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April 9, 2010

Via email transmission to rfs.regs@dhs.gov
Department of Homeland Security
United States Citizenship and Immigration Services
Stephen Tarragon, Deputy Chief
Regulatory Products Division
Clearance Office
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RE: Response to Request Comments and Suggestions / 60-Day Notice of Information Collection Under Review: Form I-129, Petition for Nonimmigrant Worker; OMB Control Number 1615-0009

Dear Mr. Tarragon:

The following comments are provided in response to your request for comments and suggestions for Form I-129, Petition for Nonimmigrant Worker, OMB Control Number 1615-0009.

The major changes that U.S. Citizenship & Immigration Services proposes to make to the Form I-129 and related Supplements are reflected most significantly in the Instructions that accompany the forms.

I. The agency proposes to add to the General Filing Instructions the requirement that a petitioner submit a duplicate copy of the petition and all supporting documentation in all instances. See P. 2. Currently, only the petitioner seeking consular processing for the sponsored beneficiary is required to submit a copy. In the digital era it is cost-ineffective to require every single petition that is filed with USCIS to be accompanied by a duplicate. There is no explanation for this change and in the absence one is led to presume the purpose might be for USCIS to engage in some activity that has not been explained to the public or in this Notice. Given that USCIS is required to impose a fee that is limited to covering the expense of adjudicating the petition filed with it and the costs thereof are to be disclosed, the imposition of this across-the-board duplicate submission requirement appears to be a decision that will require additional work and impose more costs on the agency for which no explanation has been provided and which may be for a purpose that exceeds mere adjudication.

II. It is also proposed, on P. 3, that the Instructions include definitions of the six different bases for the classification sought. At first glance this appears to be an improvement that should be welcome. However, the problem is item "f. Amended Petition." The definition states that this box is marked when there is a "material change in the terms or conditions of employment" from the originally approved petition. USCIS provides two examples: a change to

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job duties or "geographic location of the position." It is has been well established for almost a decade, at least in the context of the H-1B petition, that when a petition is approved for a single location based on an approved LCA an amended petition is not required if there is a change to geographic location. This was explained in a letter from Efren Hernandez to Ms. Lynn Shotwell of ACIP. While merely correspondence, this position is articulated in the Adjudicator's Field Manual as well. In the section devoted to Amended Petitions, the agency directs adjudications officers that an Amended H-1B Petition is not required when there is a mere geographic change and the LCA remains valid. Interestingly, with the surge in visits by FDNS to H-1B employers, companies have been reporting statements that these FDNS officers indicated that they should have filed amended petitions instead of just an LCA notwithstanding the AFM's exception. Furthermore, these FDNS visits have been followed by revocation proceedings based on the failure to report changes to the geographic location. A major shift in the policy position of the agency that has been long standing should be disclosed and discussed with all stakeholders instead of being tucked into a notice to change the I-129 form. One would hope that the uproar over the USCIS's secretive creation of the January 8, 2010 memorandum "interpreting" the regulation at 8 CFR Section 214.2(h)(4)(ii) had taught the agency the importance of transparency and openness. This is also rather shocking in its inconsistency with the President's direction to all Federal Government agencies to engage in enhanced openness.

III. The Deemed Export Acknowledgement, on page 4 of the Instructions and added to the Form is significantly concerning as well. The rules governing whether employment of an alien will be or will not be a deemed export are the subject of a highly complex series of rules, policies, and statutes. The language in the form and instructions do not explain what kind of adjudicatory changes will be imposed by the agency through the Service Center Operations Directorate nor the kinds of questions officers will be directed to ask nor the kind of training officers will be given to ensure that they there are not a deluge of RFEs regarding the statements made in the Deemed Export Acknowledgement. The Instructions do not explain whether USCIS has any plans or intentions to engage the Bureaus of Export Administration or Industry and Security at the Department of Commerce to delve into the facts underlying such an acknowledgement. Furthermore, it is concerning that with the presence of this new requirement, there are neither regulations accompanying them to be added to 8 CFR and no proposed RFE language being included with these other notices. It is expected that USCIS will submit any proposed RFE language that either Service Center will be issuing on this new question will be submitted to the OMB for approval under the Paperwork Reduction Act prior to its issuance to petitioners using an I-129 form with this acknowledgment on the form.

IV. The attestation about off-site assignments in Part 6 of the Form I-129 and proposed to be on the Data Collection Supplement is improper for several reasons. This addition to the form is expected to be used by USCIS officers as another way to issue RFEs questioning what the agency has already described pejoratively as job shops. By imposing this new requirement through a form change instead of a regulation with notice and comment, it appears that USCIS is attempting to circumvent the statutory responsibility of the Secretary of Labor. Furthermore, we note that in many instances USCIS has issued RFEs asking for an itinerary when the petition filed with USCIS clearly states there is only ONE location. Generally, no evidence is cited by the officer issuing the RFE as the basis for asking for an itinerary. In many instances, the officer is denying the H1B petition without any explanation where the Petitioner responds to the RFE without an itinerary listing multiple locations, but instead insists that there is only one location. The regulation already requires an itinerary and sometimes it does not exist. If in fact the agency is changing its long standing policy of not requiring an amended petition when there is a change to the work location, the agency should be open and should state so to the public and its stakeholders.

V. The addition to the H-1B Data Collection Supplement form of a requirement for the Beneficiary to sign is a long-standing improvement. Given the combination of the request for an extension for the worker with the company's request in one petition, there should be some signature by the Beneficiary so that there is some formal confirmation on the filing to USCIS that the alien is aware of what is going on.

VI. Finally, we believe that an additional section must be added to the Form I-129, similar to what appears on the I-140 Form, asking whether the Beneficiary has any dependents. Often I-129 Beneficiaries are not aware of the requirements for their dependents to file Form I-539 to extend/change status. A directive/instruction on the I-129 essentially for the Petitioners to communicate with their existing/future employees to advise them that dependants must change/extend their status is a necessary addition to the I-129 to facilitate maximum compliance with U.S. immigration laws by foreign workers and their dependent family members.

Very truly yours,

Aron Finkelstein
Managing Attorney