

April 21, 2017

Texas New Mexico Oklahoma AILA Chapter  
Spring Conference 2017 - *South Padre Island,*  
*Texas*

**Things I Wish I Had Known:**

**I-129, I-140, I-824,  
ETA-9141, ETA-9089**

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# Presentation Overview/Outline

- Questions welcomed, but time reserved at the end
- **Business focus** - similar panel for Family/Deportation track
- Lessons learned & practice tips
- Consulting US Citizenship & Immigration Services (**“USCIS”**)  
form instructions direct filing addresses can be helpful

# Counting the Days for RFE/NOID/MTR/Appeal Deadlines

## 8 CFR §103.8(b) - Effect of Service by Mail

- When USCIS executes service of a notice or decision by mail, **3 calendar days** shall be added.
- **Service by mail is complete upon mailing:**
  - Start counting from the U.S. Postal Service's postmark date (you might be able to tack on a few more days)
  - Save USCIS Mailing Envelopes!

# Counting the Days for RFE/NOID/MTR/Appeal Deadlines

## 8 CFR §1.2 - Definitions

- “Day” = when counting the period of time for taking any action, “day” shall include Saturdays, Sundays and legal holidays, except:
  - When the last day of the time period falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday or a legal holiday.

# I-129, Petition for a Nonimmigrant Worker

- Know the filing **deadlines and rules**, including the weekend to Monday shift.
- Know when filing one petition for multiple beneficiaries can work.
- Consideration when to use the **new employment box vs. change in employer**.
- Multiple visa options are possible, so know **I-129** supplements too.
- Account for **international travel plans** to complete the form properly.
- Plan for export control attestations for **H, L and O petitions** - see AILA's Export Control Resources at:

<http://www.aila.org/content/default.aspx?docid=34520>

*(AILA InfoNet Doc. No. 11021767)*

## *Nunc Pro Tunc* Extensions of Status

### 8 CFR §214(c)(4) - Timely filing and maintenance of status

- Failure to file for EOS prior to expiration of NIV status may be excused in the discretion of USCIS, with any extension granted from the date the previously authorized stay expired, if:
  - Delay was due to **extraordinary circumstances** beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;
  - Alien has **not** otherwise **violated NIV status**;
  - Alien remains **bona fide nonimmigrant**; and
  - Alien is **not** subject of **deportation** or **removal proceedings**.

## “Last Action Rule” not in sync with SAVE

- Client in Nonimmigrant Visa (“NIV”) status may depart the United States while an Extension of Status (“EOS”) petition is pending and s/he may be able to resume the pending or approved extension.
- But the client will have a very difficult time trying to renew a Texas Driver's License tied to the I-94 record associated with the last admission.
- **SAVE** System will not pick up on the prior I-94 record that was extended and relied upon per the Last Action Rule.

## I-140, Immigrant Petition for Alien Worker

- **Basic filing options** - know when self-petitioning may be optimal.
- Work backwards when PERM Labor Certification is part of filing strategy to account for **Immigrant visa backlogs**.
  - **Forecast time estimates** for each step and account for **time left in NIV status**; explore other NIV options
- One can use an **I-140 petition** to recapture a priority date.
  - Insert copy of prior **I-140 Approval Notice** and annotate it in red: **“For Retention (or Recapture) of Priority Date Purposes Only”** (to avoid mix-up re: basis for I-485)



## In Preparation for the I-140 Stage

- If the case is based on PERM Labor Certification, do not wait until the I-140 stage to request each Employment Verification Letter (“EVL”) from the employee - Perhaps the employee may not be able to obtain the EVLs after all!
  - Obtain EVLs before filing the ETA 9141 PWD Request with DOL.
  - Check EVL dates **against the calendar and information provided previously.**
- 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.

- **Main reasons for using Form I-824 in the **Employment-Based** context:**
  - To get a **duplicate I-797 Approval Notice** to replace a lost original
  - To request USCIS to send approved I-140 to the NVC to **convert to consular processing** of Immigrant Visa abroad
    - e.g., Foreign national no longer eligible to adjust status on Form I-485
  - To request USCIS to notify U.S. Consulate through NVC that Applicant's I-485 has been **approved to initiate IV process for Derivative(s)**

## Use of the I-824 for Derivatives Following-To-Join

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

## ETA-9141, Application for Prevailing Wage Determination Form

- Know key timing events and the US Department of Labor (“DOL”) expectations for Prevailing Wage Determinations (“PWD”).
- Take time to get **written approval** from the petitioning employer (and beneficiary) on the details in writing prior to filing.
- Using **alternative wage surveys** is possible in certain circumstances.
- Combination of teaching duties in **Special Handling** situation.

## Timely Filing of Applications/Petitions that require the ETA-9141 PWD

- ETA 9141 PWDs will be issued for a validity period **between 90 days and 1 year**, depending on when they are filed.
- DOL adjusts 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. **See 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.”** (AILA InfoNet Doc. No. 06021661)

## Time-Saving Tips while ETA 9141 PWD Request is Pending

- If the current wage being offered to the alien already exceeds the **Level 4 wage** and there is no issue re: the suggested SOC code, can initiate recruitment efforts while PWD is pending.
  - PWD must be valid at the time ETA 9089 is filed with DOL
- In **Schedule A** cases (RNs & PTs), one can initiate the **30-day Notice of Filing period** while PWD is pending:
  - If wage offered to alien exceeds Level 4
  - If the position is clearly entry-level & the wage offer exceeds Level 1

## Obtaining the Right SOC Code & Wage Level on the ETA 9141

- **Avoid** use of job duties that appear to combine different **SOC occupations**
- **Avoid** use of **managerial/supervisory job duties** if the position does not supervise the work of other employees
- Remember that the DOL wants to see information on **whether travel is required for the position**

## “Various Unanticipated Locations Throughout US” on the ETA 9141

- Make sure Travel Requirement is marked “Yes” in Item **E.a.6.**
- Indicate percentage of time for Travel Requirement in Item **E.a.6a.**
- Insert “**Various Unanticipated Locations throughout US**” in Place of Employment Information at Item E.c.1. for the Worksite Address
- Insert City, County, State & Postal Code for Employer’s Headquarter Address (**Items E.c.3., E.c.4., E.c.5., and E.c.6.**)



## Listing Special Requirements on the ETA 9141

- List all special requirements in Section **E.b.5.** and generate an Addendum page if needed.
- Can use Section E.b.5. to create Addendum for long text re: **minimum requirements/alternate combinations of education and experience.**
- **Examples of special requirements include:**
  - Licenses, certificates, certifications
  - Any special work schedules (weekends, evening/night shifts, overtime, etc.)
  - Foreign language requirements

## ETA-9089, Application for Employment Certification

- Knowing **history of forms** used previously for Labor Certification helps make the current version less confusing.
- Know **internal consistencies** and **audit triggers**, checking each one.
- Taking time to print the form and check off each answer is helpful.
  - 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).
- Account for recruiting timing events, including the **PWD expiration**.

## Listing Special Requirements on the ETA 9089

- Use box **H.14.** to catch any and all **special requirements**:
  - “Employer will accept any suitable combination of education, training, or experience.”
  - Travel Requirements
  - Licenses, certificates, certifications
  - Any special work schedules (weekends, evening/night shifts, overtime, etc.)
  - Foreign language requirements
  - When relying on Bachelor’s 5+ years' experience requirement for EB2, insert: **“Post-Bachelor’s experience required in [H.6-A. and/or H.8-C.] must be progressively responsible.”**

## “Various Unanticipated Locations Throughout US” on the ETA 9089

- Insert “**Various Unanticipated Locations throughout US**” in the Primary Worksite address 1 box (**Item H.1.**)
- Insert City, State & Postal Code for Employer’s Headquarter Address (**Item H.2.**)

## Demonstrating Foreign National Qualifications in Section K of ETA 9089

- Old ETA 750-B Statement of Qualifications of Alien provided “**Special Qualifications and Skills**” section.
- Current ETA Form 9089 **does not have a specific box.**
- **PERM denials** started in 2012 - DOL issued FAQ on July 28, 2014.
- 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, create a new Job entry, **leave Items 1-8 blank**, and list all of alien’s qualifications under Item 9.

# Questions/Comments?



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