



# Questions and Answers

## USCIS Service Center Operations Directorate (SCOPS) and American Immigration Lawyers Association (AILA) Meeting

January 23, 2012

### I. AILA Introduction

On January 23, 2012, the USCIS Service Center Operations Directorate (SCOPS) hosted an engagement with American Immigration Lawyers Association (AILA) representatives. USCIS discussed issues related to operations and adjudications. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

### II. Questions and Answers

#### 1. I-140 Premium Processing

Does SCOPS have an estimate of when I-140 Premium Processing may be instituted for international manager and national interest waiver petitions?

**USCIS Response:** Not at this time. USCIS will update the webpage when premium processing is available.

#### 2. Evidence of Qualifying Experience

AILA members report receiving requests for evidence (RFE) and denials on I-140 petitions where the verification of required skills and experience letters are written by former supervisors of the beneficiary who are no longer employed by the former employer, if the petitioner does not also provide a letter from the former employer that confirms the supervisor previously worked there and was authorized to write the experience confirmation letter. The RFEs and denials (examples provided to SCOPS in December of 2011) state that: "Letters from former colleagues, co-workers or immediate supervisors without the explicit authorization, endorsement and substantial from current or former employers are not acceptable as evidence of the beneficiary's qualifying experience." This radically departs from decades of prior practice and is not required by the regulations. 8 CFR 204.5(g) provides in relevant part: "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. **If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.**" Not only does the regulation not contain the assertion made in the RFEs and the denials but it mandates that if the listed evidence is unavailable other evidence "will" be considered. Do these RFEs and the reported denial reflect the current position of SCOPS and, if so, what is the legal basis for that position?

**USCIS Response:** We appreciate the cases that you brought to our attention and are working with our service centers to ensure that language utilized in notices issued by USCIS (including Requests for Evidence and Notices of Decision) regarding this issue are as clear as possible. USCIS's interpretation of 8 CFR 204.5(g)(1) has not changed from prior practice. 8 CFR 204.5(g)(1) requires that:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from [the beneficiary's] current or former employer or trainer(s) and shall include the name, address, and title of the writer and a specific description of the duties performed by the alien or of the training received.

Pursuant to 8 CFR 204.5(g)(1), a letter from the beneficiary's current or former employer is considered required (primary) evidence for the purposes of establishing qualifying experience. In cases where such evidence is unavailable, other documentation (secondary evidence) will be considered. Before USCIS may consider secondary evidence, however, 8 CFR 103.2(b)(2) requires the petitioner demonstrate that the primary evidence does not exist or cannot be obtained:

(i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. *If a required document, ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.*

For example, secondary evidence may be appropriate in situations where the petitioner is unable to obtain the primary evidence because the beneficiary's former employer no longer exists or is temporarily closed.

Whenever possible, the primary evidence required in 8 CFR 204.5(g)(1) should be submitted. Secondary evidence, such as letters written by former supervisors of the beneficiary who are no longer employed by the former employer, will be considered only if the petitioner can establish that a letter directly from the former employer is not available. The burden of proof in establishing that primary evidence is unavailable rests with the petitioner.

### **3. Postal Delays**

AILA is seeking clarification on service policy in relation to acceptance of petitions addressed to the physical address of a service center but delivered instead to the post office. 8 CFR 103.2(a)(7) states in pertinent part: "An application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted..."

In reviewing AILA liaison minutes, it appears that USCIS has historically stated that a case is not deemed received until it is physically picked up by the service center and taken to the service center's facility; however, this policy is not announced anywhere on the USCIS website as far as we were able to determine. Therefore, only AILA members who happened to recollect these old minutes would be aware of the policy and any non-AILA filer or an AILA filer who did not recollect the minutes would not be aware. The VSC is using that policy to reject H-1B petitions sent via USPS Express Mail, received at the U.S. Post Office on 11/22/2011 (most received around mid-day), addressed not to the P.O. box but to the various physical addresses of the Vermont Service Center (VSC) (Lower Weldon, Houghton and Lemnah

Drive) and signed for on 11/22/2011 according to the post office's records by Dan Renaud. Even if an individual (attorney or layperson) read the regulation above, the individual would not necessarily come to the conclusion that a case had not been actually received, if the individual sent the packet to the physical address and received back confirmation of delivery to that physical address signed for by the individual or entity to whom the packet is addressed. This is especially true since most people (AILA members included) do not know that even packets addressed to the physical address are not actually delivered to that address by USPS but held at the post office. The problem is compounded if daily mail delivery to the post office occurs mid-day (as would appear to be the case) but the service center picks up only once a day before that day's deliveries have been received by the post office.

AILA is therefore asking SCOPS to consider doing the following: Accept all H-1B filings that were signed for by the Service on 11/22/2011. Adopt a policy of mail pick-up that includes an end of day pick up rather than or in addition to a morning pick up. Change the existing policy to accept all filings signed for by the service as filed on the date they were signed for if addressed to the proper filing location indicated on the USCIS website and if actually timely delivered to that filing location. If USCIS is unwilling to change the policy, clearly post an announcement on the website that mailings sent via USPS – even if sent to the physical address of a particular service center – are actually being sent to the post office and not the address on the mailing and will not be considered received until they are picked up by the service center from the post office which may not occur on the actual date on which the mailing is delivered by USPS.

**USCIS Response:** We will review this issue and post guidance as necessary.