

Practice Pointer: Things I Wish I Had Known on forms I-129, I-140, I-824, ETA-9141, ETA-9089

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Practitioners who use the forms well can develop strong employment-based strategies that meet client needs. Both young and seasoned immigration attorneys who consistently apply best practices in using these forms will position themselves to obtain approvals (while hopefully avoiding the ever-increasing requests for additional evidence). In focusing on these five forms our hope is that some tactics that have worked well with our clients previously may prove beneficial to others too – ours is not an exhaustive list. We find great value in reading the AILA Practice Pointers and Advisories to keep up with current processing trends, and recommend them to all as important tools.

I-129 Petition for a Nonimmigrant Worker

- When planning the petition filing deadlines, remember the timing rules, including the weekend to Monday shift.

Remember that counting days carefully and calendaring deadlines will ensure timely delivery of responses to Requests for Evidence, Notices of Intent to Deny, Motions to Reopen, and Appeal requests. Under 8 CFR §103.8(b) -- Effect of Service by Mail, when USCIS executes service of a notice or decision by mail, 3 calendar days are added and that service by mail is complete upon mailing. This means that practitioners can start counting from the U.S. Postal Service's postmark date, which may permit adding tacking on a few more days in certain instances. Do save the USCIS Mailing Envelopes to show the postmark dates, however. Remember that when counting days, if the last day of the time period in question falls on a legal holiday or a weekend, then the period will run until the end of the *next day* that is not a Saturday, Sunday, or a legal holiday, as reflected within the definitions at 8 CFR §1.2.

- Remember when to use the new employment box vs. change in employer. From guidance provided from US Citizenship and Immigration Services' Vermont Service Center (*AILA Doc. No. 08121861*), the following practices should be considered:
 - A. When changing employers within the same classification, choose box "e" (change of employer).
 - B. When changing to a different classification, such as TN to H-1B, and changing employers, choose box "a" (new employment).
 - C. When changing to a different classification, such as TN to H-1B, and maintaining the same employer, choose box "a" (new employment).
 - D. As you will note, Option "a" (new employment) is intended for use whenever the petitioner is requesting a new classification.

- E. If a different employer is filing for an H-1B extension, and "a" (new employment) is marked instead of "e" (change of employer), this will not affect the acceptability and adjudication of the petition. However, the most appropriate response, and the one that will minimize any potential cap-related issues, is to check box "e" (change of employer).
- Multiple visa options are possible, so know I-129 supplements and when filing one petition for multiple beneficiaries can work (most often in the H-2B or H-3 context).
 - Account for international travel plans to complete the form properly, being sure to file in duplicate to account for PIMS ("Petitioner Information Management Service"), using a cover sheet to distinguish it from the main petition filing, referencing the practice pointer at http://www.aila.org/infonet/dos-practice-pointer-pims?utm_source=aila.org&utm_medium (AILA Doc. No. 11061060).
 - Plan for the export control attestations for H, L and O petitions, speaking with clients in advance on their current processes and in house planning for each position, using AILA's Export Control Resources at <http://www.aila.org/content/default.aspx?docid=34520> (AILA Doc. No. 11021767) as a reference.
 - *Nunc Pro Tunc* extensions of status may be possible, requesting the discretion of USCIS if:
 - A. Delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;
 - B. Alien has not otherwise violated NIV status;
 - C. Alien remains bona fide nonimmigrant; and
 - D. Alien is not subject of deportation or removal proceedings.
 - For Driver's Licenses, the Last Action Rule and SAVE databases may not be in synch.

I-140 Immigrant Petition

Advance preparation and planning future steps will avoid potential complications, knowing some of the implications of different filing strategies. Ideally there will be sufficient time at the beginning of the case to plan with the end result in mind, factoring in evidence that will be needed subsequently before developing the filing strategy. For example, before running PERM recruitment and requesting prevailing wages, use pre-approval documents to have the employee and petitioning employer sign off on the minimum requirements, then act to ensure all prior work experience and duties are documented.

- If the case is based on PERM Labor Certification, do not wait until the I-140 petition stage to request all Employment Verification Letters from the employee as well if experience will be required.
- Take time to check all dates on Employment Verification Letters against the calendar and information provided previously to ensure the information is correct.

- Be sure to evaluate the Petitioner's "ability to pay" prior to initiating PERM labor certification or prior to filing the I-140 if PERM Labor Certification is not required.
- In the context of a National Interest Waiver, Outstanding Professor/Researcher, or Extraordinary Ability petitions, USCIS will put weight on objective letters that come from individuals who have not worked, studied, or collaborated previously with the beneficiary.

I-824 Application for Action on an Approved Application or Petition

In the employment-based context, form I-824 is most often helpful for seeking a duplicate I-797 Approval Notice to replace a lost original, to request that USCIS to send approved I-140 to the National Visa Center ("NVC") to convert to consular processing of Immigrant Visa abroad, or to request that USCIS notify the U.S. Consulate through the NVC that Applicant's I-485 has been approved to initiate IV process for derivative family member(s).

When using the I-824 in the following-to-join context, it is possible to file the I-824 concurrently with the I-485 application. In doing so, plan on the following:

- Use a bright cover sheet to flag the I-824 for the USCIS Mailroom.
- Explain to the client why the I-824 Receipt Notice does not show the derivative family member's name.
- Plan to follow up periodically with USCIS if there is delay in I-824 adjudication after approval of the I-485 application.
- Work with the derivative family member(s) to prepare for the Consular Processing stage at the NVC (but be wary of expiring Police Certificates).

ETA-9141 Application for Prevailing Wage Determination

Know the key timing events and the US Department of Labor ("DOL") expectations for Prevailing Wage Determinations ("PWD"), setting expectations with the client and calendaring the job market test accordingly. Be sure to take the time to get written approval from the petitioning employer (and beneficiary) on the details in writing prior to filing.

- ETA 9141 PWDs will be issued for a validity period between 90 days and 1 year, depending on when they are filed, with the DOL starting to adjust OES wages on or about July 1 each year.
- In PERM Labor Certification cases, employers must file the ETA 9089 or begin the recruitment period within the validity period of the PWD, as outlined at 20 CFR §656.40(c).
- For Schedule A occupations (professional nurses and physical therapists), the ETA 9141 must be valid at the time of filing the I-140 with USCIS. See "Guidance for Schedule A Blanket Labor Certifications, effective February 14, 2006." (See AILA Doc. No. 06021661)

Take the time to carefully consider the impact of the minimum job requirements and communicate clearly with all parties on the potential impact on future filings. Avoid use of job duties that appear to combine different SOC occupations. Remember that the US Department of Labor wants to see information on whether travel is required for the position, accounting for how to indicate work at unanticipated locations throughout the United States.

- Be wary of any combination of teaching and other job duties in Special Handling context for university teachers.
- Avoid use of managerial/supervisory job duties if the position does not supervise the work of other full-time employees.
- Using alternative wage surveys is possible in certain circumstances, but the US Department of Labor is restrictive in accepting such surveys, which often come into play in physician cases.

ETA-9089 Application for Employment Certification

Knowing the history of the previous forms used for Labor Certification helps make the current version less confusing, as the current version combines the job portion with the employee's qualification sections. For this reason, taking the time to know the internal consistencies and audit triggers on the current form is essential, leaving sufficient time to check each one. Printing the form and check off each answer is often helpful, but knowing how to print a draft of the ETA 9089 from PDF format can be tricky. Instead of searching your incomplete applications, use the regular search screen, then enter the "T" number -- you will be given the choice to view or print (though "view" will also allow you to print).

As you plan with the client and set expectations, be sure to account for recruiting timing events, including the PWD expiration, and the 30-day quiet period. In completing the form, remember the following:

- While the old ETA 750-B Statement of Qualifications of Alien provided "Special Qualifications and Skills" section, the current ETA 9089 form does not have a specific box, so use box H.14 to catch all special requirements.
- Any special skills/requirements listed in H.14. must be demonstrated in the Alien's Work Experience part of the form at Section K. (e.g., insert "Utilized valid Texas Occupational Therapist license to perform job duties" at end of job duties in Item 9).
- If none of the listed jobs involve the special requirement, consider creating a new Job entry, leaving Items 1-8 blank, and list all of alien's qualifications under Item 9.

Conclusion

In the current climate for business immigration practitioners keeping track of the details on how to properly use each form is essential. We trust that some of these ideas will prove helpful and express our appreciation to the many individuals who have shared some of their own best practices and thoughts on these forms. Remember the value in regularly reading the AILA Practice Pointers and Advisories as well.