AMERICAN IMMIGRATION LAWYERS ASSOCIATION

April 2, 2018

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via www.regulations.gov
Docket ID No. USCIS-2006-0050

Re: OMB Control Number 1615–0010
USCIS 60-Day Notice and Request for Comments:
Nonimmigrant Petition Based on Blanket L Petition; Form I-129S

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-Day Notice and request for comments on the proposed changes to Form I-129S, Nonimmigrant Petition Based on Blanket L Petition, published in the Federal Register on January 31, 2018.[1]

AILA is a voluntary bar association of more than 15,000 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, 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 Form I-129S and its instructions.

Timing of Notice and Comment Period

The Federal Register notice announcing the changes to Form I-129S was published on January 31, 2018, with a 60-day comment period ending April 2, 2018. However, the draft form and instructions detailing the proposed changes were not made publicly availalable until March 16, 2018, a mere 17 days before the end of the comment period. Therefore, in addition to considering comments received on or before April 2, 2018, DHS should also extend the comment period to provide a full 60 days from the time the draft form and instructions were published on www.regulations.gov. Given that many U.S. employers and their attorneys have

[1] 83 Fed. Reg. 4502 (Jan. 31, 2018).

been fully engaged in the preparation of H-1B petitions for filing on April 2, 2018, routine users of Form I-129S have not had a sufficient opportunity to review and meaningfully comment on the many proposed changes. Though we submit these comments today, we too would benefit from additional time to provide more thorough and thoughtful comments.

Proposed Instructions for Form I-129S

Ambiguous Use of the Pronoun "You"

The form instructions use the word "you" interchangeably to refer to petitoners, beneficiaries, representatives, and interpreters. For example, on page 1, under "Evidence," the instructions state, "At the time of filing, **you** must submit all evidence and supporting documents…." (emphasis added). Under "Biometric Services Appointment," the instructions state, "USCIS may require that **you** appear for an interview or provide biometrics…." Although as noted at the top of page 1, Form I-129S is completed by "an employer (petitioner) to classify an employee (beneficiary) as an L-1 intracompany nonimmigrant transferee under a blanket L petition (LZ) approval," use of the pronoun "you," without specifying to which party or parties the instruction specifically pertains, is confusing.

In addition, on page 8, under "Requests for Interview," the instructions state that "[w]e may request that **you** appear at a USCIS office for an interview based on your petition." (emphasis added). Given that the possibility of an interview has, to our knowledge, not previously been contemplated in connection with the blanket L petition process, it is unclear whether the beneficiary, the petitioner, or both may be expected to attend an interview. Therefore, we recommend that the instructions use the nouns "petitioner," "beneficiary," "representative," or "interpreter" as appropriate, in lieu of the pronoun "you."

Validity of Signatures

On page 1, the proposed instructions state, "USCIS will consider a photocopied, faxed, or scanned copy of the original, handwritten signature valid for filing purposes. The photocopy, fax, or scan must be of the original document containing the handwritten, ink signature." We applaud USCIS for allowing submission of Form I-129S with a photocopied, faxed, or scanned copy of an original handwritten signature. Such a change is long-awaited, in line with modern practices, and will streamline filing procedures for attorneys, petitioners, beneficiaries, and other parties.

In-Person Interviews and Biometrics

The General Instructions and the Processing Information state that "USCIS may require that you appear for an interview or provide biometrics…." Under 8 CFR §103.2(b)(9), "USCIS may require any applicant, petitioner, sponsor, beneficiary, or individual filing a benefit request, or any group or class of such persons submitting requests, to appear for an interview and/or biometric collection." However, as explained above, it is unclear whether for purposes of the

interview, "you" refers to the petitioner or the beneficiary. The only guidance provided is that an interview might be necessary to "obtain additional information."

In addition, the General Instructions state that persons who appear for biometrics capture will also be required to sign an oath confirming, *inter alia*, that he or she provided or authorized all information contained in the petition, and that the information is complete, true, and correct. It is assumed, as a matter of logic, that the party ordered to appear for biometrics capture would be the beneficiary. However, Form I-129S gathers information about both a business entity and an individual applicant, and it is unclear how a beneficiary would be expected to have access to commercial information relating to the petitioner. It is also unclear how a beneficiary would be in a position to know whether the petitioner has made the determinations necessary to complete Part 6 of the form relating to compliance with EAR and ITAR obiligations.

In addition, we note that the possibility of an interview is the latest in a trend of USCIS shifting additional and unnecessary burdens on petitioners and beneficiaries of blanket L extensions. In 2016, USCIS began requiring applicants for an extension of L-1 status who initially entered the U.S. based on an approved blanket L petition to provide:

- Form I-129, Petition for a Nonimmigrant Worker;
- Form I-129S, Nonimmigrant Petition Based on Blanket L Petition (06/02/16 ed.); and
- A copy of their previously approved Form I-129S.

These requirements are duplicative and unnecessary for several reasons. First, under the current process, CBP is required to provide USCIS with the endorsed I-129S upon initial admission of the intracompany transferee. The fact that this may not be consistently happening should not shift additional burdens to employers. Second, the information elicited on the I-129S form is duplicative of the information contained in Form I-129 and the L Classification Supplement. The current proposed revisions to Form I-129S contemplate that USCIS intends to call in for biometrics and interview any individual or employer seeking a blanket L-1 extension or amendment which places further burdens on the L-1 process and is redundant and excessive. Should USCIS have specific concerns that would compel it to meet with the petitioner and/or beneficiary, it already has the authority to do so through the FDNS site visit process, which is funded by the $500 fraud prevention fee filed with the L-1 petition.

USCIS Resources to Conduct Interviews

Blanket L petitons are filed at USCIS Service Centers. These are regional, remote locations that are not accessible to the public. The instructions list locations where an individual my be instructed to appear for biometrics appointments if they are outside of the United States. The proposed instructions are silent, however, about where a petitioner or beneficiary may be requested to appear for an interview in connection with a blanket L petition.

Almost three decades ago, the legacy Immigration and Naturalization Service consolidated jurisdiction for adjudication of nonimmigrant worker petitions with the regional service centers to create a cadre of officers with subject-matter expertise and to enhance the consistency of adjudications. USCIS Field Offices do not adjudicate nonimmigrant petitions of any kind. Referral of petitioners or beneficiaries to such offices for an interview in connection with a blanket L application would mean either review by officers without any expertise relating to the benefit being sought or creating a need to retrain a completely new set of officers. In addition, requiring field office interviews for such petitions would add significant costs and admininstrative burdens to both USCIS and the U.S. businesses that utilize the efficiencies that the blanket L process was designed to create.

Certified Translations

The General Instructions on page 2 have been changed from "the certification should also include…" to "DHS recommends the certification contain…." We note, however, that a recommendation can be ignored with no detriment while ignoring a requirement would result in a potential request for evidence or denial of the benefit sought. If the requested information from the translator is in fact a requirement, it should be clearly stated as such in the instructions.

Use of Form I-129S in the Context of Canadian L-1 Blanket Filings before CBP

On March 26, 2018, USCIS and CBP announced an I-129 pilot program for Canadian L applicants at the Blaine, Washington port of entry. The pilot asks applicants seeking L-1 admission at the Blaine port of entry to first file a petition with USCIS. We are concerned that this change would undermine the speed and agility of Canadian blanket L entries, contrary to Congress's intent. We are also concerned that the proposed revisions to Form I-129S, specifically those requiring biometrics and a USCIS interview, may have been added in conjunction with plans for the Canadian blanket L pilot and its possible expansion. For these reasons, the proposed form revisions relating to biometrics and interviews should be suspended unless and until full notice and comment is provided to the public.

Comments on Proposed Form I-129S

Prior Periods of Stay in the United States

The proposed section 3 on page 2, part 2 asks "Was the beneficiary of this petition in the United States during the last seven years? Y/N." The instructions for this section provide that a person answering "yes" must include all periods of stay in the U.S. in a work authorized capacity. We suggest that this question be reworded to state: "Was the beneficiary of this petition in the United States in a work-authorized status in the past seven years?" This will clarify that a person in the U.S. in the past seven years in a status that did not provide work authorization may answer "no."

To the extent that the proposed question is intended to elicit whether the applicant was in the U.S. in any nonimmigrant status during the prior three years to determine whether the applicant physically spent one full year abroad during the qualifying period, the question should be rewritten to focus on that period only.

Disclosure of Social Security Number (SSN)

Form I-129S was initially created for beneficiaries who apply for an L-1 visa at a U.S. consulate under the blanket process.[2] While some beneficiaries may have worked in the U.S. previously and would possess an SSN, that is often not the case. Although Form I-129S currently requests the beneficiary's SSN, most blanket L-1 beneficiaries do not have one. Prior U.S. work history is already disclosed on the form, which should enable the government to glean whether or not the applicant already possesses an SSN and can generate further inquiry during the consular interview, when warranted. There is no value to making this change and it is confusing when most applicants who use this form do not possess an SSN.

Petitioner's or Authorized Signatory's Declaration and Certification

We are concerned with the addition of language that would authorize the release of "any information contained in this petition, including supporting documents, in my USCIS records, and in the petitioning organization's USCIS records, to USCIS or other entities and persons where necessary to determine eligibility for the immigration benefit sought or where authorized by law." Significant documentation is required to establish L-1 eligibility, and that which is related to specialized knowledge is often of a highly sensitive and proprietary nature. We are concerned that this could make it easier for the general public and for U.S. companies' competitors to access confidential and trade secret information and could jeopardize U.S. competitiveness, as well as compromise beneficiaries' personally identifiable information, through a Freedom of Information Act (FOIA) request or similar means. From a privacy perspective, it is unsettling that the proposed authorization extends to "other entities and persons" without specifically enumerating which entities or persons might have access to this information.

Conclusion

We appreciate the opportunity to comment on the proposed changes to Form I-129S and its instructions, and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[2] Canadian citizens, being visa exempt, use Form I-129S to apply for L-1 admission at the port of entry.