

## Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services' Form I-129 Notification Procedures Recommendation Number 62

March 31, 2022

Nonimmigrant beneficiaries in most employment categories seeking to change or extend status in the United States do so through submissions to U.S. Citizenship and Immigration Services (USCIS) from their employers. Businesses file Form I-129, *Petition for a Nonimmigrant Worker*, with USCIS to extend, amend or change the status of the nonimmigrant beneficiary or beneficiaries while petitioning for the employment.

USCIS does not provide Form I-129 beneficiaries with notice of USCIS actions taken, such as receipt notices, approval letters, or Form I-94, *Arrival/Departure Record*. USCIS provides these documents only to the beneficiaries' employers or the employers' legal representatives, despite the fact that the Immigration and Nationality Act requires the beneficiary be issued and carry the Form I-94 at all times.

This means that beneficiaries must rely on employers for all information regarding the petition. For beneficiaries who are extending, amending, or changing status, the lack of direct notification may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status.

We are recommending that USCIS directly notify beneficiaries of Form I-129 of actions taken in the petition. The formal recommendation provides an overview of the Form I-129 petition process, outlines key issues of concern, and proposes measures to address those concerns.

This is the first formal recommendation this office has issued in several years. We believe this is a step USCIS should take to simplify an increasingly complex set of obligations to which all participants in U.S. immigration benefits are subject.

We look forward to the agency's response to this recommendation. We are grateful for its commitment to continuing to work with us to improve the administration of our nation's immigration benefits system.

Sincerely,  
Phyllis A. Coven  
CIS Ombudsman

[www.dhs.gov/cisombudsman](http://www.dhs.gov/cisombudsman)

### RECOMMENDATIONS

The CIS Ombudsman recommends that USCIS:

- Mail the receipt notice and approval notices with the Form I-94, *Arrival/Departure Record*, attached to the beneficiary addresses collected on Forms I-129.
- Allow the beneficiary to track case status online and eventually provide receipt and approval notices (with Form I-94) directly to the beneficiary's online account.
- Develop a technological solution allowing beneficiaries to access the receipt and approval notices online. Alternatively, for approvals, USCIS could collaborate with CBP to provide the I-94 online via CBP's I-94 website.

### REASONS FOR THE RECOMMENDATIONS

- USCIS does not provide Form I-129 beneficiaries with notice of USCIS actions taken, such as receipt notices, approval letters, or Form I-94, *Arrival/Departure Record*. USCIS provides these documents only to the beneficiaries' employers or the employers' legal representatives, despite the fact that the Immigration and Nationality Act requires the beneficiary be issued and carry the Form I-94 at all times.
- Beneficiaries must rely on employers for all information regarding the petition. For beneficiaries who are extending, amending, or changing status, the lack of direct notification may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status.
- Our desire in issuing this recommendation is to shed light on this issue and lead to an improvement in this adjudicative process. With proper notice of actions affecting their own status, employees gain required information and can make informed decisions. Employers benefit from a compliant and informed workforce. The immigration benefits system maintains its integrity and efficiency.

## Improving U.S. Citizenship and Immigration Services' Form I-129 Notification Procedures

March 31, 2022

*The Citizenship and Immigration Services Ombudsman (CIS Ombudsman), established by the Homeland Security Act of 2002, identifies systemic problems that individuals and employers face when seeking services from U.S. Citizenship and Immigration Services (USCIS) and makes recommendations based on: individual complaints and requests for help; information and inquiries we receive from non-governmental organizations and federal officials, including USCIS; and our interactions and meetings with applicants, petitioners, employers, non-governmental organizations including community and faith-based organizations, and immigration professionals across the country.*

### BACKGROUND

USCIS does not provide notice to sponsored beneficiaries of actions taken regarding their status. Federal law requires nonimmigrants to be issued proof of status<sup>1</sup> and subjects them to potential immigration consequences and criminal penalties for failing to keep status documentation with them at all times.<sup>2</sup> Current U.S. Citizenship and Immigration Services (USCIS) procedures do not, however, provide beneficiaries sponsored by petitioners and identified on the Form I-129, *Petition for a Nonimmigrant Worker*, with notice of actions taken.<sup>3</sup> Rather, USCIS sends all notices relevant to the petition only to the petitioning employer or agent and, if applicable, to its legal representative. Beneficiaries must rely on employers for all information regarding the petition, including their own status documentation, when applicable. Noncitizen workers and their advocates have expressed concern that the failure to directly notify the beneficiaries of actions taken on the petition may leave

<sup>1</sup> INA § 264(d); 8 U.S.C. § 1304(d); *see also* Rajah v. Mukasey, 544 F.3d 427, 440 ftnt. 11 (2d Cir. 2008) (“The I-94 serves as proof that the alien has validly entered the country...[and] has complied with certain registration requirements, *see* 8 C.F.R. § 264.1(a) (noting that the I-94 is proof of registration), and has a right to remain for a set time period.”).

<sup>2</sup> INA § 264(e); 8 U.S.C. § 1304(e); *see also* 8 C.F.R. § 214.2(h)(18). *See also* Tsolmon v. United States, 841 F.3d 378, 380 (5th Cir. 2016) (“‘Aliens are...required to maintain and produce required documents regarding their status’ [citing Rajah v. Mukasey, 534 F.3d at 440] ...as Tsolmon is a Mongolian citizen lawfully in the United States on an H-1B temporary worker visa. But Tsolmon did not have a physical copy of his immigration papers, despite a law requiring registered aliens eighteen or over to carry identifying documents. 8 U.S.C. § 1304(e).”).

<sup>3</sup> On August 18, 2021, USCIS published several notices in the Federal Register requesting public comment on its plan to separate the Form I-129 into several individual forms to consolidate and simplify information collection requirements. “Agency Information Collection Activities; Proposals, Submissions, and Approvals,” 86 Fed. Reg. 46260-46265 (Aug. 18, 2021). On February 15, 2022, USCIS published notices providing an additional 30 days for comments on these forms, as required under the Paperwork Reduction Act of 1995. “Agency Information Collection Activities; New Collection: Petition for Nonimmigrant Worker: E and TN Classifications; Petition for Nonimmigrant Worker: L Classifications; Petition for Nonimmigrant Worker: H-3, P, Q or R Classifications; and Petition for Nonimmigrant Worker: O Classifications” 87 Fed. Reg. 8599 (Feb. 15, 2022); “Agency Information Collection Activities; New Collection: Petition for Nonimmigrant Worker: H-2A Classification and Petition for Nonimmigrant Worker: H-2B Classification,” 87 Fed. Reg. 8601 (Feb. 15, 2022). As these proposed revisions have not gone into effect at the time of publishing this recommendation, we continue to refer to the Form I-129 as one form. USCIS’ proposed form revisions do not alter its current notification procedures. If USCIS moves forward with implementing the proposed revisions, it will still need to address the challenges discussed within this recommendation.



Office of the Citizenship and  
Immigration Services Ombudsman

Working to improve the immigration benefits process



them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status.

As directed by President Biden in Executive Order 14012 (*Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*), USCIS must review existing regulations, orders, guidance documents, policies, and similar agency actions to identify barriers and sources of fear that prevent immigrants from accessing the legal immigration system as well as government services available to them, and to make recommendations on how to remove these barriers, consistent with applicable law.<sup>4</sup> Lack of direct notice to beneficiaries of actions on I-129 petitions represents such a barrier.

To address this issue, USCIS needs to provide beneficiaries with notification in connection with I-129 petitions filed on their behalf when the requested action impacts their immigration status.<sup>5</sup> The Citizenship and Immigration Services Ombudsman (CIS Ombudsman) recommends the following:

1. Mail the receipt notice and approval notices with the Form I-94, *Arrival/Departure Record*, attached to the beneficiary addresses collected on Forms I-129. This would enable beneficiaries to access documentation demonstrating being in status/in a period of authorized stay and to check the status of the petition via online tools or by communicating with the USCIS Contact Center.<sup>6</sup>
2. Until the Form I-129 becomes available for online filing and more extensive electronic processing/adjudication, USCIS could leverage current online features to overcome problems with inaccurate or obsolete beneficiary mailing addresses. USCIS could allow the beneficiary to track case status online and eventually provide receipt and approval notices (with Form I-94) directly to the beneficiary's online account.<sup>7</sup>
3. Another option is for USCIS to develop a technological solution, similar to U.S. Customs and Border Protection's (CBP) Form I-94 online system, allowing beneficiaries to access the receipt

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<sup>4</sup> Executive Order 14012, "*Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*," 86 Fed. Reg. 8277 (Feb. 2, 2021).

<sup>5</sup> Petitions that impact status would include petitioners who select Box b, c, d, e, or f, on Part 2, Question 4, Page 2 of the current Form I-129. The recommendation does not include petitions that request consular processing because employers must provide these beneficiaries with the approval notice to facilitate the visa application process, and beneficiaries are subsequently issued a Form I-94 after their admission to the United States. In addition, petitions that impact status involve beneficiaries that are already in the United States, which requires the petitioner to provide a residential address for the beneficiary on the Form I-129.

<sup>6</sup> The CIS Ombudsman only recommends that beneficiaries be given copies of receipt and approval notices. The CIS Ombudsman is not recommending the provision of requests for evidence, denial notices, or any other such correspondence that might disclose confidential or private petitioner/employer information. To that end, the beneficiary would be able to use online tools, the USCIS Case Status Online page, and the USCIS Contact Center to ascertain the status of the petition (i.e., pending, approved, or denied) but not to provide evidence, access petition information, or otherwise advocate for approval of the petition.

<sup>7</sup> USCIS Web page, "Benefits of a USCIS Online Account;" <https://www.uscis.gov/file-online/benefits-of-a-uscis-online-account> (accessed Mar. 23, 2022).

and approval notices online. Alternatively, for approvals, USCIS could collaborate with CBP to provide the I-94 online via CBP's I-94 website.<sup>8</sup>

## REGULATORY FRAMEWORK – ADMINISTRATIVE EFFICIENCY AT THE EXPENSE OF EQUITY

*Regulatory and processing changes to the filing of requests for extensions and changes of status led to a lack of documentation for beneficiaries demonstrating their status.* Under current regulations, the employer controls the filing of the Form I-129. USCIS often makes two separate determinations when adjudicating this petition. The initial determination, made on all petitions, involves the petitioner and beneficiary meeting the eligibility requirements for the requested nonimmigrant classification (eligibility request). The second determination, if requested by the petitioner, includes the beneficiary's extension of stay or change of status request (status request). Despite the fact that the latter directly concerns the beneficiary's legal status, USCIS sends or provides written notices of action and adverse decisions only to the petitioner.<sup>9</sup>

Prior to 1991, these separate requests were not included on the same petition, and nonimmigrants were responsible for filing their own status request.<sup>10</sup> Under this process, nonimmigrants received notification.<sup>11</sup> In response to additional workloads generated by the Immigration Act of 1990, USCIS' predecessor agency, the Immigration and Naturalization Service (INS), created the Form I-129 to consolidate the eligibility and status requests into one form.<sup>12</sup> It later revised the corresponding regulations in an effort to streamline the process and deal directly with the employer in such matters.<sup>13</sup> Specifically, INS viewed employees as an "intermediary" in the process and eliminated direct notification for matters involving their immigration status.<sup>14</sup>

<sup>8</sup> See CBP Web page, "I-94 Website," <https://i94.cbp.dhs.gov/I94/#/home> (accessed Mar. 23, 2022).

<sup>9</sup> USCIS uses numerous types of Form I-797, *Notice of Action*, to communicate with the petitioner or convey an immigration benefit. See USCIS Web page, "Form I-797: Types and Function" (Jan. 12, 2021); <https://www.uscis.gov/forms/filing-guidance/form-i-797-types-and-functions> (accessed Mar. 23, 2022).

<sup>10</sup> In 1983, after nearly a decade of having these separate requests combined, the Immigration and Naturalization Service (INS) published a final rule that required all H and L nonimmigrants to file separate extension of stay requests on the Form I-539, *Application to Extend/Change Nonimmigrant Status*. INS subsequently reconciled its change of status filing procedures. Then, in 1990, INS further amended its filing procedures for nonimmigrants to reduce workloads and employer costs by requiring only the filing of an application of extension of stay by the beneficiary, "accompanied by a letter (or labor certification determination in H-2 cases) from the employer restating the terms and conditions of employment as specified in the original petition." Under these modifications, approval of the beneficiary's application for extension of stay would automatically extend the visa petition without the filing of a new petition. See "Powers and Duties of Service Officers; Availability of Records; Nonimmigrant Classes; Temporary Alien Employees," 48 Fed. Reg. 41142 (Sep. 14, 1983); "Change in Nonimmigrant Classification," 50 Fed. Reg. 25696 (Jun. 21, 1985); and "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 55 Fed. Reg. 2606 (Jan. 26, 1990).

<sup>11</sup> "A new approval notice shall be issued to the petitioner at the same time that the beneficiary is notified that his or her extension of stay application has been approved." 8 C.F.R. § 214.2(h)(13)(1991). See also 8 C.F.R. § 248.3(d) (1993).

<sup>12</sup> "Information Collections Under Review," 56 Fed. Reg. 50349 (Oct. 4, 1991).

<sup>13</sup> "Changes in Processing Procedures for Certain Applications and Petitions for Immigration Benefits," 59 Fed. Reg. 1455 (Jan. 11, 1994).

<sup>14</sup> "Information Collections Under Review," 56 Fed. Reg. at 50350.

*A lack of documentation does not mean a lack of status.* Notwithstanding this lack of direct notification to the beneficiary, the regulations continue to recognize the material distinction between eligibility for the nonimmigrant classification and the beneficiary's eligibility for the extension of stay or change of status request.<sup>15</sup> USCIS' Adjudicator's Field Manual (AFM), the most recent compendium of policy in this area, further acknowledges this fundamental difference:

The I-129 serves both as the employer's petition and the nonimmigrant's request for the new status...<sup>16</sup> Extensions involving H, L, O, P or Q aliens are, in reality, a two-step adjudication: consideration of the employer's request to extend the petition to classify the [noncitizen] as a nonimmigrant worker, and consideration of the alien's request for additional time as a nonimmigrant.<sup>17</sup>

*The agency combined two processes into one.* The agency's notification procedures fail to distinguish between the petitioner's eligibility determination and the beneficiary's status request. Once the petitioner files the Form I-129, USCIS sends a receipt notice to the employer and its attorney, if represented. Filing the petition enables certain beneficiaries to continue working beyond the expiration of their authorized period of stay<sup>18</sup> and/or begin working for a new employer prior to approval.<sup>19</sup> In these instances, access to the receipt notice essentially assures the beneficiary that they are not engaging in unauthorized employment. However, without direct notification from USCIS, the beneficiary must rely on their current or prospective employer to confirm that the petition was properly filed. The prospective employer may also face challenges in obtaining status documentation from the beneficiary's current employer, which may unnecessarily delay the filing of the petition and prevent the beneficiary/employer from utilizing portability provisions where applicable.<sup>20</sup>

If USCIS determines that the beneficiary is eligible for the status request, it will issue an original approval notice, with a tear-off Form I-94, to the employer or the legal representative.<sup>21</sup> The Form I-94 is used to document lawful status in the United States and the authorized length of stay. Although the Immigration and Nationality Act requires that the beneficiary be issued and carry the Form I-94 at all times<sup>22</sup> and certain regulations require employees to retain a copy of the approval notice,<sup>23</sup> USCIS does not provide this documentation directly to beneficiaries. There also is no corresponding mechanism or

<sup>15</sup> 8 C.F.R. §§ 214.2(h)(15)(i), (l)(15)(i), (o)(12)(i), and (p)(14)(i).

<sup>16</sup> AFM § 30.3(d)(1) pertaining to Change of Nonimmigrant Status Under Section 248. USCIS is in the process of retiring its AFM, and, in the interim, has moved remaining AFM content to its corresponding USCIS Policy Manual Part. The cited section does not conflict with any provision in the Policy Manual.

<sup>17</sup> AFM § 30.2(d)(3) pertaining to Extension of Stay for Nonimmigrants. The cited section does not conflict with any provision in the Policy Manual; rather, the Policy Manual discusses issuing split decisions in extension requests. See 2 USCIS Policy Manual, Pt. A, Ch. 4(C); <https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4> (accessed Mar. 23, 2022).

<sup>18</sup> 8 C.F.R. § 274a.12(b)(20).

<sup>19</sup> INA § 214(n); 8 U.S.C. § 1184(n); see also 8 C.F.R. §§ 214.2(h)(2)(i)(H).

<sup>20</sup> *Id.*

<sup>21</sup> 8 C.F.R. § 103.2(b)(19)(ii)(C).

<sup>22</sup> INA §§ 264(d)-(e); 8 U.S.C. §§ 1304(d)-(e).

<sup>23</sup> 8 C.F.R. § 214.2(h)(18).

regulatory guidance in place to ensure that employees actually receive this documentation from their employers.<sup>24</sup>

Alternatively, if USCIS approves the nonimmigrant visa classification request but finds that the beneficiary is ineligible for the extension of stay or change of status request, it will issue an approval notice without a Form I-94 to the petitioner and/or the petitioner's attorney, if represented.<sup>25</sup> An adverse decision involving a status request typically leaves the beneficiary without lawful immigration status and may ultimately affect their ability to remain in or return to the United States.<sup>26</sup> Despite these significant legal implications, the employee does not receive notice of the adverse decision from USCIS and depends on the employer for notification.

While combining the separate filings into one form created agency efficiency, it failed to address the inequity that resulted from eliminating direct notification to beneficiaries on matters concerning their legal status.<sup>27</sup> USCIS' regulations and policy continue to recognize a material distinction between the employer's request concerning the validity of the petition and the requested action pertaining to the employee's nonimmigrant status. While each party has a vested interest in the outcome of these distinct requests, only one party (the employer) receives notification. The streamlined process did not change the employee's obligation to maintain lawful status,<sup>28</sup> avoid unauthorized employment,<sup>29</sup> or carry proof of legal status.<sup>30</sup> However, eliminating direct communication with beneficiaries makes it much more difficult for noncitizen workers to stay informed of their legal status and comply with immigration laws.

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<sup>24</sup> Notably, nonimmigrants may file the Form I-102, *Application for Replacement/Initial Nonimmigrant Arrival-Departure Document*, if they were granted an extension of stay or change of status after they were initially admitted to the United States and need to replace their lost, stolen, or mutilated Form I-94. The current filing fee for the Form I-102 is \$445. See USCIS Web page, "I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document" (Feb. 7, 2022); <https://www.uscis.gov/i-102> (accessed Mar. 23, 2022).

<sup>25</sup> 8 C.F.R. § 103.2(b)(19). See also 2 USCIS Policy Manual, Pt. A, Ch. 4(C); <https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4> (accessed Aug. 10, 2021). In such situations, the beneficiary typically must visit a Department of State consular office to apply for the corresponding nonimmigrant visa before applying for admission into the United States and receiving a Form I-94.

<sup>26</sup> See INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B). See also INA § 237(a)(1)(C)(i); 8 U.S.C. § 1227(a)(1)(C)(i). The CIS Ombudsman also notes that USCIS typically includes the following language within its split decision notices, "The beneficiary's failure to maintain the beneficiary's nonimmigrant status may leave the beneficiary without lawful immigration status. The beneficiary may now be present in the United States in violation of the law. Failing to maintain valid nonimmigrant status or remaining in the United States beyond the expiration of nonimmigrant status may affect the beneficiary's ability to return to the United States in the future."

<sup>27</sup> Members of Congress have recently cited the need to provide status documentation directly to certain beneficiaries, recognizing that a lack of direct notification may leave beneficiaries unaware of their immigration status. See the Joint Explanatory Statement to Division F – Department of Homeland Security Appropriations Act, 2022, p. 77 (March 9, 2022) ("USCIS shall also establish a process whereby workers may confirm that they are the beneficiaries of H-2A petitions and can receive information about their own immigration status, including/their authorized period of stay and the status of any requested visa extensions"); <http://docs.house.gov/billsthisweek/20220307/BILLS-117RCP35-JES-DIVISION-F.pdf> (accessed Mar. 23, 2022)

<sup>28</sup> INA § 237(a)(1)(C)(i); 8 U.S.C. § 1227(a)(1)(C)(i).

<sup>29</sup> 8 C.F.R. § 214.1(e); See also INA §§ 245(c)(2), (c)(8); 8 U.S.C. §§ 1255(c)(2), (c)(8).

<sup>30</sup> INA § 264(e); 8 U.S.C. § 1304(e).

## USCIS' Current Reliance on Employers to Deliver Status Documentation Leaves Noncitizen Workers Susceptible to Abuse

*The lack of direct notification/documentation leaves workers vulnerable.* Since USCIS does not issue status documentation directly to noncitizen workers, beneficiaries must rely on their petitioning employers to provide them with notification. Without the necessary receipt, the beneficiary also cannot inquire about the status of the petition. And while employers are subject to a criminal provision that prohibits them from destroying, concealing, or confiscating workers' immigration documents,<sup>31</sup> USCIS does not impose any sanction on the employer for failing to provide the beneficiary with notices, including approval notices containing Forms I-94.<sup>32</sup> Without further protections and absent an obligation for the agency itself to provide the notice, the beneficiary is left vulnerable and at risk of exploitation.<sup>33</sup>

For example, the withholding of status documentation is one of the most common methods of coercion used by human traffickers to control their victims.<sup>34</sup> USCIS' current notification procedures—which result in the employer having sole control of the beneficiary's status documentation—may inadvertently enable unscrupulous employers to engage in this behavior.<sup>35</sup> Although this coercive tactic can be employed by any business, the proliferation of third-party arrangements and labor contractors in several nonimmigrant worker categories has resulted in additional vulnerabilities.<sup>36</sup> In these arrangements, employees are typically placed at third-party worksites and may be moved frequently to new work locations, which often requires the filing of a new petition for the beneficiary to maintain status.<sup>37</sup> The petitioner may also be a labor contractor.<sup>38</sup> A subset of these employers/contractors are in a position to misuse visa programs to exploit workers, falsifying documents and deceiving workers

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<sup>31</sup> 18 U.S.C. § 1592.

<sup>32</sup> It is noted that the Form I-797A states that the employer “*should*” provide the lower portion of the approval notice (I-94) to the employee; however, this language does not constitute a legal requirement. Notably, USCIS' M-274, *Handbook for Employers*, which contains guidance for completing Form I-9, *Employment Eligibility Verification*, states, “You *must* give your employee the Form I-94, which is evidence of their employment-authorized nonimmigrant status.” USCIS Web page, “6.7 Extensions of Stay or Other Nonimmigrant Categories” (Feb. 16, 2022); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/60-evidence-of-status-for-certain-categories/67-extensions-of-stay-for-other-nonimmigrant-categories> (accessed Mar. 23, 2022).

<sup>33</sup> See, e.g., *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 775 (E.D. Mich. 2021)(H-2A workers moved among employers without notice their statuses were being amended via the filing of Form I-129).

<sup>34</sup> See Feehs & Currier Wheeler, *2020 Federal Human Trafficking Report*, Human Trafficking Institute (Jun. 8, 2021); <https://traffickinginstitute.org/federal-human-trafficking-report/> (accessed Mar. 23, 2022).

<sup>35</sup> “NGOs continued to call for increased transparency and accountability for temporary worker programs and for agencies to develop a more accessible system to share visa applications and job-related information with workers in real time, including the names of employer petitioners.” Department of State, “2021 Trafficking in Persons Report,” p. 592 (Jun. 2021); [https://www.state.gov/wp-content/uploads/2021/07/TIP\\_Report\\_Final\\_20210701.pdf](https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf) (accessed Mar. 23, 2022).

<sup>36</sup> “[W]orkers who work for employers other than those who petitioned for them may fear deportation and be more likely to tolerate poor working conditions or abusive situations.” U.S. Government Accountability Office, “H-2A and H-2B Visa Program Increased Protections Needed for Foreign Workers,” GAO-15-154 (Mar. 2015), p. 31; <https://www.gao.gov/assets/670/669047.pdf> (accessed Mar. 23, 2022).

<sup>37</sup> For example, see *Matter of Simeio*, 26 I&N Dec. 542 (AAO 2015).

<sup>38</sup> An H-2A Labor Contractor (H-2ALC) is any person who meets the definition of employer under DOL's regulations under 20 C.F.R. § 655.103(b).

about the terms and conditions of proposed employment.<sup>39</sup> Under these circumstances, the resulting insecurity and uncertainty about immigration status is only exacerbated by the lack of direct notification from USCIS. Noncitizen workers are left to rely on notification from an employer that may seek to exploit them, creating a situation that is ripe for labor trafficking. In addition, because they lack the proper documentation, noncitizen workers may fear reporting program violations, thereby underutilizing them as an essential resource to combat fraud and abuse.<sup>40</sup>

*Other agencies involved in the process take a different approach.* Unlike USCIS, the Department of Labor (DOL) has issued regulations that penalize employers for failing to provide required documentation. Recognizing the importance of workers being aware of their rights, DOL regulations require that employers provide certain beneficiaries with documentation used to support their Form I-129 petitions.<sup>41</sup> Failure to provide this documentation can result in civil monetary penalties or temporary debarment.<sup>42</sup> While USCIS may not have the statutory authority to levy such penalties, DOL's approach underscores the need for USCIS to modify its current notification procedures to similarly recognize the importance of informing workers about their rights. The more informed a noncitizen worker is about their rights, which includes direct knowledge of their status, the less likely they are to become a victim of the coercive tactics used by labor traffickers, such as intimidation and retaliation. Until USCIS modifies its approach, noncitizen workers will continue to be susceptible to abuse and forced to rely on documentation from an employer whose motives may not align with the employer's desire to maintain their immigration status.

### **USCIS' Current Notification Procedures Create Unnecessary Barriers and Inhibit Efficiency in the Agency's Verification Programs**

*Status documentation is a necessity to the beneficiary.* As the Form I-94 is evidence of lawful status, it is used for a variety of purposes. Beneficiaries use the Form I-94 to complete Form I-9, *Employment Eligibility Verification*, and as evidence of their immigration status for certain benefits. Employees must present their employers with unexpired, original, acceptable documentation that shows their

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<sup>39</sup> In 2014, California amended a state law that regulates the services of foreign labor contractors to address concerns that these employers "...are often complicit with, or are directly involved in, the illegal trafficking of foreign workers." See Cal. Bus. & Prof. Code chap. 21.5 (2014), as amended by Senate Bill No. 477 (Sept. 28, 2014).

<sup>40</sup> As directed by Secretary Mayorkas, USCIS must develop agency plans to alleviate or mitigate the fear that victims of, and witnesses to, labor trafficking and exploitation may have regarding their cooperation with law enforcement in the investigation and prosecution of unscrupulous employers. See DHS Memorandum, "Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual" (Oct. 12, 2021); [https://www.dhs.gov/sites/default/files/publications/memo\\_from\\_secretary\\_mayorkas\\_on\\_worksite\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf) (accessed Jan. 12, 2022). Providing direct notice to beneficiaries of action on I-129 petitions can help mitigate the fear that victims of labor trafficking and exploitation may have regarding their cooperation with law enforcement.

<sup>41</sup> "The Department agrees that it is important that H-1B nonimmigrants be aware of their rights. For this reason, Sec. 655.734(a)(3) requires that all H-1B nonimmigrants be provided a copy of the LCA which supports their petition." "Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States," 65 Fed. Reg. 80110, 80170 (Dec. 20, 2000). See also 20 C.F.R. §§ 655.122(q) (requirement to provide H-2A workers a copy of the work contract in a language understood by the workers) and 29 C.F.R. § 503.16(l) (requirement to provide H-2B workers with a copy of the job order).

<sup>42</sup> See 20 C.F.R. §§ 655.810 and 655.73, 29 C.F.R. § 502.19.





employment eligibility when completing Form I-9.<sup>43</sup> For employers that participate in E-Verify, USCIS uses Form I-94 information to confirm employment authorization of certain employees.<sup>44</sup> USCIS can also use Form I-94 information to verify the immigration status of individuals who apply for benefits with federal, state, and local benefit-granting agencies authorized to use USCIS' Systematic Alien Verification for Entitlements (SAVE) program.<sup>45</sup> Some of these agencies include the Social Security Administration as well as state agencies such as departments of motor vehicles (DMVs) and public assistance agencies and organizations. The beneficiary's lack of direct access to this status document creates inefficiencies within USCIS' verification programs and represents a barrier that prevents beneficiaries from accessing services and benefits to which they may be entitled.

With a growing number of employers and federal, state, and local agencies participating in USCIS' verification programs, the viability of these programs depends on an individual's ability to present appropriate evidence to demonstrate their immigration status and employment eligibility. In the context of the Form I-129, for example, beneficiaries are typically required to present a valid approval notice and/or Form I-94.<sup>46</sup> Beneficiaries must meet their burden of establishing eligibility for employment or various public benefits (such as a driver's license, health insurance, social security card, etc.); however, the beneficiary is powerless to comply if the employer withholds the necessary documentation.

For example, USCIS' published resources inform benefit-granting agencies (such as DMVs) that H-1B<sup>47</sup> employees should be able to present originals or copies of receipt notices and approval notices to prove their current status, and instruct third-party agencies to request and submit this information for

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<sup>43</sup> A foreign passport accompanied by a Form I-94 may be used to complete the Form I-9 to verify employment eligibility. The term "original I-94" includes, but is not limited to, "any printout or electronic transmission of information from DHS systems containing the electronic record of admission or arrival/departure." 8 C.F.R. § 1.4(d). *See also* USCIS Web page, "Form I-9 Acceptable Documents," <https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents> (accessed Jan. 11, 2022).

<sup>44</sup> E-Verify is a web-based system that allows businesses to confirm the eligibility of their employees to work in the United States. *See* USCIS Web page, "Learn More About E-Verify and myE-Verify," <http://www.uscis.gov/e-verify> (accessed Aug. 10, 2021).

<sup>45</sup> The SAVE program is a USCIS service that helps federal, state, and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants so only those entitled to benefits receive them. *See* USCIS Web page, "Electronic Immigration Status Verification," <http://www.uscis.gov/save> (accessed Aug. 10, 2021).

<sup>46</sup> *See* "A Guide on Immigration Documents Commonly Used by Benefit Applicants" (Sep. 2019); <https://save.uscis.gov/web/media/resourcesContents/SAVEGuideCommonlyusedImmigrationDocs.pdf> (accessed Aug. 10, 2021). In the context of H-1B nonimmigrants, USCIS has issued Form I-9 guidance that instructs employers to request the employee's Form I-94 issued for employment with the previous employer. *See* USCIS Web page, "6.5 H-1B Specialty Occupations" (Apr. 27, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/60-evidence-of-status-for-certain-categories/65-h-1b-specialty-occupations> (accessed Mar. 23, 2022). The beneficiary's inability to obtain the required documentation from her previous employer may also leave the new employer susceptible to allegations of unfair documentary practices in violation of 8 U.S.C. § 1324b(a)(6). Specifically, the new employer may require the employee to submit more documentation than it would require from similarly situated employees due to the previous employer's failure to provide the approval notice containing the Form I-94.

<sup>47</sup> The H-1B nonimmigrant classification applies to noncitizens who will perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability. INA § 101(a)(15)(H); 8 U.S.C. § 1101(a)(15)(H).

additional verification if SAVE is unable to verify immigration status on an initial inquiry.<sup>48</sup> However, this guidance fails to address the gap that exists under current notification procedures. As notices required for verification are not issued directly to beneficiaries, there is currently a lack of continuity in these verification programs, which then expends unnecessary resources of employers, benefit-granting agencies, and USCIS.

In addition, consistent with Executive Order 14012, the CIS Ombudsman has identified USCIS' current notification procedures as a barrier that prevents noncitizen workers from accessing the legal immigration system and government services available to them. In situations where beneficiaries cannot obtain the necessary status documentation from their employers, they are unable to demonstrate eligibility for benefits to which they may be entitled. Although the employer controls the filing of the Form I-129, beneficiaries remain responsible for maintaining their nonimmigrant status. However, the lack of direct access to their status documentation impedes beneficiaries from fully participating in the legal immigration system.

### Recommendations to USCIS

In view of the above-noted concerns, the CIS Ombudsman recommends that USCIS provide beneficiaries with receipt notices and approval notices/Form I-94 in connection with Form I-129 petitions filed on their behalf when the requested action impacts their immigration status. Depending on the recommendations ultimately pursued by USCIS, regulatory amendments may be necessary.<sup>49</sup>

Specifically, the CIS Ombudsman recommends the following:

1. Mail the receipt notice and approval notice (with Form I-94) to the beneficiary.

As the Form I-129 collects the beneficiary's residential address, USCIS can mail the receipt notice directly to the beneficiary. Once beneficiaries have this information, they can use the USCIS online account tools, the USCIS Case Status Online page, and the USCIS Contact Center to track the status of the petition to receive certain updates, such as when a decision is made.

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<sup>48</sup> For example, "For applicants with a pending petition to extend their H-1B nonimmigrant status, they *should* possess a Form I-797C demonstrating that there is a pending petition. In such cases if the applicant's admit-to date has passed, the SAVE system will return a response prompting the agency to institute additional verification. Under these circumstances, agencies should request that the applicant present the Form I- 797C." USCIS Fact Sheet, "Information for SAVE Users: H-1B Nonimmigrants;" [https://save.uscis.gov/web/media/resourcesContents/SAVE\\_Information\\_for\\_SAVE\\_Users\\_H\\_1B\\_Nonimmigrants.pdf](https://save.uscis.gov/web/media/resourcesContents/SAVE_Information_for_SAVE_Users_H_1B_Nonimmigrants.pdf) (Sept. 2020) (accessed Aug. 10, 2021).

<sup>49</sup> For example, USCIS may have concerns about the impact that providing beneficiaries with notification may have on separate regulations pertaining to who may be recognized or be an affected party in proceedings. See 8 C.F.R. §§ 103.2(a)(3) ("A beneficiary of a petition is not a recognized party in [a benefit request] proceeding"), 103.3(a)(1)(iii)(B) (for administrative appeals, certifications, and motions, a beneficiary is not an "affected party" with legal standing in a proceeding). DHS may accordingly find it necessary to change its regulations to distinguish notifications from the right to participate in the petition adjudication before this recommendation can be implemented by USCIS.

In order to comply with the statutory requirement that beneficiaries be issued the Form I-94, USCIS has similar options available. USCIS could mail a paper approval notice, which contains the Form I-94, directly to the beneficiary.<sup>50</sup>

2. Ultimately, mailing of the receipt and approval notices relies on the petitioner to provide USCIS with accurate information regarding the beneficiary's mailing address and to maintain that information throughout the petition process. Because the beneficiary does not sign the Form I-129, this option still leaves noncitizen workers vulnerable as petitioners may accidentally provide an incorrect address, or worse, misrepresent this information. In addition, beneficiary addresses may change, and mailings may not be sent to the most recent address. USCIS may also have concerns about the long-term costs of mailing additional notices and the workload associated with handling mail returned as undeliverable, which could require increases in filing fees.

Until the Form I-129 becomes available for online filing and more extensive electronic processing/adjudication, USCIS could leverage current online features to overcome problems with inaccurate or obsolete beneficiary mailing addresses. USCIS could allow the beneficiary to track case status online and eventually provide receipt and approval notices (with Form I-94) directly to the beneficiary's online account.<sup>51</sup>

3. Another option to overcome problems associated with mailing addresses provided by employers on Form I-129 is for USCIS to implement technological solutions to provide these materials. USCIS could develop a technological solution that will enable beneficiaries to obtain receipt/approval information. Similar to the website CBP has developed for nonimmigrant travelers to obtain their Form I-94 information, USCIS could allow beneficiaries to enter information from their passports to retrieve this information online.<sup>52</sup> In the alternative, USCIS could collaborate with CBP to provide the Form I-94 electronically via CBP's website. CBP has previously indicated that it would explore the possibility of adding USCIS approval information to its website.<sup>53</sup> The CIS Ombudsman encourages USCIS to coordinate with CBP to advance this feature. Doing so would provide beneficiaries with efficient access to their status documentation.<sup>54</sup>

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<sup>50</sup> The CIS Ombudsman only recommends that beneficiaries be given copies of receipt and approval notices. The CIS Ombudsman is not recommending that USCIS provide requests for evidence, denial notices, or any other such correspondence that might disclose confidential or private petitioner/company information. To that end, the beneficiary would be able to use online tools, the USCIS Case Status Update page, and the USCIS Contact Center to ascertain the status of the petition but not to provide evidence or otherwise advocate for approval of the petition.

<sup>51</sup> USCIS Web page, "Benefits of a USCIS Online Account;" <https://www.uscis.gov/file-online/benefits-of-a-uscis-online-account> (accessed Oct. 22, 2021).

<sup>52</sup> See CBP Web page, "I-94 Website;" <https://i94.cbp.dhs.gov/i94/#/home> (accessed Aug. 10, 2021).

<sup>53</sup> "Definition of Form I-94 to Include Electronic Format," 81 Fed. Reg. 91646, 91650 (Dec. 19, 2016).

<sup>54</sup> "The new definition makes clear that the Form I-94 now includes information collected electronically and also defines 'original Form I-94' to include the printout from the I-94 website. Due to the new definition provided for the Form I-94, CBP believes it is clear that the printout constitutes evidence of registration and no further change is needed." "Definition of Form I-94 to Include Electronic Format," 81 Fed. Reg. at 91649.



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Adopting the above recommendations would address the current inequity in USCIS' notification procedures. It would also bolster protections for noncitizen workers, as they will no longer be reliant on employers that may withhold this documentation to exploit them. Further, issuing notification to beneficiaries would increase efficiencies within USCIS' verification programs. Finally, adopting a policy of notifying beneficiaries promotes access to the legal immigration system and eliminates barriers that prevent noncitizens from fully, fairly, and equally accessing services and benefits to which they may be entitled.