation 9 refers to a beneficiary in a religious vocation for whom secular employment is permitted, which is a correct statement of the law. Second, it refers to the requirement that the petitioner provide salaried or non-salaried compensation, except in the case of a missionary who may provide self-support. One way to improve the clarity of this attestation is to break it into multiple attestations. Another possibility is to break up the first sentence into two shorter sentences. For example, "If the position is not a religious vocation, the beneficiary will not engage in secular employment." This could be followed by a second sentence such as "The petitioner will provide salaried or non-salaried compensation." A third sentence could then read as follows: "If the position is traditionally uncompensated and not a religious vocation, the beneficiary will not engage in secular employment and the beneficiary will provide self-support."

10. *If the offered position requires at least twenty hours of work per week, or if fewer than twenty hours per week, the compensated service for another religious organization and the compensated service at the petitioning organization will total twenty hours per week. If the beneficiary will be self-supporting, the petitioner must submit documentation establishing that the position the beneficiary will hold is part of an established program*

for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

Attestation 10 would be clearer if first sentence stated as follows: "The alien will be employed at least twenty hours per week" which is the wording in the regulation. If the longer version of the first sentence as written in attestation 10 is required, the second sentence of attestation 10 would be clearer if it was a separate attestation. It is difficult for petitioners to answer yes or no to the wording of attestation 10.

11. *The beneficiary has been a member of the petitioner's denomination for at least 2 years immediately before Form I-129 was filed and is otherwise qualified to perform the duties of the offered position.*

The first part of Attestation 11 would more accurately track the language of the regulations for R-1 status if it required "denominational membership" which is defined as membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien would work. See 8CFR §214.2(r)(3). The following alternative is suggested: "The beneficiary has been a member during at least the two year period immediately preceding the filing date of the petition in the same type of religious denomination as the United States religious organization where the alien will work…."

12. *"The petitioner will notify USCIS within 14 days of any changes in the beneficiary's employment, including working fewer than the required number of hours or having been released or otherwise terminated from employment before the end of the authorized R-1 stay."*

This attestation is not required by 8 CFR §214.2(r)(8). It derives from 8 CFR §214.2 (r)(14) but does not accurately state the regulatory requirement. The regulation does not obligate an employer to notify USCIS with regard to "any" change in employment. Rather, the regulation obligates an employer to provide notice in very specific situations, i.e., "…when an R-1 alien is working less than the required number of hours or has been released from or otherwise terminated employment before the expiration of a period of authorized R-1 stay…." Attestation 12 should not include a requirement inconsistent with the regulation, and should not create by attestation additional instances where notice is required. Attestation 12 would track the law if it was worded as follows: "The petitioner will notify USCIS within 14 days if an R-1 alien is working less than the required number of hours or has been released from or has otherwise terminated employment before the expiration of a period of authorized R-1 stay."

Conclusion

AILA appreciates the opportunity to provide input on this important form and the revisions proposed to it.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION