Annual Report 2016

Citizenship and Immigration Services

Ombudsman

June 29, 2016

Homeland Security

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Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Mail Stop 0180
Washington, DC 20528-0180

June 29, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairmen and Ranking Members:

The Office of the Citizenship and Immigration Services Ombudsman is pleased to submit, pursuant to section 452(c) of the Homeland Security Act of 2002, its 2016 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Message from the Ombudsman

For almost 4 years I have had the immense honor of serving as the Citizenship and Immigration Services Ombudsman. As I look back on my service, I am mindful of our mission and proud of how hard we work to advance it. I have been privileged to visit a sizeable part of U.S. Citizenship and Immigration Services' (USCIS) operations, meeting hundreds of USCIS officers and staff and seeing firsthand their proven commitment to public service and to immigrant communities around the country and abroad. During this time, I have also hosted with the Ombudsman staff over 500 stakeholder engagements to gain a deeper understanding of the issues that USCIS' customers face today.

Our immigration system has evolved in impressive ways, with USCIS rising to meet national security and fraud detection challenges, engaging effectively through local field offices, and, most recently, working to address the unprecedented credible fear and affirmative asylum backlogs. At the same time, the agency has allocated vast resources to refugee processing in the Middle East and to the critical national security activities involved in that effort. USCIS also created the Central American Minors program to offer much-needed safe passage to the United States to children from El Salvador, Guatemala, and Honduras. Over the past 5 years, USCIS has also planned for and delivered on essential executive action solutions in the absence of comprehensive immigration reform.* Throughout that time, the agency has been responsive to Congressional oversight, with hearings focused lately on refugee processing, executive actions, the use of social media, and alleged fraud among prospective immigrant investors.

USCIS, however, still has much work to do to resolve longstanding systemic issues that compromise efficiency, quality of adjudications, and customer service. As a former Immigration and Naturalization Service counsel, seasoned immigration practitioner, and now as the Ombudsman, I have seen the detrimental impacts of inadequate customer service, delays in processing times, inconsistent adjudications, and ineffective policymaking. These are meaningful problems and should be treated as such.

With a myriad of competing priorities, the agency has made insufficient progress to address processing times delays (critically on the rise in the past 2 years); inconsistencies in adjudications across service centers; substantial failure to meet the 90-day regulatory adjudication deadline for employment authorization documents; and the continued issuance of overly burdensome and unnecessary requests for evidence. I believe USCIS will achieve its full potential as a 21st century immigration agency when its customer service and adjudicatory functions are consistently prioritized, resourced, and afforded equal oversight.

Consequently, as problems persist, the Ombudsman plays an important, independent role in ensuring that USCIS is responsive to its customers. At the Ombudsman's office, we work tirelessly to achieve the mission by providing expert case assistance to the public and by monitoring trends that reflect the existence and emergence of serious and pervasive issues within the agency. We formulate recommendations to USCIS—both formally and informally—to resolve those problems, and report to Congress areas where the agency still needs to improve.

The Ombudsman staff accomplishes this hefty mission with both dedication and resilience. It does so collaboratively and thoughtfully, caring for the customer often in ways he or she may not have experienced during the immigration process. One customer spoke to this hallmark of our work—that behind every application there is an individual, a family, an employee or an employer who deserves a fair process and timely case resolution:

* As we finalized this Report, the U.S. Supreme Court issued its decision in *U.S. v. Texas,* 579 U.S. ___ (June 23, 2016), leaving the court of appeals ruling in place and prohibiting implementation by U.S. Department of Homeland Security of the Deferred Action for Parents of American and Lawful Permanent Residents program (DAPA) and the expansion of the Deferred Action For Childhood Arrivals (DACA) program. The current DACA policy, however, remains in place.

> I want to say a big thank you for sending a reply as promp[tly] as you did. It is nice to know that there is an organization like yours working with the immigration office to help applicants with their immigration problems with USCIS. This is the first time…that I feel there are people in the immigration office who really care about me as an applicant….Your email means a lot to me and has given me hope for my application.

During my tenure as Ombudsman, I have witnessed our small team successfully manage a 270 percent increase in requests for case assistance while timely meeting our reporting obligations; working to resolve complex policy issues; conducting over 100 stakeholder engagements annually; and hosting for 5 years in a row one of the most constructive immigration policy conferences in the country. I applaud the Ombudsman team for their dedication, creativity, and deep desire to show the public the very best of government. This Annual Report reflects their efforts over the past year to respond to rising and longstanding challenges in the delivery of immigration services.

I thank both Secretary Jeh Charles Johnson and Deputy Secretary Alejandro Mayorkas for their steadfast support of the Ombudsman's mission and its work. I would also like to thank USCIS Director León Rodríguez and the agency's Headquarters and field leadership for their continued collaboration to make the agency more effective.

Finally, the Ombudsman's work is strengthened by the active participation of our knowledgeable stakeholders. They routinely identify and share information on emerging trends, keeping us apprised where things go right and where improvement is needed. Their continued engagement is integral to our full understanding of the issues and their impact on the USCIS customer; we thank them for their feedback and dedication. We also work daily with dedicated officers throughout USCIS who share in our goal of providing immigration services grounded on fair treatment and superlative customer service. That the agency is able to perform its functions on a daily basis is due to their dedication to duty. All of these individuals inspire hope that, working together, we can develop consistent and lasting excellence in our immigration system.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman) 2016 Annual Report contains:

- An overview of the Ombudsman's mission and services;
- A review of U.S. Citizenship and Immigration Services (USCIS) programmatic and policy challenges during this reporting period; and
- A detailed discussion of pervasive and serious problems, recommendations, and best practices in humanitarian, employment, and family areas, as well as customer service and integrity.

Ombudsman's Office Overview

In the 2016 reporting period (April 1, 2015 to March 31, 2016), the Ombudsman received 9,279 requests for case assistance, a 23 percent increase from the 2015 reporting period. Overall, 29 percent of the requests were for employment-based matters; 28 percent for humanitarian-based matters; 23 percent for family-based matters; and 20 percent for general immigration matters, such as applications for naturalization. Notably, the Ombudsman received 1,288 requests for case assistance involving applications for employment authorization—a 42 percent increase from the prior reporting period.

The Year in Outreach

The Ombudsman conducted over 121 stakeholder engagements in the reporting period, reaching a diverse multitude of stakeholders in regions across the United States. The Ombudsman also created a social media presence through Facebook in November 2015. To inform stakeholders of new initiatives and receive feedback on a variety of topics and policy trends, the Ombudsman hosted nine public teleconferences and held a Fifth Annual Conference, featuring Secretary of Homeland Security Jeh Johnson as keynote speaker as well as an "armchair" discussion with USCIS Director León Rodríguez.

DHS Blue Campaign

As Chair of the Blue Campaign Steering Committee (Blue Campaign), the Department's unified voice for combatting human trafficking, Ombudsman Odom is at the forefront of these efforts. The Blue Campaign brings together resources and expertise from across DHS Components, harnessing partnerships with a network of other governmental and non-governmental organizations. The Ombudsman strengthens these initiatives by providing ongoing subject matter expertise and organizing stakeholder events and trainings addressing pressing trafficking issues. The Ombudsman also provides case assistance to individuals seeking to resolve problems with applications and petitions for humanitarian immigration relief, including immigrant victims of trafficking.

Key Developments and Areas of Focus

Humanitarian

Asylum Backlogs and Continuing Assessment of Problems

The volume of affirmative asylum cases pending at USCIS has reached well over 100,000 and continues to grow. Sustained surges in high-priority credible and reasonable fear claims and a boom in new affirmative asylum filings drive this backlog. Despite significant efforts by the Refugee, Asylum and International Operations Directorate's Asylum Division to respond to this pending caseload, such as doubling the Asylum Officer corps, the backlog of cases and processing delays continues to expand. The Ombudsman encourages USCIS to provide greater transparency surrounding the backlog, and is committed to exploring additional ways to efficiently respond to worsening processing delays and promote measures to ease the hardships stemming from these delays.

Central American Minors Refugee/Parole Program

The Ombudsman has conducted extensive engagement with stakeholders and government officials in the United States and abroad in connection with the Central American Minors (CAM) Refugee/Parole program. During the Ombudsman's recent trip to Mexico, El Salvador, and Guatemala, the Ombudsman met with foreign governments, USCIS and DOS officials, humanitarian organizations, and at-risk youth, as well as observed Resettlement

Support Center pre-screenings and USCIS interviews of CAM applicants. The Ombudsman anticipates issuing an assessment and recommendations pertaining to the program's operational structure and effectiveness under current eligibility requirements. Stakeholders have reported and the Ombudsman has observed a number of shortcomings with the CAM program, including lengthy processing times; lack of standardized expedite procedures, safety protocols, and dedicated funding; narrow eligibility criteria; prohibitive upfront costs for DNA testing; and limited means for expanding public awareness of the program.

The Haitian Family Reunification Parole Program

Stakeholders have expressed concerns too few Haitians are eligible for the program and face obstacles impeding realization of the program's goals, namely receipt of the invitation to apply for the program and prohibitive filing fees. The Ombudsman has monitored the program's implementation and conducted engagement with the Haitian Family Reunification Parole Program (HFRP) stakeholders during the reporting period. As of December 31, 2015, USCIS had only adjudicated 590 applications of the 3,789 pending applications. The Ombudsman will continue to track HFRP's progress and explore potential measures to strengthen the number of beneficiaries benefitting from the program, including allowing beneficiaries with later priority dates to qualify and increasing outreach in both the United States and Haiti.

The Deferred Action for Childhood Arrivals Program

Since implementation late 2012, the Deferred Action for Childhood Arrivals (DACA) program has allowed approximately 723,282 recipients to live and work in the United States without fear of removal. The Ombudsman continues to recommend USCIS offer the option of a substantive review of denials based on grounds other than the administrative errors listed in the DACA FAQs. A number of requests for case assistance also revealed DACA recipients unknowingly traveled outside the United States after receiving approved advance parole documents, but before the effective date or "date issued." The Ombudsman proposes clarifying the "permissible period" for travel to ensure DACA grantees understand the importance of these dates.

Provisional Waivers

On July 22, 2015, USCIS published a proposed rule expanding the Provisional Waiver program to allow all individuals statutorily eligible for the unlawful presence waiver, who can establish extreme hardship to any qualifying relative, to participate in the program. On October 7, 2015, USCIS issued draft guidance pertaining to the "extreme hardship" standard for public comment. The Ombudsman welcomes the proposed regulatory amendments and much needed draft policy guidance. The Ombudsman also continues to urge USCIS to offer the option of a substantive review of provisional waiver denials essential to achieving full program integrity.

Special Immigrant Juveniles

For more than 25 years, the Special Immigrant Juvenile (SIJ) program has protected vulnerable youth in this country who cannot be reunified with one or both parents as a result of abuse, neglect, abandonment, or a similar basis under state law. Congress has entrusted state courts to make these determinations while acknowledging only DHS can issue immigration benefits. On December 11, 2015, the Ombudsman issued a second formal recommendation on the SIJ program, addressing a number of questionable practices by USCIS, including the re-evaluation of state court orders; burdensome requests for evidence; and interviews that are not age-appropriate. In response, USCIS has assured it will take some steps to address these concerns; the Ombudsman will continue monitoring the program improvements promised. The Ombudsman is also particularly concerned with the significant retrogression of SIJ visa numbers (EB-4 category) announced in the May 2016 *Visa Bulletin* for applicants from El Salvador, Guatemala, and Honduras and will continue to engage with the agency and stakeholders regarding the problems emanating from retrogression.

Interagency, Customer Service, and Process Integrity

Processing Times and Processing Delays

Over the last 3 reporting years, the Ombudsman has seen increases in requests for case assistance to address USCIS processing time delays. The Ombudsman urges USCIS to address lengthening processing times as a serious and pervasive issue. The Ombudsman believes, as a fee-for-service agency, USCIS must develop and implement a process accurately reflecting the time it takes to process applications and petitions from receipt to completion. USCIS has announced its exploration of and commitment to more accurate processing times based on actual, real-time data. The agency should immediately address the problems that are preventing it from meeting the processing time goals promised in its 2007 final fee rule, to which USCIS recently recommitted.

Background Checks and Clearances

Stakeholders continue to experience case processing delays caused by background checks and other types of security screening that can last several years. While these checks are essential features of immigration processing, extended delays and the lack of transparency about the process causes significant distress, family separation, and other hardships. The Ombudsman recommends USCIS create a unified monitoring process to follow up on processing of background and security checks, in particular pending Federal Bureau of Investigation (FBI) name checks and ICE investigations, and prioritize the processing of those in which security is an identified issue. Where cases will remain on review for indefinite periods, USCIS should give the applicant or petitioner notice and an opportunity to pursue alternative options for relief and protection, including withdrawing the application.

Delivery of Secure Documents

Stakeholders continue to encounter problems with the timely receipt of secure documents from USCIS. Every year USCIS sends millions of secure documents to applicants and their legal representatives through the U.S. Postal Service (USPS). While it is understandable USCIS seeks to closely control the issuance of secure documents to reduce the potential for fraud, requiring the applicant to file a new application and repay the fees when USCIS or USPS is the cause of a delivery issue, as often happens, is inherently unfair. The Ombudsman continues to recommend USCIS use prepaid couriers or certified mail to track delivery of secure documents and be more proactive in notifying customers when secure documents are returned.

Transformation

Transformation is USCIS' multi-year effort to digitize its paper-based filing and adjudication systems into a single electronic environment. USCIS processed timely and

accurately the majority of the limited available e-filings, but stakeholders encountered challenges locating or obtaining processing times and obtaining timely customer service. Of greater concern is the release in March 2016 of a major audit report by DHS's Office of the Inspector General, reviewing the "deeply troubled" Transformation program and noting USCIS has resisted "independent oversight" and "minimized the shortcomings of the program." The Ombudsman recommends USCIS improve its customer service, including examining ways to increase responsiveness to user feedback and allow for more external user involvement to implement holistic approaches.

Consular Returns

Stakeholders whose approved petitions are returned to USCIS by DOS experience uncertainty and ongoing challenges due to resource limitations, poor interagency communication, and antiquated file transmission between USCIS and DOS. The Ombudsman recommends the receiving USCIS service center verify the file is in the right place before storing the file, and send notice to the petitioner with the location of the file. Most importantly, the Ombudsman again calls upon USCIS to establish and post on its website agencywide processing goals for consular returns. The agency should also provide clear guidance to the public regarding the process and timeline for case resolution.

Business and Employment

Employment-Based Immigrant Petitions

During the reporting period, USCIS has taken a number of steps to implement the President's Immigration Accountability Executive Action for businesses and immigrant workers. On November 20, 2015, the agency published the draft policy memorandum *Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability*; and a Notice of Proposed Rulemaking (NPRM) on December 31, 2015, to implement certain provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). USCIS has still not changed its position that foreign worker beneficiaries lack legal standing in the petition process despite mounting case law to the contrary. USCIS must reconsider its position on Form I-140, *Immigrant Petition for Alien Worker* employee standing and make a corresponding regulatory change, fully aligning its policy to the letter and spirit of AC21 to provide certain qualified employees greater employment mobility while awaiting the completion of the permanent residence process.

EB-5 Immigrant Investor Program

As reported in past years, processing times for EB-5 petitions continue to degrade. Stakeholders shared concerns regarding USCIS' Investor Program Office's (IPO) regulatory authority to administer the program; outdated regulatory requirements; program integrity in light of allegations and findings of fraud or noncompliance with other federal laws; the manipulation of Targeted Employment Areas through gerrymandering; and the inconsistent implementation of policy. The Ombudsman will monitor regulatory and statutory changes to the program initiated by IPO and Congress, and will continue to address stakeholders concerns with the quality, consistency, and timeliness of IPO's adjudication of EB-5 applications and petitions.

H-2 Temporary Workers and Labor Trafficking

During the reporting period, the Ombudsman heard from workers' rights organizations regarding the vulnerabilities and exploitation of H-2 workers sponsored by U.S. employers. Exploitation takes the form of involuntary servitude or forced labor, and can result in other workplace-based crimes. During this reporting period, the Ombudsman participated in interagency activities to address stakeholder concerns, and worked to resolve requests for case assistance by workers encountering challenges in their pursuit of protective immigration benefits. The Ombudsman will continue to explore ways USCIS can collaborate with federal agency partners to address employee exploitation and human trafficking, and will convene DHS representatives to discuss how to enhance protections within the Department's authorities.

H-2B Temporary Non-Agricultural Workers

Stakeholders continue to assert the H-2 program is overly regulated and bureaucratic, causing significant challenges in hiring foreign workers to fill temporary agricultural (H-2A) and non-agricultural (H-2B) jobs. Recent regulatory and legislative developments have exacerbated conditions affecting both employers and employees contributing to an overall increase, at least temporarily, in H-2B processing delays. The Ombudsman will continue to monitor stakeholder concerns about the treatment of both employers and employees in the H-2B program to promote improved program functionality and address abuse concerns.

Additionally, the Ombudsman will continue to make recommendations, as appropriate, to promote more effective interagency communication to facilitate the lawful and timely entry of temporary workers into the United States.

Requests for Evidence

As in previous years, the Ombudsman continues to monitor the rates at which Requests for Evidence (RFEs) are issued at the Vermont Service Center (VSC) and California Service Center (CSC) in three high-skilled nonimmigrant visa categories: H-1B (Specialty Occupation Workers), L-1A (Intracompany Transferee Managers and Executives) and L-1B (Specialized Knowledge Workers). The FY 2015 RFE rates for these categories continues to show disparities between the two service centers, including fluctuations in RFE issuance rates and unexplained divergences. The FY 2015 RFE data in other employment-based nonimmigrant visa categories also revealed high rates of issuance in two product lines at the VSC: O-1 (Individuals with Extraordinary Ability or Achievement), reported at 49 percent, and P-1 (Internationally Recognized Athletes), which increased to 65 percent. The Ombudsman will continue to monitor and engage USCIS on issues pertaining to the quality and frequency of RFEs.

Employment Authorization Documents

In 2006, 2008, and 2011, the Ombudsman issued formal recommendations suggesting ways to reduce USCIS' processing delays for employment authorization documents (EADs). USCIS adopted some of the Ombudsman's recommendations, but disagreed EAD processing was a significant issue, given the small percentage of delayed cards. However, FY 2015 data showed EAD adjudications after 90 days reached a troublesome 22 percent, or 449,307 filings. With a proposal to eliminate the 90-day processing requirement currently under consideration by the agency, timeliness remains a real concern for EAD processing. The proposed regulatory changes are not likely to result in decreased processing times, absent significant commitment from the agency to devote resources to improving processing times across the product line. The Ombudsman continues to highlight EAD processing delays as a systemic issue, and will continue to monitor and engage the agency as long as EAD delays persist.

Families and Children

Applying for Naturalization

Despite President Obama's White House Task Force on New Americans' efforts to strengthen existing pathways to naturalization, a number of barriers remain to eligible applicants. A sizable number of the 8 million permanent residents eligible to apply for citizenship are elderly, poorly educated, or indigent, and face greater difficulty meeting naturalization qualifications. USCIS recently issued an NPRM for a new fee schedule that includes a biometrics fee waiver and a partial fee waiver for certain low-income applicants. Nevertheless, the naturalization process continues to be plagued by prolonged delays; USCIS is currently failing to meet its processing time goal at almost every field office. To ensure access to U.S. citizenship by eligible permanent residents, the Ombudsman will continue to monitor the naturalization process and engage with USCIS and stakeholders through public engagements and requests for case assistance.

Fee Waiver Processing

USCIS recently posted an updated version of its fee waiver form more than doubling the length, with an additional five pages of attestations, requiring more supporting documentation. The updated form will have a negative impact, particularly on *pro se* applicants for whom it may serve as a deterrent. Rather than adding to the burden, the agency should focus on clarifying and simplifying the overall fee waiver application process and train adjudicators on its eligibility guidance to achieve quality and consistency in fee waiver adjudications. In addition, stakeholders reported denial notices provide insufficient guidance as to the inadequacies of the requests, preventing customers and legal representatives from making corrections that would lead to success in future requests. The Ombudsman urges USCIS to cite specific deficiencies in denial notices to prevent unnecessary refilings.

Parole

Parole authority has been increasingly used in the past few years to reunify families, address humanitarian emergencies, support circumstances justified by significant public benefits, and facilitate international travel for business and educational purposes. Despite its increased use, USCIS has not yet issued guidance on the meaning of the Board of Immigration Appeal's 2012 precedent decision on advance parole for certain individuals to return to the United States

after temporarily traveling abroad or guidance clarifying the specific types of evidence required for a grant of humanitarian parole. Similarly, U.S. Immigration and Customs Enforcement (ICE) has not issued guidance for military parole in place requests from family members of active-duty, reserve, and guard members of the Armed Forces of the United States, resulting in inconsistent treatment of individuals who fall under ICE jurisdiction. The Ombudsman recently issued a formal recommendation asking USCIS to exercise its statutory authority to implement a parole policy for eligible U petitioners located abroad who are waiting to receive a U visa. The Ombudsman encourages the use of parole consistent with statutory parameters to accomplish these and related goals, and will continue to engage with USCIS on these issues.

Military Immigration Issues

The Ombudsman strongly supports USCIS' efforts to meet the needs of members of the U.S. military and their family members. While USCIS field offices diligently work to mitigate ongoing processing delays in military naturalization applications by communicating with USCIS military liaison officers, the agency has no control over the FBI background checks and can take no action on an application until that process is complete. These delays undermine the purpose of USCIS' "Naturalization at Basic Training" initiative, and affect military readiness because soldiers are unable to deploy with their units abroad or obtain necessary security clearances. The Ombudsman will continue to monitor processing delays, assist service members, and liaise with USCIS and the FBI to identify opportunities to address and mitigate delays.

Petitions to Remove Conditions on Residence

Despite improvements in the processing and adjudication of petitions to remove conditions on residence (Form I-751), stakeholders continue to express concerns with processing delays. The Ombudsman strongly urges USCIS to acknowledge longstanding persistent issues in the processing of I-751 petitions, as well as implement the Ombudsman's 2013 recommendations to provide timely, effective, and accurate notice to petitioners concerning their status. The Ombudsman will continue to monitor USCIS processing delays of petitions filed by conditional residents and engage with USCIS on expanding the publication of field office processing times, as well as adjudicating I-751s within a year of receipt.

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Ombudsman's Office: The Year in Review

Ombudsman's Office Overview

The Homeland Security Act (HSA) of 2002 established the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman).[1] The mission of the Ombudsman is to:

- Assist individuals and employers in resolving problems with U.S. Citizenship and Immigration Services (USCIS);
- Review USCIS policies and procedures to identify areas in which individuals and employers have problems in dealing with USCIS; and
- Propose changes in the administrative practices of USCIS to mitigate identified problems.[2]

Critical to achieving this mandate is the Ombudsman's role as an independent, impartial, and confidential resource within the U.S. Department of Homeland Security (DHS).

- ***Independent.*** The Ombudsman is an independent DHS office, reporting directly to the DHS Deputy Secretary and is not a part of USCIS.
- ***Impartial.*** The Ombudsman works in a neutral and impartial manner to improve the delivery of immigration benefits and services.
- ***Confidential.*** Individuals and employers seeking assistance from the Ombudsman may do so in confidence. Any release of confidential information is based on prior consent, unless otherwise required by law or regulation.

The Ombudsman performs its mission by:

- Evaluating individual requests for case assistance and recommending USCIS engage in corrective actions, where appropriate;
- Identifying trends in requests for case assistance, reviewing USCIS operations, researching applicable legal authorities, and writing formal recommendations or informally bringing systemic issues to USCIS' attention for resolution; and
- Facilitating interagency collaboration, and conducting outreach to a wide range of public and private stakeholders.

During the 2016 reporting period (April 1, 2015 to March 31, 2016), the Ombudsman was staffed with approximately 30 full-time employees with diverse backgrounds and areas of subject matter expertise in immigration law and policy. Most of the staff is devoted to requests for case assistance submitted by the public. These individuals include former USCIS, U.S. Department of State (DOS), and U.S. Department of Labor (DOL) staff; attorneys who previously worked for non-profit organizations; and private sector business and family immigration experts.

Requests for Case Assistance

In the 2016 reporting period, the Ombudsman received 9,279 requests for case assistance, an increase of 23 percent from the 2015 reporting period. Individuals, employers, and their legal representatives who encounter problems with USCIS in the processing of their immigration benefits requests may contact the Ombudsman after attempting to resolve the issue directly with USCIS.

The Ombudsman works to resolve case issues directly with USCIS field offices, service centers, and other offices. Collaboration and open dialogue are key tools in resolving problems with pending applications or petitions that have been brought to the Ombudsman's attention. When warranted, the request may be escalated to USCIS Headquarters.

The Ombudsman works to resolve a wide range of issues across employment, family, and humanitarian categories, addressing the following:

[1] In this Report, the term "Ombudsman" refers interchangeably to the Ombudsman, the Ombudsman's staff and the office.

[2] HSA § 452, 6 U.S.C. § 272.

- Typographic errors in immigration documents;
- Cases 60 days past normal processing times;
- USCIS' failure to schedule biometrics appointments, interviews, naturalization oath ceremonies, or other appointments;
- Change of address and mailing issues, including non-delivery of notices of action or completed immigration documents (e.g., Employment Authorization Documents (EADs), Permanent Resident Cards, etc.);
- Cases where the beneficiary may "age-out" of eligibility for the requested immigration benefit;
- Refunds in cases of clear USCIS error;
- Lost files or file transfer problems;
- Clear errors of fact, or gross and obvious misapplication of the relevant law by USCIS in Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs), and denials;
- Applications and petitions that were improperly rejected by USCIS;
- Ongoing, systemic issues that should be subjected to higher level review (e.g., the exercise of discretion, the misapplication of evidentiary standards, USCIS employees failing to comply with its policies, etc.);
- Cases where an individual is in removal proceedings before the Immigration Court and has an application or petition pending before USCIS that may have a bearing on the outcome of removal proceedings; and
- Certain cases involving U.S. military personnel and their families (e.g., citizenship for military members and dependents; family-based survivor benefits for the immediate relatives of armed forces members, etc.).

Based on a review of requests for case assistance submitted to the Ombudsman during the 2016 reporting period, the top three difficulties experienced with USCIS are:

- Applications or petitions pending outside posted processing time (55 percent);

Figure 1.1: Top Five Primary Form Types Received in Requests for Case Assistance

Form Type	Received	% of Total Receipts
I-485, Application to Register Permanent Residence or Adjust Status Based on an I-130 607 Based on an I-140 511 Based on another classification 655	1,773	19.18%
I-765, Application for Employment Authorization (exclusive of Deferred Action for Childhood Arrivals (DACA))	1,226	13.07%
I-821D, Consideration of Deferred Action for Childhood Arrivals	909	9.84%
I-130, Petition for Alien Relative	878	9.50%
N-400, Application for Naturalization	562	6.08%

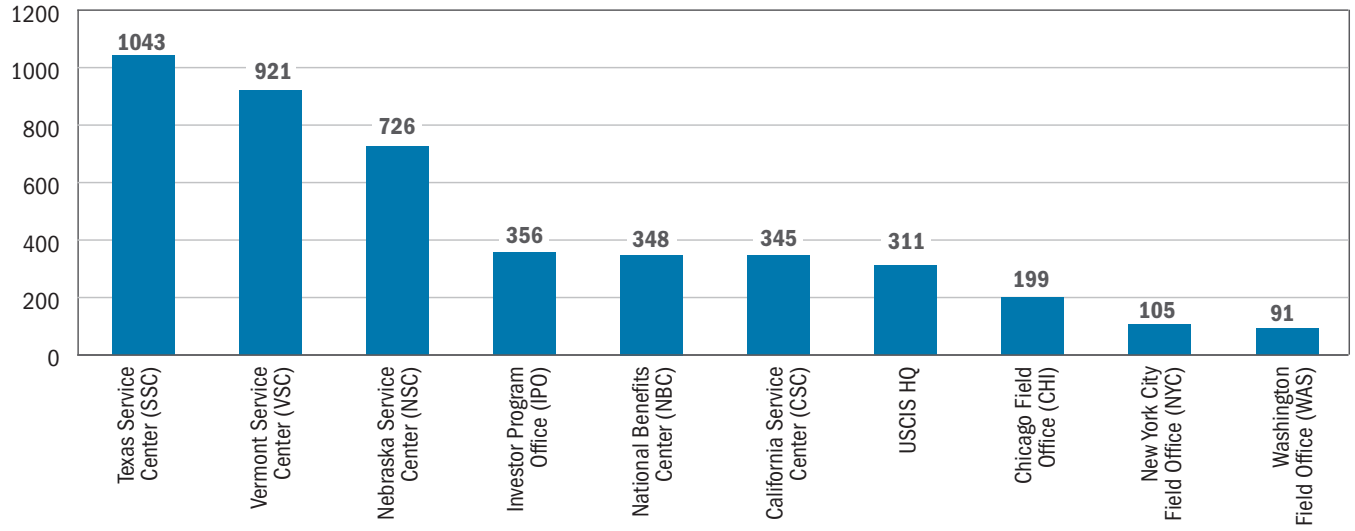
- Adjudication issues, such as incorrect decisions or RFEs that are unrelated to the application or petition (11 percent); and
- Administrative issues, including those related to file transfer and mailing issues (8 percent).

The Ombudsman closed 12 percent of requests for case assistance prior to USCIS contact because the issue was outside of the office's jurisdiction, not yet ripe for review (e.g., within posted processing times), or was resolved by USCIS before the Ombudsman could take action.

The Ombudsman's Jurisdiction. The Ombudsman's jurisdiction is limited by statute to matters involving USCIS.[3] The Ombudsman does not have the authority to assist with problems individuals or employers experience with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), DOS, the Executive Office for Immigration Review (EOIR), or DOL. When a request for case assistance falls outside of the Ombudsman's jurisdiction, it will inform the customer the matter is outside the scope of the Ombudsman's authority and reference the appropriate government agency. The

[3] HSA § 452(b)(1), 6 U.S.C. § 272(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice.

Figure 1.2: Top Ten USCIS Facilities Contacted During Reporting Period



Ombudsman is not an appellate body. Additionally, the Ombudsman does not have the authority to demand USCIS reopen a case, or to reverse any decisions the agency may have made.

An Office of Last Resort. The Ombudsman recognizes that many who request assistance have already waited beyond the duration of USCIS processing times. Absent an urgent matter, the Ombudsman requires customers to wait 60 days past USCIS posted processing times before submitting requests for case assistance.[4] Individuals are also asked to attempt to solve the problem on their own through USCIS' customer service options before contacting the Ombudsman.[5] In 69 percent of requests for case assistance submitted to the Ombudsman during the reporting period, individuals and employers first contacted the National Customer Service Center (NCSC), while 25 percent appeared at InfoPass appointments at USCIS local field offices. The remainder may have sought assistance through another means, such as a Congressional Representative.

Ombudsman Inquiries Resolved Through Direct Contact with USCIS Offices. The Ombudsman evaluates each request for assistance by examining facts, reviewing relevant USCIS systems, and analyzing applicable laws, regulations, policies, and procedures. After assessing each request for case assistance, the Ombudsman may contact USCIS service centers, field offices, or other facilities to request remedial actions.

Expediting Inquiries to USCIS. The Ombudsman will expedite a request based on an emergency or hardship.[6] In deciding whether to expedite, the Ombudsman follows the same criteria established by USCIS.[7]

USCIS Responses. Pursuant to a revised Memorandum of Understanding between USCIS and the Ombudsman executed in March 2016, USCIS has 15 business days to respond to the Ombudsman with the action taken on a specific application or petition, and 5 business days to respond to expedited inquiries.[8] During the majority of the 2016 reporting period, the timeframes were 30 business days and 3 business days for expedites.

[4] There are two exceptions to the Ombudsman's requirement applicants wait 60 days past USCIS processing times: requests for case assistance related to applications for employment authorization, which are to be adjudicated in 90 days pursuant to current regulations and accordingly may be submitted at day 75; and Deferred Action for Childhood Arrivals renewal applications, which may be submitted at day 105. *See* 8 C.F.R. § 274a.13(d). USCIS Webpage, "Renew Your DACA;" https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/renew-your-daca (accessed May 26, 2016).

[5] USCIS customer service options include: My Case Status, the NCSC, InfoPass, and e-Request. *See* USCIS Webpage, "myUSCIS – Case Status;" https://egov.uscis.gov/casestatus/landing.do (accessed Apr. 28, 2016); USCIS Webpage, "InfoPass;" https://infopass.uscis.gov/ (accessed Apr. 28, 2016), USCIS Webpage, "e-Request;" https://egov.uscis.gov/e-Request/Intro.do (accessed Apr. 28, 2016).

[6] Individuals or employers requesting expedited handling are instructed to clearly state so in Section 10 ("Description") of Form DHS-7001, briefly describe the nature of the emergency or other basis for the expedite request, and provide relevant documentation to support the expedite request. All expedite requests are reviewed on a case-by-case basis.

[7] USCIS Webpage, "Expedite Criteria" (Aug. 28, 2015); https://www.uscis.gov/forms/expedite-criteria (accessed Apr. 28, 2016). The criteria are severe financial loss to company or person; emergency situation; humanitarian reasons; nonprofit organization whose request is in furtherance of the cultural and social interests of the United States, Department of Defense, or national interest situation; USCIS error; or compelling interest of USCIS.

[8] "Memorandum of Understanding Between U.S. Citizenship and Immigration Services and the Citizenship and Immigration Services Ombudsman" (Mar. 30, 2016)(copy on file with the Ombudsman).

The Ombudsman closes requests for assistance after USCIS takes action to resolve the issue. Where USCIS cannot provide a specific timeframe in which it will resolve the issue or the case is at least 6 months past USCIS posted processing times, the Ombudsman may place the application or petition in a separate docket of long-pending cases. The Ombudsman regularly follows up with USCIS and monitors these cases until the agency takes action on the application or petition.

Ombudsman case assistance, of course, does not always result in approval. Based on the Ombudsman's intervention, USCIS sometimes takes action on a long-pending case and issues a RFE, a NOID, or a denial. Often cases that have fallen outside normal processing times have done so for reasons beyond the control of USCIS, such as pending background checks being conducted by another agency. Some adjudication issues are a matter of discretion, and in some such situations the USCIS decision is not changed after an Ombudsman inquiry; others are reopened and reversed. The Ombudsman's case assistance is never a substitute for legal recourse; for many immigration benefits, individuals and employers must file Motions to Reopen/Reconsider and appeal to preserve their rights.[9]

The following cases demonstrate the types of assistance provided by the Ombudsman in the 2016 reporting period:

Expediting Cases

- ***Humanitarian Reasons.*** When an interpreter for a publishing house needed to travel to Haiti for a humanitarian mission there, he reached out to the Ombudsman. He had filed Form I-131*, Application for Travel Document,* with a request to expedite more than 2 months before his scheduled trip. Despite several telephone calls and a visit to the local USCIS office, the applicant still had no response, only a week before he was scheduled to travel. With the help of the Ombudsman, the document was produced just in time for his humanitarian mission.

- ***Multi-Agency Issues.*** The Ombudsman was contacted about a U.S. citizen mother and her young child who were living in a refugee camp in Turkey after fleeing their home in northern Iraq. The mother and her family in the United States were trying to obtain approval of the Form I-130, *Petition for Alien Relative* filed on behalf of the son to allow the pair to come to the United States. The Ombudsman served as the liaison with USCIS, DOS, and later, once the petition was approved, with CBP to ensure the child's entry to the United States.

Reopening Improper Denials

- ***Deferred Action for Childhood Arrivals (DACA).*** The Ombudsman reached out to USCIS regarding a denied Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*. USCIS denied the applicant's renewal of DACA based on travel outside of the United States without authorization. Although USCIS issued the customer an advance parole document, he departed the United States one day before the "issue date." The customer departed the United States in good faith after receiving the document, not realizing the "issue date" represented the initiation of validity for travel. Following an inquiry from the Ombudsman, USCIS reopened and approved this case (and several others like it) since he returned prior to the advance parole document's end date.

- ***Provisional Waivers.*** After being denied a provisional waiver, a spouse sought assistance from the Ombudsman. Her application had included substantial evidence of the severe psychological, emotional, and financial hardship her U.S. citizen husband would suffer if the two were separated or if he were to relocate to El Salvador with her. After a request from the Ombudsman that USCIS reconsider the husband's very detailed affidavit and the totality of the family's circumstances, the agency reopened the case and exercised its discretion to grant the provisional waiver.

- ***Legal Interpretations.*** Representatives for more than a dozen victims of labor trafficking reached out to the Ombudsman expressing concern about denied Forms I-918, *Petition for U Nonimmigrant Status.* USCIS denied the petitions because, while the petitioners had established they were victims of involuntary servitude, the agency found they had not demonstrated the harm they suffered was substantial or prolonged. The Ombudsman reached out to USCIS, asking the agency to give deference to DOL's certification in the cases. USCIS later informed the Ombudsman it reopened all of the cases.

[9] *See generally* 8 C.F.R. § 103.3(a) (appeals), 103.5 (motions to reopen/reconsider).

Administrative and Procedural Issues

- ***Refunds.*** A customer received an approval notice for her Form I-130 along with a request to submit Form I-824, *Application for Action on an Approved Application or Petition,* even though consular processing had been requested on the I-130. The customer returned the completed form and $400 fee to USCIS and was later informed she did not have to file the Form I-824; however, the agency refused to refund the filing fee. Following receipt of the Ombudsman's inquiry, USCIS refunded the fee to the customer.

- ***Mailing Issues.*** The customer, an elderly man suffering from Alzheimer's disease, filed three Forms I-90, *Application to Replace Permanent Resident Card.* The card was never delivered, despite the post office's records indicating two deliveries to the man's mailing address. As the post office did not return the card to USCIS, USCIS continued to assert the applicant had to re-file with the fee. The applicant was able to document a series of items that had gone missing or were undelivered at his assisted living facility. This evidence was included in the Ombudsman's inquiry to USCIS. The agency reopened the last denied Form I-90 and re-sent the permanent resident card.

- ***Erroneous Denial for Abandonment.*** USCIS denied a Form I-730, *Refugee/Asylee Relative Petition* on the ground the petitioner had not responded to a Notice of Reopening and Intent to Deny, thereby abandoning the petition. The petitioner's attorney had timely responded to the request on his client's behalf. The Ombudsman contacted USCIS with the tracking number and signature confirmation for the petitioner's response, and the petition was reopened on USCIS' motion.

Employment-related Matters

Credited to a program increase approved by Congress and the President in Fiscal Year (FY) 2015,[10] the Ombudsman established a team of analysts dedicated to resolving employment-related cases during this reporting year. Employment-related cases make up nearly 30 percent of all requests from the public. The funding increase restored prior years' budget reductions and enables the office to better respond to continued increases in requests for case assistance. Examples of employment-related cases received include:

- USCIS denied a groundskeeping company's Form I-129, *Petition for a Nonimmigrant Worker* for 30 workers on the basis that the company regularly requested peakload workers year after year and thus had no "temporary" need. The Ombudsman asked the service center to review the petition, which it did and subsequently reopened and approved the petition.

- When a U.S.-based company sought to transfer a foreign-born production manager to its U.S. team, it filed Form I-129 for an L-1A Intracompany Manager. The petition was approved, but when the beneficiary presented himself at a port of entry, he was refused on the ground that he did not qualify as an L-1A. Following an inquiry by the Ombudsman, both USCIS and CBP reviewed the petition; the manager was admitted to the United States, and the derogatory note was removed from his record.

- A foreign-born worker experienced difficulty getting two approved immigrant visa petitions interfiled so he could retain his former priority date and be eligible to adjust status based on the earlier priority date. He was the beneficiary of a recently approved Form I-140, *Immigrant Petition for Alien Worker* in the second employment preference category (EB-2). He had also previously been the beneficiary of an approved I-140 in the third employment preference category (EB-3). The Ombudsman worked with USCIS to ensure the EB-3 priority date was used with the EB-2 approval to timely adjudicate the application to adjust status.

[10] Department of Homeland Security Appropriations Act, 2015, Pub. L. No. 114-4, 129 Stat. 39 (2015).

USCIS' Role in Resolving Cases

None of the Ombudsman's work would be possible without corresponding effort from USCIS. The agency's staff is a critical component in accomplishing the Ombudsman's mission. The Ombudsman appreciates the dedication of USCIS staff, and will continue to work with them for the timely and efficient adjudication of immigration benefits.

The Year in Outreach

In this reporting period, the Ombudsman conducted over 121 stakeholder engagements, reaching a multitude of diverse stakeholders[11]—including state and local officials, Congressional offices, national and community-based organizations, attorney bar associations, employer associations, and individuals—to understand and address concerns about the delivery of immigration services and benefits.[12] The Ombudsman increased outreach across the United States through webinars, teleconferences, and stakeholder engagements, which included visits with USCIS service centers and field offices.

Social Media

In November 2015, the Ombudsman created a social media presence through Facebook[13] to fulfill further its statutory mission. The Ombudsman regularly posts updates of interest to customers, creating new opportunities to engage with stakeholders.

Teleconferences

The Ombudsman expanded the frequency of teleconferences informing stakeholders of immigration issues and policy trends. The Ombudsman hosted nine teleconferences during the reporting year to provide information and receive stakeholder feedback on immigration issues and policy trends. The Ombudsman hosted the following teleconferences in the 2016 reporting period:[14]

- Impact of USCIS Delays on U.S. Department of Motor Vehicles (DMV) Benefits (February 25, 2016)
- Transformation of USCIS Systems (January 28, 2016)
- Special Immigrant Juvenile Status (December 15, 2015)
- Fifth Annual Ombudsman Conference Recap (November 19, 2015)
- Consular Returns: A Conversation with the Department of State and USCIS (October 28, 2015)
- USCIS Forms: Impact and Process of Form Changes (September 29, 2015)
- Recap of the Annual Report to Congress (July 16, 2015)
- U Visas: A Conversation with the Department of State and USCIS (May 27, 2015)
- H-1B Changes in Worksite Locations (April 30, 2015)

The Ombudsman's Annual Conference

On November 5, 2015, the Ombudsman held its "Fifth Annual Conference: Government and Stakeholders Working Together to Improve Immigration Services."[15] The conference included over 300 in-person participants; thousands more viewed the conference via livestream.[16] DHS Secretary Jeh Johnson delivered keynote remarks, focusing on diversity and immigration as key American values. Secretary Johnson was followed by USCIS Director León Rodríguez, who engaged with stakeholders during an extensive question and answer session. He announced USCIS had adopted the Ombudsman's recommendation to centralize adjudications of special immigration juvenile petitions into one USCIS service center. The morning plenary offered a rare opportunity to hear directly from government decisionmakers regarding planning and implementation of President Obama's 2014 directive to take common sense steps to fix our broken immigration system through executive actions. The afternoon panels

[11] The Ombudsman has established a performance measure to conduct 100 outreach activities each fiscal year. *See* DHS Quarterly Performance Report Management Measures FY 2015 End of Year (Dec. 16, 2015), p. 58.

[12] Northeast: New York, NY; and Newark, NJ. Midwest: Cincinnati, Ohio; Valparaiso, South Bend, and Indianapolis, IN; Detroit, MI; and Omaha, NE. Mid-Atlantic: Richmond and Charlottesville, VA; Baltimore, Catonsville, Silver Spring, and National Harbor, MD; and Washington, DC. Southeast: Macon, GA; Memphis, TN; Birmingham, AL; Greensboro and Raleigh, NC; and Miami and Tampa, FL. Southwest: Irving, Harlingen, San Antonio, Austin, Houston, and Dallas, TX. West: Las Vegas, NV; San Diego, San Jose, and San Francisco, CA; Salt Lake City and West Valley City, UT; and Westminster, Boulder, and Denver, CO.

[13] The Ombudsman's Facebook page can be found at https://www.facebook.com/cisombudsman/.

[14] Recaps of the Ombudsman's teleconference series can be found at https://www.dhs.gov/ombudsmans-public-teleconference-series.

[15] *See* DHS Blog, "Ombudsman's Fifth Annual Conference: Government and Stakeholders Working Together to Improve Immigration Services" (Nov. 24, 2015); https://www.dhs.gov/blog/2015/11/24/ombudsman%E2%80%99s-fifth-annual-conference-government-and-stakeholders-working-together (accessed May 24, 2016).

[16] As of May 2016, the recording of the livestream had over 6,000 views.

focused on a variety of immigration issues, including employment and humanitarian hot topics, DACA, parole, and provisional waivers.

The Ombudsman's Language Access Plan

The Ombudsman has developed a Language Access Plan to provide greater access to Ombudsman services for individuals with limited English proficiency by providing language assistance services. The Ombudsman translated the full 2015 Annual Report to Spanish and the executive summary to Spanish, Arabic, and Mandarin. In accordance with the Language Access Plan, the Ombudsman participated in its first Spanish engagement via radio. The Ombudsman will continue to review best practices to incorporate languages for individuals with limited English proficiency.[17]

The Ombudsman's Annual Report

The Ombudsman submits an Annual Report to Congress by June 30 each year in accordance with HSA 452(c). As this report is being finalized, the Ombudsman has not received USCIS' response to the 2015 Annual Report.

DHS Blue Campaign: Protections for Immigrant Victims of Trafficking

As Chair of the Blue Campaign, the Department's unified voice for combatting human trafficking, Ombudsman Odom is at the forefront of these efforts. In tandem with USCIS and a host of other federal, state, and local entities, the Blue Campaign has elevated awareness of successful anti-trafficking strategies while enhancing humanitarian relief programs for many thousands of trafficking and abuse victims each year.

DHS helps prevent trafficking through public outreach and education; protects trafficking victims through a coordinated, victim-centered approach; and aids the prosecution of traffickers through law enforcement investigations. Central to DHS's protection of trafficking and abuse victims is the Department's continued implementation of the Violence Against Women Act (VAWA) and Victims of Trafficking and Violence Protection Act (VTVPA).[18] Under VAWA and VTVPA, USCIS extends three key forms of relief: (1) a process through which domestic violence victims can obtain independence from abusive partners by self-petitioning for legal permanent residence; (2) T visas granted for victims of human trafficking who aid law enforcement officials in the investigation or prosecution of those crimes; and (3) U visas granted to victims of certain criminal conduct, including human trafficking, who aid law enforcement officials in the investigation or prosecution of that conduct.[19] ICE exercises its authority to permit continued presence in the United States for victims of severe forms of trafficking in persons.[20] Through these programs, DHS brings immigration relief to more than 11,000 victims of trafficking and other criminal conduct annually.

With support from its Federal Law Enforcement Training Center (FLETC), DHS is a national leader in anti-human trafficking training development and delivery, providing instruction to law enforcement, first responders, prosecutors, government, and faith-based and private organizations. Since 2010, DHS Components and Blue Campaign have trained well over 200,000 individuals on indicators of human trafficking.[21] This year, under the Justice for Victims of Trafficking Act, FLETC is providing Human Trafficking Awareness training as part of the requisite core curriculum for 91 law enforcement agencies.

Blue Campaign offers a variety of free, public resources through its website to help raise awareness about combating human trafficking.[22] Blue Campaign posters displayed at truck stops and major airports across the country showcase

[17] DHS, "Language Access Plan" (Feb. 28, 2012); http://www.dhs.gov/xlibrary/assets/crcl/crcl-dhs-language-access-plan.pdf (accessed Apr. 27, 2016).

[18] VAWA, Pub. L. No. 103-322, 108 Stat. 1796, Title IV (1994) (codified as amended in scattered sections of 8 and 42 U.S.C.); VTVPA, Pub. L. 106-386, 114 Stat. 1464 (2000)(codified in scattered sections of 22 U.S.C.). *See also* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-16, 119 Stat. 2961 (2006); Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54 (2013).

[19] *Id.*

[20] 28 C.F.R. § 1100.35.

[21] In conjunction with FLETC, the Blue Campaign provided live, in-person training to several state and local jurisdictions, including trainings in Minot, Dickinson, Williston, Fargo, and Bismarck, ND; Lincoln, Nebraska; Chicago, IL; Newark, NJ; and San Diego, CA. In addition, the Blue Campaign produced three human trafficking-awareness training videos for tribal law enforcement officers, judges, advocates, and probation officers about indicators of human trafficking and identifying controlling behaviors of traffickers, and a new 45-minute web-based training course for state and local law enforcement accessible through the FLETC website.

[22] DHS Blue Campaign, http://www.dhs.gov/bluecampaign (accessed May 19, 2016).

examples of the three forms of human trafficking: forced labor, domestic servitude, and commercial sex trafficking.[23]

One of Blue Campaign's key successes has been the ability to create a vast network of partner organizations to join in DHS's efforts to combat human trafficking. Within the past year, Blue Campaign has entered into formal partnerships with South Carolina Office of the Attorney General, North Dakota Public Health Association, Mississippi Office of Homeland Security, and TravelCenters of America, a company operating highway gas stations, quick-service restaurants, and convenience stores in 43 states. Through these partnerships, DHS provides web-based training resources to personnel and co-branded public awareness materials to educate the public on recognizing and reporting suspected human trafficking activity.

The Ombudsman also provides case assistance to individuals seeking to resolve problems with applications and petitions for immigration relief, including immigrant victims of trafficking. In addition, the Ombudsman conducts regular stakeholder engagements with service providers to understand and address systemic concerns with the immigration benefits process for victims of trafficking and other crimes.

DHS Council on Combating Violence Against Women. The Council on Combating Violence Against Women (Council) arose out of DHS's ongoing commitment to preventing and addressing gender-based violence.[24] In January 2016, the Council co-hosted a Human Trafficking 101 teleconference with the Blue Campaign in recognition of Human Trafficking Awareness month, sharing information about the indicators of human trafficking, the investigation and prosecution of trafficking crimes, protections for immigrant victims including the U and T visas, and support services.

With support from the Ombudsman, the Council updated the *U and T Visa Law Enforcement Resource Guide* in December 2015,[25] providing federal, state, local, tribal, and territorial law enforcement officials information on how to support the investigations and prosecution of crimes involving qualified immigrant victims.[26] The updated guide includes information about U and T visa requirements and on the I-918B certification and I-914B declaration processes, best practices, answers to important and frequently asked questions from judges, prosecutors, law enforcement agencies, and other officials, and contact information for DHS personnel responsible for U and T visa issues.[27]

[23] Additional resources include indicator cards for law enforcement, first responders, or others likely to encounter victims; pamphlets on human trafficking, DHS services, and DHS programs; and cards listing contact information for the National Human Trafficking Resource Center for distribution to potential victims and vulnerable populations.

[24] In 2010, DHS established a working group dedicated to championing the mission of the White House Council on Women and Girls. In March 2013, DHS formally launched the Council on Combating Violence Against Women.

[25] Maria Odom and Heather Fong, "DHS Releases Updated Law Enforcement Resource Guide on U and T Visas," DHS Blog (Dec. 21, 2015); https://www.dhs.gov/blog/2015/12/21/dhs-releases-updated-law-enforcement-resource-guide-u-and-t-visas (accessed May 16, 2016).

[26] DHS Webpage, "U and T Visa Law Enforcement Resource Guide" (Nov. 25, 2015); https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide (accessed May 16, 2016).

[27] Louis F. Quijas and January Contreras, "Department of Homeland Security Releases U Visa Law Enforcement Certification Resource Guide" White House Blog (Jan. 3, 2012); https://www.whitehouse.gov/blog/2012/01/03/department-homeland-security-releases-u-visa-law-enforcement-certification-resource- (accessed May 16, 2016).

Key Developments and Areas of Focus

Under Section 452(c)(1)(B) of the HSA of 2002, the Ombudsman's Annual Report must include a "summary of the most pervasive and serious problems encountered by individuals and employers" seeking benefits from USCIS and other information as the Ombudsman may deem advisable. This year's Annual Report covers issues and developments in the following areas:

(1) Humanitarian

(2) Interagency, Customer Service, and Process Integrity

(3) Employment

(4) Families and Children

Humanitarian

U.S. immigration law provides humanitarian relief for immigrant victims of crime, persecution, and abuse. Despite efforts by USCIS to address the increasing number of asylum requests, applicants are experiencing longer delays. Special Immigrant Juvenile relief and in-country refugee/parole processing in El Salvador, Guatemala, and Honduras, are critical for vulnerable youth populations. The Ombudsman has engaged with stakeholders to explore measures that enhance Haitians' ability to reunite with their families. The Ombudsman continues to be concerned with ongoing processing issues with DACA applications and inconsistent processing of provisional waivers.

Asylum Backlogs and Continuing Assessment Problems

Responsible USCIS Offices: Refugee, Asylum, and International Operations Directorates

The volume of affirmative asylum cases pending at USCIS has reached well over 100,000 and continues to grow,[28] creating progressively longer processing delays for asylum applicants around the country. Sustained surges in high-priority credible and reasonable fear claims and a boom in new affirmative asylum filings are primary drivers of this backlog.[29] Despite significant efforts by the Refugee, Asylum and International Operations (RAIO) Directorate's Asylum Division to respond to this pending caseload, such as doubling the Asylum Officer corps since 2013,[30] the backlog continues to grow.

Background

USCIS' inventory of pending affirmative asylum cases has ballooned over the last 5 years. At the conclusion of FY 2011, the affirmative asylum inventory numbered 9,274 applications.[31] By December 31, 2015, that total had soared to 128,308 cases—a nearly 1400 percent increase in backlogged cases.[32] Many factors have contributed to the worsening backlog, including: (1) persistent high volumes of requests for credible and reasonable fear

[28] *See* USCIS Webpage, "Asylum Office Workload, December 2015" (Jan. 13, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_2015-12_NGO_info.pdf (accessed Feb. 29, 2016).

[29] *See* Ombudsman's Annual Report 2015, p. 59.

[30] *See* USCIS Asylum Division Quarterly Stakeholder Meeting Notes, p. 1 (Feb. 5, 2016) (the Asylum Division stated that over 400 Asylum Officers were then on staff); information provided by USCIS (Jan. 20, 2015) (the Asylum Division stated that in 2013 it had 203 Asylum Officers on staff).

[31] *See* USCIS Webpage, "Asylum Office Workload, July 2011" (Feb. 3, 2012); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/AffirmativeAsylumWorkload1.pdf (accessed May 5, 2016).

[32] *See* Asylum Office Workload, December 2015, *supra* note 28.

determinations,[33] (2) a substantial rise in new affirmative asylum applications;[34] (3) a spike in asylum applications filed with USCIS by Unaccompanied Alien Children (UACs) in removal proceedings;[35] (4) the temporary assignment of significant numbers of Asylum Officers to the Refugee Affairs Division (RAD);[36] and (5) high turnover among Asylum Officers.[37]

Credible and Reasonable Fear Claims. A large volume of credible and reasonable fear cases continues to limit the Asylum Division's capacity to direct its resources to the adjudication of pending affirmative asylum applications.[38] While requests for credible fear determinations peaked in FY 2014 at just under 50,000,[39] that total decreased only slightly to just over 48,000 in FY 2015.[40] Moreover, the number of new credible fear cases received by USCIS achieved successive record highs in the months of September, October, and December 2015, at 6,643; 6,727; and 8,641, respectively.[41]

New Affirmative Asylum Claims. Even as the Asylum Division works to adjudicate affirmative asylum cases, the volume of newly-filed affirmative asylum cases is climbing each year. USCIS received 83,197 new affirmative asylum cases in FY 2015, representing more than a 130 percent increase over new filings in FY 2011.[42]

New UAC Claims. As noted in the 2015 Annual Report, applications filed by UACs under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which take precedence in interview scheduling over most adult applications, also contributed to the affirmative asylum backlog.[43] In FY 2013, 718 cases were filed with USCIS under the TVPRA.[44] In FY 2015, that number swelled to 14,218, an almost 2,000 percent increase.[45]

Asylum Officers Temporarily Assigned to Refugee Affairs Division. The elevation of the number of refugees eligible for admission into the United States also has impacted the affirmative asylum backlog. The U.S. Government raised the cap for refugee admissions into the United States from 70,000 in FY 2015 to 85,000 in FY 2016.[46] To help meet this enhanced refugee caseload, the Asylum Division has indicated that over the course of FY 2016 it would place an estimated 200 Asylum Officers on temporary assignment to RAD, with an approximately 2-month commitment for each assignment.[47] This initiative further diminishes the resources available to the Asylum Division for targeting the affirmative asylum backlog.

Asylum Officer Turnover. A high rate of Asylum Officer turnover continues to undermine USCIS' capacity to process backlogged asylum cases. The Asylum Division reported that attrition in FY 2015 was 43 percent.[48] Such departures undercut the Asylum Division's efforts to boost the number of Asylum Officers available to adjudicate backlogged applications.

Impacts of Backlog

Pre-Interview Wait Times. As the backlog grows, so does the length of time affirmative asylum applicants

[33] *See, e.g.*, Ombudsman Annual Conference 2015, "Humanitarian Hot Topics Panel," p. 2 (Nov. 5, 2015), USCIS Webpage, "Credible Fear Workload Report Summary" (FY 2015) (PDF no longer available but is on file with the Ombudsman).

[34] *See, e.g.*, "Asylum Office Workload, December 2015," *supra* note 28.

[35] *See* USCIS Webpage, "MPA and PRL Report 10/01/14-9/30/15" (Oct. 1, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Minors_FY15.pdf (accessed Feb. 29, 2016). *See also* Ombudsman Annual Report 2015, p. 59.

[36] *See* Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30, at 2.

[37] *See* information provided by USCIS (Nov. 2, 2015).

[38] *See* Ombudsman's Annual Report 2015, pp. 59-60.

[39] USCIS Webpage, "Credible Fear and Reasonable Fear - FY 2014" (Oct. 28, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Credible_Fear_and_Reasonable_Fear_FY14_Q4.pdf (accessed Feb. 29, 2016).

[40] Credible Fear Workload Report Summary, *supra* note 33.

[41] *See* Ombudsman Annual Conference 2015, "Humanitarian Hot Topics Panel" (Nov. 5, 2015); Credible Fear Workload Report Summary, *supra* note 33. USCIS Webpage, "Credible Fear Workload Report Summary, FY 2016 Total Caseload;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY16_CF_and_RF_stats_thru_2015-12-31.pdf (accessed Feb. 29, 2016).

[42] *See, e.g.*, USCIS Webpage, "Asylum Office Workload, September 2015" (Jan. 13, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Affirmative_Asylum_Stats_2015-09.pdf (accessed May 6, 2016); *see also* information provided by USCIS (Apr. 28, 2014).

[43] *See* Ombudsman's Annual Report 2015, p. 60; USCIS Webpage, "Affirmative Asylum Scheduling Bulletin" (Apr. 25, 2016); https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (accessed May 5, 2016).

[44] USCIS Webpage, "MPA and PRL Report 10/01/12-9/30/13" (Oct. 8, 2013); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/Asylum-MinorsFY13.pdf (accessed Feb. 29, 2016).

[45] MPA and PRL Report 10/01/14-9/30/15, *supra* note 35.

[46] DOS Webpage, "Proposed Refugee Admissions for Fiscal Year 2016" (Oct. 1, 2015); http://www.state.gov/j/prm/releases/docsforcongress/247770.htm (accessed Feb. 29, 2016).

[47] *See* Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30, at 2.

[48] Information provided by USCIS (Nov. 2, 2015). The Asylum Division indicates that some of this turnover is a result of the internal promotion of Asylum Officers. *See* Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30.

Figure 2.1: Asylum Interview Wait Times

Asylum Office	Approximate wait time from filing date to interview for third priority affirmative asylum applicants scheduled for interviews in July 2015	Approximate wait time from filing date to interview for third priority affirmative asylum applicants scheduled for interviews in January 2016	Increase or decrease in approximate wait time from filing date to interview for third priority affirmative asylum applicants scheduled for interviews in July 2015 compared to January 2016
Arlington	23 Months	28 Months	+ 5 Months
Chicago	26 Months	32 Months	+ 6 Months
Houston	15 Months	20–21 Months	+ 5–6 Months
Los Angeles	47 Months	53 Months	+ 6 Months
Miami	29 Months	32 Months	+ 3 Months
Newark	27 Months	31 Months	+ 4 Months
New York	23–24 Months	19 Months	– 4–5 Months
San Francisco	24 Months	24 Months	No change

Sources: AILA Webpage, "Affirmative Asylum Scheduling Bulletin" (Aug. 7, 2015); http://www.aila.org/infonet/processing-time-reports/affirmative-asylum-scheduling-bulletins/2015/uscis-affirmative-asylum-scheduling-bulletin (accessed Feb. 29, 2016); USCIS Webpage, "Affirmative Asylum Scheduling Bulletin" (Feb. 5, 2016); https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (accessed Feb. 29, 2016).

must wait before being scheduled for asylum interviews. As discussed in the 2015 Annual Report, asylum offices currently schedule affirmative asylum interviews according to the following priorities: (1) rescheduled interviews; (2) affirmative asylum cases filed by children; and (3) all other pending affirmative asylum cases in the order they were received ("third priority" cases).[49] The *Affirmative Asylum Scheduling Bulletin* (Scheduling Bulletin), first published by the Asylum Division in August 2015 and updated monthly, shows the approximate filing dates of third priority applications currently being scheduled for interviews at each asylum office.

Stakeholders have expressed appreciation for the transparency afforded by the Scheduling Bulletin.[50] Nonetheless, as illustrated in Figure 2.1, the Bulletin underscores both the magnitude of the wait times as well as their persistent growth in nearly all asylum offices. For example, wait times for third priority applicants scheduled for interviews in January 2016 ranged from approximately 19 months at the New York Asylum Office to approximately 53 months at the Los Angeles Asylum Office.[51] Meanwhile, wait times for third priority applicants scheduled for interviews at the Houston Asylum Office in January 2016 were 5 to 6 months longer than for applicants scheduled for interviews at the same office in July 2015. The New York Asylum Office was the sole asylum office in which wait times fell during this timeframe. Data shows that for most third priority asylum applicants, interview delays are growing progressively longer.

Although the Scheduling Bulletin has helped alleviate some of the uncertainty experienced by asylum seekers, they continue to articulate disappointment and concern over the long wait times. One asylum applicant from Egypt who filed an affirmative application in 2014 submitted a request for case assistance to the Ombudsman in 2015 noting that he tried several times to get an interview date, but to no avail: "I'm ex[t]remely stressed and terrified for the saf[e]ty of my wife and children back in my native country...they now

[49] *See* USCIS Webpage, "Affirmative Asylum Scheduling Bulletin" (Apr. 25, 2016); https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (accessed May 5, 2016); Ombudsman's Annual Report 2015, pp. 59-60.

[50] *See*, *e.g.*, Ombudsman Annual Conference 2015, "Humanitarian Hot Topics Panel" (Nov. 5, 2015).

[51] The differences in these wait times among asylum offices reflect in significant part the impact of the developments noted in the "Background" section above, such as increases in TVPRA applications and requests for credible and reasonable fear determinations. For example, the Los Angeles Asylum Office adjudicates a high volume of credible and reasonable fear cases as well as many children's applications, which limit that office's resources for adjudicating third priority affirmative asylum cases. *See* Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30, at 2. Credible Fear Workload Report Summary (FY 2016), *supra* note 41. The New York Asylum Office, on the other hand, has no detention facilities in its jurisdiction and performs only a small quantity of credible fear determinations each year, meaning that it can devote a significantly higher proportion of its resources to adjudicating third priority asylum cases. *See* Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30 at 2; Credible Fear Workload Report Summary, FY 16, *supra*.

remain in dire straits because of the mounting instability of the country…."

Post-Interview Wait Times. Many stakeholders also have voiced frustration and confusion over processing delays following their asylum interviews. Such delays can stem from pending security checks, Asylum Division Headquarters review, or other circumstances.

The average length of time between "recommended approvals" (issued when USCIS finds after the interview an affirmative asylum case is approvable but for a pending FBI name check[52]) and "final approvals" of affirmative asylum cases has increased in recent years, growing from an average of 83 days for such cases completed in FY 2014 to 105 days for such cases completed in FY 2016 as of March 31.[53] Likewise, the average length of Asylum Division Headquarters review—required for certain types of affirmative asylum cases prior to the issuance of a final decision in those cases—has risen.[54] When Asylum Division Headquarters review was conducted in FY 2014, the average duration of that review was 182 days; this average dropped to 146 days in FY 2015, then rose to 239 days in the first two quarters of FY 2016.[55]

Downstream Impact: Employment Authorization Based on Pending Asylum Cases. Stakeholders also have voiced concern regarding the cost and delay associated with obtaining work authorization while asylum cases are pending.[56] Although there is no fee to file an initial Form I-765, *Application for Employment Authorization* based on a pending asylum case, each application to renew requires a fee or an accompanying request for a fee waiver.[57] Because USCIS issues EADs under this category with validity periods of only 1 year, asylum seekers often must renew their EADs multiple times (in some cases up to 4 years in a row). The current $380 EAD filing fee[58] places a significant financial burden on a vulnerable population.

An individual requesting case assistance regarding a post-asylum interview delay wrote:

As you know, the conditions in Syria [are] terrible and my wife and children are in imminent danger with bombs falling on top of them on daily basis....I can't bring them near me until I get my case result. I am sure you understand my anguish as a husband and a father of small children who are alone in a place that became a battle zone.

Regulations prescribe a processing period of 30 days for EAD applications based on pending asylum cases.[59] However, stakeholders report USCIS regularly fails to meet the 30 days, often exceeding the 90-day period currently provided for other EAD adjudications.[60] USCIS confirmed that as of October 31, 2015, the Vermont Service Center (VSC) was taking at least 110 days to process I-765s based on pending asylum applications.[61]

EAD application delays imperil asylum applicants' employment status and prospects. One asylum applicant noted, "now I'm about to face a direct impact by loosing (sic) my full-time job…due to expired EAD. This job is the only income source for family (3 small kids…) and we may experience significant hardship while waiting for EAD renewal."[62]

USCIS Response

The Asylum Division continues to take significant measures in response to the growing backlog, including: 1) hiring new asylum officers; 2) establishing new asylum sub-offices; 3) publishing the *Affirmative Asylum Scheduling Bulletin*; and 4) developing new EAD procedures.

New Hires. The Asylum Division continues to expand its officer corps to better meet the challenges of the swelling backlog. The number of Asylum Officers on staff rose from 203 in 2013 to 350 in January 2015, exceeding 400 as of February 2016.[63] Moreover, USCIS authorized the

[52] *See* USCIS Asylum Division, "Affirmative Asylum Procedures Manual (AAPM)" (November 2013), p. 23; https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf (accessed May 5, 2016).

[53] Information provided by USCIS (Apr. 20, 2016).

[54] *See* AAPM, *supra* note 52. Information provided by USCIS (Apr. 20, 2016).

[55] Information provided by USCIS (Apr. 20, 2016).

[56] Asylum applicants may apply for employment authorization when their applications have been pending for 150 days. 8 C.F.R. §§ 208.7, 274a.12(c)(8).

[57] *See Instructions for Form I-765, Application for Employment Authorization;* https://www.uscis.gov/i-765 (accessed May 5, 2016).

[58] *Id.*

[59] 8 C.F.R. § 208.7(a)(2011).

[60] 8 C.F.R. § 274a.13(d); information provided through request[s] for case assistance.

[61] AILA Webpage, "USCIS Processing Time Information for the Vermont Service Center" (Dec. 15, 2015); http://www.aila.org/infonet/processing-time-reports/vsc/2015/vsc-processing-time-report-12-15-15 (accessed Feb. 29, 2016).

[62] Information provided through request for case assistance.

[63] Information provided by USCIS (Jan. 20, 2015); Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30.

Asylum Division to increase the number of Asylum Officer positions to 533 in FY 2016, 85 more than were authorized in FY 2015.[64]

Asylum offices make hiring selections above approved staffing levels to mitigate the effects of turnover.[65] The Asylum Division has also implemented initiatives to improve retention, such as the introduction of Senior Asylum Officer positions.[66] In addition, the Asylum Division has dramatically scaled up the frequency of the RAIO Directorates' Combined Training and Asylum Division Officer Training Course, conducting trainings of 95 new Asylum Officers from January through March 2016 alone.[67]

New Asylum Sub-Offices. In recent years, the Asylum Division has created three sub-offices to assist with its rising caseloads: the Boston sub-office of the Newark Asylum Office; the New Orleans sub-office of the Houston Asylum Office; and, most recently, the Crystal City, Virginia, sub-office of the Arlington Asylum Office. The Crystal City sub-office exclusively conducts remote credible and reasonable fear adjudications, and will eventually staff up to 60 Asylum Officers, performing these adjudications for a variety of jurisdictions.[68] The Asylum Division indicated, for example, that the Crystal City sub-office will assist the Los Angeles Asylum Office with its credible and reasonable fear caseload.[69]

Change in EAD Policy. USCIS has taken steps to alleviate hardships experienced by asylum applicants in connection with EADs based on pending asylum cases. A planned change to procedures involving the Asylum EAD Clock would allow asylum applicants who relocate, resulting in a change of jurisdiction, to notice USCIS without causing their asylum EAD clocks to stop.[70] In addition, USCIS has proposed a rule change that would automatically extend the validity period of an EAD based on a pending asylum application when the applicant timely applies to renew the EAD.[71]

Ombudsman Assistance

The Ombudsman contacted USCIS asylum offices regarding both pre- and post-interview processing delays in connection with requests for assistance submitted by stakeholders. The Ombudsman also met with asylum office officials and asylum stakeholders to learn more about the impacts of the backlog.

The Ombudsman recognizes the steps taken by the Asylum Division to respond to the growing backlog. To further enhance transparency surrounding the backlog, optimize adjudicative resources, and mitigate the impacts of widening processing delays, the Ombudsman is reviewing potential recommendations to the Asylum Division and International Operations Directorate.

Central American Minors Refugee/Parole Program

Responsible USCIS Office: Refugee, Asylum, and International Operations Directorate

Tens of thousands of unaccompanied Central American children arrive at the U.S. southern border each year.[72] Facing enormous risks, many children endured serious harm during their journey north, seeking to reunite with a parent or relative in the United States.[73] USCIS and DOS established the Central American Minors (CAM) Refugee/Parole Program in 2014 to help children avoid this dangerous trip north by affording them an in-country process for safe

[64] *See* Ombudsman Annual Conference 2015, "Humanitarian Hot Topics Panel" (Nov. 5, 2015); *See* USCIS Webpage, "USCIS Processing of Asylum Cases;" http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/USCIS_Reponds_to_Humanitarian_Caseload.pdf (accessed Mar. 9, 2015) Webpage no longer available but copy is on file with the Ombudsman.

[65] Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30.

[66] Information provided by USCIS (Nov. 2, 2015).

[67] Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30.

[68] Asylum Division Quarterly Stakeholder Meeting Notes, p. 1 (Dec. 11, 2015).

[69] Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 30.

[70] *See*, *e.g.*, Ombudsman's Annual Report 2012; Ombudsman Recommendation 45, "Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication" (Aug. 26, 2011), p. 1 (description of the asylum clock); Asylum Division Quarterly Stakeholder Meeting Notes, *supra* note 68.

[71] "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Proposed Rule," 80 Fed. Reg. 81899, 81928-81929 (Dec. 31, 2015).

[72] U.S. Customs and Border Protection Webpage, "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016;" http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016 (accessed Mar. 1, 2016).

[73] "Review of the President's Emergency Supplemental Request," *before the* Senate Committee on Appropriations, 113th Cong. 2nd Sess. (2014) (statement of Secretary of Homeland Security Jeh Johnson); http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations (accessed Mar. 1, 2016).

relocation to the United States as refugees or parolees.[74] The Ombudsman addressed this important program in the 2015 Annual Report,[75] and conducted an in country assessment of CAM in May 2016 with the goal of evaluating the program's implementation and effectiveness to date.

Background

In FY 2014, CBP processed 51,705 UACs—a designation for certain minors without parental support and lawful immigration status[76]—from El Salvador, Guatemala, and Honduras.[77] This represented a 1,464 percent increase over the 3,304 such childen processed in FY 2009.[78] Although UAC apprehension rates fell in FY 2015, they rebounded sharply in the first half of FY 2016.[79]

A complex host of factors, including high levels of violence and poverty in El Salvador, Guatemala, and Honduras (the so-called Northern Triangle) causes children to flee to the United States.[80] During their dangerous journey, children continue to be vulnerable to harm and are subject to abuse and exploitation by criminal networks and other factors.[81] USCIS and DOS created CAM to provide some of these children with a safe alternative route to the United States.[82] The CAM program authorizes certain foreign national parents (Qualifying Parents) who reside in the United States to file Form DS-7699, *Affidavit of Relationship (AOR) for Minors Who Are Nationals of El Salvador, Guatemala, and Honduras* (CAM-AOR) on behalf of their children who live in El Salvador, Guatemala, or Honduras.[83] These children (Qualifying Children) may then relocate to the United States upon being approved in country for refugee or parole status.[84] Certain derivative beneficiaries may likewise qualify under CAM.[85] As of April 23, 2015, almost 5 months into the program, DOS had received only 565 CAM-AORs.[86] Less than a year later, by March 21, 2016, that figure had grown to 7,357 CAM-AORs representing 8,035 Qualifying Children and derivative beneficiaries.[87]

The vast majority of Qualifying Children, 86 percent, were located in El Salvador. Approximately 12 percent were located in Honduras and a little over 2 percent were in Guatemala.[88] By far, Temporary Protected Status (TPS) was the immigration status held by the largest percentage of petitioning Qualifying Parents—approximately 89 percent.[89] Slightly more than eight percent were submitted by legal permanent residents.[90] Other forms of lawful status held by a smaller percentage of Qualifying Parents included DACA, Deferred Action (non-DACA), parole, and withholding of removal.[91] As of March 28, 2016, however, only 144 individual beneficiaries—46 refugees and 98 parolees—had arrived in the United States through the CAM program. Of those, 93 arrived from El Salvador, 46 from Honduras and 5 from Guatemala.[92] As of March 21, 2016, 2,633 children in El Salvador, 38 in Guatemala and 175 in Honduras had not yet received a pre-screening interview.[93] A total of 1,088 children had completed prescreening, but had not received DNA testing results, and 1,143 children had not yet been interviewed to determine if they qualified for refugee or parole status.[94]

[74] USCIS Webpage, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)" (June 1, 2015); http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam (accessed Mar. 1, 2016); DOS Webpage, "In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States" (Nov. 14, 2014); http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm (accessed May 16, 2016).

[75] *See generally* Ombudsman's Annual Report 2015, pp. 72-77.

[76] HSA § 462.

[77] U.S. Customs and Border Protection Webpage, "Unaccompanied Alien Children Encountered by Fiscal Year," http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed May 16, 2016).

[78] United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, *supra* note 72.

[79] *Id.*

[80] U.S. Government Accountability Office, "Central America: Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras," GAO-15-362 (Mar. 2015) at 4-9; http://www.gao.gov/products/GAO-15-362 (accessed Mar. 4, 2016).

[81] Review of the President's Emergency Supplemental Request, *supra* note 73.

[82] In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (CAM), *supra* note 74.

[83] *Id.*

[84] In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (CAM), *supra* note 74. DOS Webpage, "In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States" (Nov. 14, 2014); http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm (accessed May 16, 2016).

[85] In Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (CAM), *supra* note 74.

[86] "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," *before the* Subcommittee on Immigration and the National Interest *of the* U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. 3 (2015) (written statement of Simon Henshaw, Principal Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State); http://www.judiciary.senate.gov/imo/media/doc/04-23-15%20Henshaw%20Testimony.pdf (accessed Mar. 1, 2016).

[87] Information provided by USCIS (Apr. 14, 2016).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

Figure 2.2: Affidavits of Relationship Processed as of March 21, 2016

Category	El Salvador		Guatemala		Honduras		Cumulative Total	
	Cases	Individuals	Cases	Individuals	Cases	Individuals	Cases	Individuals
CAM-AORs Accepted	6,082	6,505	165	168	829	886	7,076	7,559
CAM-AORs Rejected	242	413	4	9	35	54	281	476
Total AORs	6,324	6,918	169	177	864	940	7,357	8,035

Source: Information provided by USCIS (Apr. 14, 2016).

Ongoing Concerns

Length of Processing Timeframe. The current length of time for processing CAM applications poses significant risks for eligible minors in Central America, particularly those who face imminent danger.[95] Many Qualifying Children who pursue protection through CAM do so in order to escape ongoing threats of immediate harm.[96] Delays occur because domestic resettlement agencies that operate in coordination with DOS, and through which Qualifying Parents must file CAM-AORs, often lack the resources to quickly perform the associated intake and casework.[97] Once the Qualifying Parent has filed the CAM-AOR, the remaining case processing, including in-country Resettlement Support Center (RSC) prescreening, DNA testing, and USCIS adjudication, take many months, in some cases, close to a year.[98] During this time, Qualifying Children often are vulnerable to serious harm, and in a few cases have been killed during the pendency of their cases.[99] The current length of processing is a strong deterrent for eligible minors and their families who would seek protection through CAM but who feel they cannot risk remaining in country to complete the application process.[100]

Lack of Standardized Expedite Procedures and Safety Protocol. The dangerous conditions in El Salvador, Guatemala, and Honduras require that special safety and protection measures be taken to protect particularly vulnerable children seeking protection through CAM. Stakeholders report that RSCs have been responsive to requests for expedited case processing,[101] but resettlement agencies have not been provided with standardized expedite criteria and procedures by DOS and USCIS.[102] In addition, CAM currently uses a single "child protection officer" to provide additional safety measures for minor applicants.[103] The absence of systematic safeguards for particularly vulnerable children prevents the program from providing these children with a safe alternative to a cross-country passage.

Lack of Dedicated Funding. Domestic refugee resettlement agencies do not receive dedicated CAM funding, and consequently do not have resources devoted specifically to carrying out essential CAM operations. The functions vested in these agencies and their affiliates include CAM outreach and education, the provision of guidance to potentially eligible families, assistance with CAM-AOR filings, and ongoing CAM case management.[104] Resettlement agencies report that approvals for parole do not qualify for reimbursement.[105] Given that USCIS has approved a low number of CAM applications for refugee status, such reimbursement amounts have proven modest. As a result, some resettlement agency affiliates have opted out of providing CAM assistance; other affiliates can allocate only limited resources to the CAM program.[106] The consequences of such underresourcing are widely felt by the agencies and applicants alike. Lack of dedicated funding results in insufficient CAM training for affiliate staff, limited public outreach by affiliates, lengthy wait times for some eligible families even prior to filing CAM-AORs, and reduced efficiency in CAM case processing.[107]

Eligibility Criteria. The CAM eligibility criteria, while enabling thousands of deserving children to seek needed relief, does not benefit many vulnerable Central American minors who also need protection in the United States.

95 Information provided by stakeholders (from February to April 2016, the Ombudsman's Office communicated with a number of CAM stakeholder groups regarding their experience with the program, including the U.S. Committee for Refugees and Immigrants, Church World Service, International Rescue Committee, Lutheran Immigration and Refugee Service, Kids in Need of Defense, and HIAS).

96 Information provided by stakeholders.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 Information provided by DOS (May 2, 2016).

104 Information provided by stakeholders.

105 Information provided by stakeholders; information provided by DOS (May 2, 2016).

106 Information provided by stakeholders.

107 Information provided by stakeholders.

While the 7,357 CAM-AORs received by March 21, 2016[108] signal a marked increase in program participation, the sustained number of UAC arrivals from the Northern Triangle to the southern U.S. border demonstrates that broader protections are needed.[109] Stakeholders have raised concerns that the immigration statuses and categories that a Qualifying Parent must fall within to file a CAM-AOR, as well as the familial relationships contemplated by CAM, are too narrowly drawn, restricting the program's ability to reach key populations of at-risk Central American youth.[110]

For example, parents are currently the only stateside relatives who may file a CAM-AOR,[111] a policy that prevents CAM from benefitting vulnerable children in the region who lack parents living in the United States. In addition, the CAM program does not recognize U, T, or VAWA statuses as categories under which a parent in the United States is eligible to file a CAM-AOR.[112] Furthermore, although CAM permits certain biological parents who live with Qualifying Children in Central America to access the program if those parents are married to the stateside Qualifying Parents, that access is blocked if the in-country parent is not married to the Qualifying Parent, irrespective of the in-country parent's relationship to and care of the Qualifying Children.[113]

DNA Testing Costs. The upfront costs borne by Qualifying Parents for mandatory DNA testing to confirm biological relationships with their Qualifying Children deters or delays participation in the CAM program. Although DOS provides reimbursement for these fees later in the application process, after the tests have confirmed relationships, stakeholders stress that the upfront costs are prohibitive for some eligible families.[114] Families may require an extended period of time in which to acquire the needed funds,[115] prolonging a case processing timeframe that already exacerbates the risks for eligible children. The overwhelming majority of DNA test results confirm child-parent relationships. Of the 2,188 DNA results received, only 17 tests did not confirm a relationship.[116]

[108] Information provided by USCIS (Apr. 14, 2016).
[109] United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, *supra* note 72.
[110] Information provided by stakeholders.
[111] In Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (CAM), *supra* note 74.
[112] *Id.*
[113] *Id.*
[114] Information provided by stakeholders.
[115] *Id.*
[116] Information provided by USCIS (Apr. 14, 2016).

Public Awareness of CAM. Significant segments of potential Qualifying Parents in the United States and vulnerable minors in Central America are unaware of the CAM program. USCIS, together with DOS, has conducted extensive outreach in the United States to better educate the public.[117] However, due to an absence of dedicated CAM funding, resettlement agencies often lack the resources to engage in their local communities.[118] Moreover, to date, a much lower percentage of CAM applicants are located in Guatemala and Honduras than in El Salvador, raising concerns about the program's visibility in those countries.[119] In addition, stakeholders have noted that many nongovernmental organizations in the United States and Central America are unfamiliar with CAM and therefore ill-positioned to educate and assist potentially eligible parents and children.[120]

Refugee Grant Rates. In the CAM program, unlike in most refugee contexts, USCIS may consider on a case-by-case basis whether applicants denied refugee status nonetheless qualify for parole.[121] While stakeholders voice support for this two-pronged relief framework, they express concern that USCIS is not consistently receptive to valid refugee claims, particularly those based on membership in a "particular social group."[122]

Ombudsman Engagement and Recommendations

The Ombudsman has conducted extensive engagement with stakeholders and government officials in the United States and abroad in connection with the CAM program. This includes meetings with DOS' Bureau of Population, Refugees, and Migration and RAD to discuss current CAM policies and procedures. In May 2016, the Ombudsman and a team of subject matter experts visited Mexico, El Salvador, and Guatemala to learn more about CAM's implementation abroad and the dangers facing minors in the region. During this trip, the Ombudsman met with foreign governments, USCIS and DOS officials, humanitarian organizations, and at-risk youth, and also observed RSC prescreenings and USCIS interviews of CAM applicants. Upon conclusion of this comprehensive engagement and study of CAM, and in response to the concerns addressed earlier in this section, the Ombudsman anticipates issuing an assessment and recommendations pertaining to the program's operational structure and effectiveness under current eligibility requirements.

[117] Ombudsman's Annual Report 2015, pp. 76-77.
[118] Information provided by stakeholders.
[119] *Id.*
[120] *Id.*
[121] In Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (CAM), *supra* note 74.
[122] Information provided by stakeholders.

The Haitian Family Reunification Parole Program

Responsible USCIS Office: Refugee, Asylum and International Operations Directorate

USCIS launched the Haitian Family Reunification Parole (HFRP) program in 2014 to speed the reunification of Haitian families, boost remittances critical to the Haitian economy, and promote safe migration from Haiti to the United States.[123] While lauding the establishment of HFRP, stakeholders have expressed concerns that too few Haitians are eligible for the program and face obstacles impeding realization of the program's goals.

Background

HFRP authorizes certain Haitian beneficiaries of an approved Form I-130, *Petition For Alien Relative,* to enter the United States as parolees while awaiting availability of their immigrant visas.[124] The DOS National Visa Center (NVC) initiates the HFRP application process by sending invitation letters to I-130 petitioners, prioritizing petitioners whose relatives in Haiti are an estimated 18 to 30 months from becoming eligible to receive immigrant visas.[125] A USCIS service center conditionally approves or denies the submitted HFRP applications, sending conditionally approved applications to the USCIS Port-au-Prince Field Office.[126]

Initially, USCIS aimed to interview roughly 5,000 HFRP beneficiaries each year.[127] As of December 31, 2015, the NVC had mailed 7,634 HFRP invitations, which identified 14,099 beneficiaries eligible to participate in the program.[128] By that same date, USCIS had accepted 3,789 HFRP applications from petitioners.[129] Of those, USCIS issued final approvals to only 432, and denied 158; 3,199 accepted applications had not yet received final decisions.[130] On June 6, 2016, USCIS announced it had issued a third round of HFRP invitations to eligible petitioners.[131]

Ongoing Concerns

Stakeholders have voiced concern over the limits of HFRP's current scope, centering on the modest number of beneficiaries made eligible for HFRP relative to the total number of Haitians awaiting immigrant visa numbers. The 14,099 identified beneficiaries constitute roughly 12 percent of the 119,685 family-sponsored Haitian beneficiaries awaiting visa availability as of November 1, 2015.[132]

For some potential participants the filing fees are prohibitive; others do not perceive that the benefits of entering the United States faster by a few months outweigh the lower cost of consular processing.[133] An individual who seeks parole through HFRP must pay $1,810 in filing fees to apply for work authorization and to adjust to permanent resident status.[134] In contrast, the fees to consular process abroad, subsequently entering the United States as a permanent resident are less than half the amount at $610.[135] Stakeholders note that this $1,200 difference is compounded for families that include more than one beneficiary, resulting in potential program participants opting out of HFRP.[136] For the latter, the choice of waiting to consular process because of prohibitive filing costs means continued separation from family members, and challenging conditions in Haiti.

Stakeholders suggest beneficiaries with a significantly longer wait would benefit from the advantages HFRP offers, including a longer period to earn the income needed to

[123] "Implementation of Haitian Family Reunification Parole Program," 79 Fed. Reg. 75581, 75581-82 (Dec. 18, 2014).

[124] USCIS Webpage, "The Haitian Family Reunification Parole (HFRP) Program" (Jul. 7, 2015); http://www.uscis.gov/HFRP#Eligibility for HFRP (accessed Mar. 2, 2016).

[125] Implementation of Haitian Family Reunification Parole Program. 79 Fed. Reg. at 75583.

[126] USCIS Webpage, "Number of Haitian Family Reunification Parole (HFRP) Program Applications as of December 31, 2015;" https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/HFRP_performancedata_fy2016_qtr1.pdf (accessed Mar. 25, 2016).

[127] Implementation of Haitian Family Reunification Parole Program. 79 Fed. Reg. at 75583.

[128] Number of HFRP Program Applications as of December 31, 2015, *supra* note 126.

[129] *Id.*

[130] *Id.*

[131] USCIS Email, "USCIS Message: Haitian Family Reunification Parole (HFRP) Program" (June 6, 2016) (copy on file with the Ombudsman).

[132] DOL Webpage, "Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2015" https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf (accessed Mar. 2, 2016); *see also* information provided by stakeholders (Feb. 19, 2016).

[133] Information provided by stakeholders (Feb. 19, 2016).

[134] HFRP Program, *supra* note 124. (the $1,810 total includes the $360 fee for Form I-131, *Application for Travel Document*, the $380 fee for Form I-765, *Application for Employment Authorization*, and the $1,070 fee for Form I-485, *Application to Register Permanent Residence or Adjust Status* and accompanying biometrics. The $1,810 figure does not include other potential associated costs).

[135] USCIS Webpage, HFRP Program, *supra* note 124. (the $610 figure includes the $325 Immigration Visa Application Processing Fee, the $120 fee for DOS' review of the Affidavit of Support, and the $165 USCIS Immigrant Visa Fee. The $610 figure does not include other potential associated costs).

[136] Information provided by stakeholders (Feb. 19, 2016).

pay adjustment of status fees. For this reason, and due to the concerns regarding the current scope of the program, stakeholders have urged the expansion of HFRP to include beneficiaries with expected visa eligibility dates beyond the current limit, proposing 4 to 5 years instead of 3 years.[137]

Finally, stakeholders point out some HFRP invitees have not provided USCIS and the NVC with updated mailing address information.[138] As a result, these petitioners may not have received their invitations, leaving beneficiary relatives unaware they can benefit from the program.[139] Engagement with the Haitian community, especially those present in the United States, should continue to reiterate the importance of maintaining a current address for each petition filed with USCIS, particularly after the petition has been approved and they await a current priority date.

The Ombudsman has monitored the program's implementation and conducted engagement with HFRP stakeholders during the reporting period. The Ombudsman will continue to track HFRP's progress and explore potential measures to strengthen the number of beneficiaries benefitting from the program, including allowing beneficiaries with priority dates further out to qualify. Continued outreach to the affected community both in the United States and in Haiti would help ensure that petitioners' mailing addresses are current and those potentially eligible for the program receive timely notice.

The Deferred Action for Childhood Arrivals Program

Responsible USCIS Office: Field Operations and Service Center Operations Directorates

Background

Implemented in late 2012, DACA has allowed approximately 723,282 recipients to live and work in the United States without fear of removal.[140] USCIS has approved 502,018 applications renewing the ability of DACA recipients to remain and work in the United States since Jun 2014.[141]

[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Information received from USCIS (Apr. 14, 2016).
[141] *Id.*

The number of renewal applications filed with USCIS declined during the 2016 reporting period.[142] As a result, the related requests for case assistance to the Ombudsman have similarly fallen. However, issues remain in the processing of DACA applications—problems that are likely to continue during the upcoming renewal surge in the coming months.[143]

Ongoing Concerns

Impact of Travel on DACA Adjudications. In this reporting period, the Ombudsman received requests for case assistance involving NOIDs and denials issued to DACA renewal applicants based on USCIS' conclusion that applicants impermissibly traveled outside an approved advance parole period.[144] USCIS issues travel documents to eligible DACA recipients who wish to travel outside the United States for humanitarian, educational, or employment purposes.[145] A travel document includes a "date issued" as well as an end date, representing the validity period for travel abroad. USCIS typically produces the travel document several weeks in advance of the "date issued" indicated on the advance parole document, and it requires that individuals travel after the "date issued" and return before the end date on the travel document.[146]

The requests for case assistance submitted to the Ombudsman during the reporting period generally involved travel outside the United States by DACA recipients who received the approved advance parole document but left a few days before the "date issued" because they were not aware of the significance of that date. The advance parole document does not make it clear that the "date issued," noted in the upper right corner, is associated with the document's validity for travel. In most cases, the "date issued" has no correlation to the actual date of issuance.

[142] Information received from USCIS (Apr. 14, 2016).
[143] As we finalized this Report, the U.S. Supreme Court issued its decision in *U.S. v. Texas,* 579 U.S. ___ (June 23, 2016), leaving the court of appeals ruling in place and prohibiting implementation by DHS of the Deferred Action for Parents of American and Lawful Permanent Residents program (DAPA) and the expansion of the DACA program. The current DACA policy, however, remains in place.
[144] Information provided through requests for case assistance.
[145] USCIS Webpage, "Frequently Asked Questions" (June 15, 2015) (last reviewed/updated Mar. 2016); https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Mar. 25, 2016) (Question 57: "Generally, USCIS will only grant advance parole if your travel abroad will be in furtherance of: humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative; educational purposes, such as semester-abroad programs and academic research; or employment purposes such as overseas assignments, interviews, conferences or, training, or meetings with clients overseas").
[146] "Instructions for Application for Travel Document" (Form 1-131) (Jan 22, 2016); https://www.uscis.gov/sites/default/files/files/form/i-131instr.pdf (accessed May 20, 2016).

Affected customers reported they travelled in good faith, with the advance parole document in hand.[147] A reasonable person could conclude that travel after receipt of the advance parole document is permissible, irrespective of the "date issued."

To highlight the significance of the "date issued," the Ombudsman recommends that USCIS:

- Engage with the public to ensure DACA grantees understand the importance of advance parole issue and end dates;
- Add clarifying instructions to the Form I-131, *Application for Travel Document* and the advance parole approval notice;
- Redesign the advance parole document (I-512) to make the permissible period of travel clearer; and
- Revise the language in the DACA FAQs to highlight the importance of traveling within the approved period of an advance parole.[148]

Denials and Lack of Review. USCIS does not have an appeal process or option for a motion to reopen or reconsider DACA denials. Individuals may request review of a denial decision through the Service Request Management Tool (SRMT) process if they can demonstrate the denial involves one of the eight administrative errors listed in the DACA FAQs.[149] A vast majority of DACA denial requests for case assistance submitted to the Ombudsman do not involve one of these eight administrative errors and are therefore not reviewable through the SRMT process.

During this reporting period, the Ombudsman received 59 requests for case assistance that sought reconsideration of DACA denials. Most of these inquiries pertained to certain eligibility criteria (current enrollment in school, completion of an eligible educational program, or continuous residence) and denials based on criminal arrests or convictions.

Applicants whose applications are denied for failure to meet the education requirement receive denial notices stating that they have not shown enrollment in or completion of an educational program.[150] This general denial language can be confusing to applicants because it does not acknowledge USCIS' review of the evidence submitted in support of the educational requirement. For example, USCIS may deny an application despite receiving a diploma because it does not recognize the educational institution as an eligible accredited institution.[151] In the absence of clear-cut explanatory language in the denial letter indicating why the evidence submitted is insufficient, applicants are unable to determine the underlying cause of the denial and make informed decisions about the steps required to refile successfully. USCIS can address this issue by adding case specific language to denials addressing why the evidence was deficient and did not meet the education requirement.

The Ombudsman also received requests for case assistance from applicants who were unable to show continuous presence since June 15, 2007 because the documentary evidence was unavailable or the affidavits they provided were insufficient according to USCIS. In particular, homeless, abused, or abandoned youth are at a disadvantage in showing continuous presence due to lack of access to documentary evidence.

In addition, several cases assistance requests involved denials based on criminal arrests or convictions. A subset of these cases involved denials based on the applicants' failure to provide court dispositions for juvenile criminal records. Denials for failure to provide court dispositions are problematic because some states prohibit the disclosure of juvenile records, making it impossible for the applicant to comply.[152]

Recommendation

The Ombudsman continues to recommend that USCIS offer the option of a substantive review of denials based on grounds other than the administrative errors listed in the DACA FAQs. This would provide an opportunity to present reasons why the adjudication was incorrect and how the application warrants a favorable exercise of discretion. A robust review process will increase consistency in adjudications and afford eligible undocumented youth better access to DACA.

[147] Information provided through requests for case assistance.

[148] Letter from the Ombudsman to Alejandro Mayorkas, Deputy Secretary of Homeland Security (Jul. 15, 2015) (copy on file with the Ombudsman).

[149] Frequently Asked Questions, *supra* note 145 (Question 25).

[150] Information provided through requests for case assistance.

[151] *See generally,* Frequently Asked Questions, *supra* note 145 (Questions 33-40).

[152] States vary considerably in the extent to which a juvenile record can be disclosed, viewed, copied, and shared. *See, e.g.,* California Welfare & Institutions Code § 827.9 ("Confidentiality is necessary to protect those persons from being denied various opportunities, to further the rehabilitative efforts of the juvenile justice system, and to prevent the lifelong stigma that results from having a juvenile police record.")

Provisional Waivers

Responsible USCIS Office: Field Operations Directorate

The Provisional Unlawful Presence Waiver (Provisional Waiver) preserves family unity, allowing qualified applicants to remain in the United States with their families while USCIS determines eligibility for waivers of the 3-year and 10-year unlawful presence bars.[153] From April 1, 2015 through December 31, 2015, USCIS received 36,794 provisional waiver applications and issued 26,258 approval notices, 7,702 denial notices, and 11,435 RFEs. It also reopened 294 requests that were previously denied.[154] During this period, USCIS adjudicators provided more detailed explanations in RFE and denial letters,[155] particularly when denials were based upon a "reason to believe" the applicant was subject to another ground of inadmissibility or failed to meet the extreme hardship requirement.[156] The Ombudsman has observed, however, that USCIS continues to deny valid waiver applications by inconsistently applying the preponderance of the evidence standard when evaluating all of the extreme hardship evidence presented by the applicant. As a result, the Ombudsman supports USCIS' efforts to finalize guidance setting forth clear extreme hardship standards.

[153] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546. INA § 212 (a)(9)(B)(i)(I), commonly known as the 3-year bar, refers to the time an individual is barred from returning to the United States. The 3-year bar is triggered by 180 days or more of unlawful presence and a departure from the United States, followed by seeking readmission. INA § 212(a)(9)(B)(i)(II), commonly known as the 10-year bar, is triggered by 1 year or more of unlawful presence and a departure from the United States, followed by seeking readmission.

[154] Information provided by USCIS (Apr. 6, 2016). Although requested, USCIS did not provide data for the number of receipt, approval, RFE, or reopening notices issued during the current reporting period. USCIS did provide data for the number of denials issued between April 1, 2015 and March 12, 2016, which is outlined in Figure 2.3.

[155] The lack of detail in RFEs and summary denials was discussed in some detail in the Ombudsman's Annual Report 2015, pp. 23-24.

[156] USCIS categorizes extreme hardship to the qualifying relative under five groups: health-related factors, financial considerations, education-related factors, personal considerations, and special factors. However, "extreme hardship" is not defined in the statute or the regulations and has not been defined by the federal courts. USCIS states it "will consider all factors and supporting evidence that an applicant submits" to make a determination on the provisional waiver application. *See* "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535, 551 (Jan. 3, 2013). *See generally* DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Feb. 9, 2016).

Background

USCIS implemented the Provisional Waiver program on March 4, 2013 to reduce family separation for certain immediate relatives who can demonstrate "extreme hardship" to a U.S. citizen spouse or parent and do not have any grounds of inadmissibility other than unlawful presence as defined in section 212(a)(9)(B) of the Immigration and Nationality Act (INA).[157] All Forms I-601A, *Application for Provisional Unlawful Presence Waiver*, are filed and adjudicated at the National Benefits Center (NBC) to allow for uniform adjudication and coordination with the DOS once the waiver is approved.[158]

USCIS Proposed Rule. On July 22, 2015, in response to Secretary Johnson's memorandum directing the agency to expand the Provisional Waiver program,[159] USCIS published a proposed rule to amend the 2013 regulation to allow all individuals statutorily eligible for the unlawful presence waiver who can establish extreme hardship to any qualifying relative to participate in the program.[160] The proposed rule also would expand the provisional waiver to the spouse and child of legal permanent residents if the qualifying relative(s) would experience extreme hardship due to separation from or relocation with the applicant. USCIS received 641 comments by the close of the comment period (September 21, 2015).[161] The agency is in the process of reviewing and responding to these comments as it drafts the final rule, which was scheduled for publication in spring 2016.[162]

USCIS Draft Policy Guidance. On October 7, 2015, in response to the November 2014 directive from Secretary Johnson,[163] USCIS issued draft guidance pertaining to the

[157] Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule, 78 Fed. Reg. at 535.

[158] This process is consistent with the centralized processing of Forms I-601, which was one of the recommendations made by the Ombudsman in 2010. *See* Ombudsman's Recommendation 45, "Processing of Waivers of Inadmissibility" (June 10, 2010). *See also* Ombudsman Recommendation Update: USCIS Processing of Waivers of Inadmissibility (Dec. 7, 2011).

[159] Expansion of the Provisional Waiver Program, *supra* note 156.

[160] "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility," 80 Fed. Reg. 43338 (July 22, 2015).

[161] Federal eRulemaking Portal Web page, www.regulations.gov; Docket ID USCIS-2012-0003-3771 (accessed Feb. 19, 2016).

[162] Current Unified Agenda and Regulatory Plan, Fall 2015, "DHS/USCIS Final Rule: Expansion of Provisional Waivers of Unlawful Presence Waivers of Inadmissibility," http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1615-AC03; Ombudsman's Annual Conference 2015.

[163] Expansion of the Provisional Waiver Program, *supra* note 156.

"extreme hardship" standard for public comment.[164] The draft guidance provides factors the agency will consider when making an extreme hardship determination,[165] as well as a list of special circumstances that "strongly suggest extreme hardship."[166] The draft policy specifies that extreme hardship determinations are to be made based on the totality of the circumstances, rather than any one factor, and that the grant of the waiver is a matter of discretion.[167] The draft guidance also incorporates a significant change taken from USCIS' proposed rule that the qualifying relative would need to prove extreme hardship due to separation from or relocation with the applicant, or both.[168] As this Report is being finalized, the draft guidance has not been issued in its final form.

Ongoing Concerns

Since USCIS implemented the Provisional Waiver program 2 years ago, the Ombudsman has received over 300 requests for case assistance; the last reporting period saw a 92 percent increase in requests. Of the requests received during the 2016 reporting period, 55 percent involved substantive issues such as "extreme hardship" denials; "reason to believe" denials on grounds other than unlawful presence, including fraud and smuggling grounds; and USCIS applying a standard higher than preponderance of the evidence.[169] USCIS has taken the position it will not reconsider I-601A denials where information in its databases indicate applicants committed fraud or were apprehended for smuggling.[170] USCIS has also taken the position that an applicant who re-entered the United States after previously accruing unlawful presence, even if the applicant was a minor when the prior unlawful presence was accrued, is subject to the previous violator bar under INA section 212(a)(9)(C).[171] In addition, the Ombudsman has noticed an increase in requests for case assistance due to I-601A applications pending outside posted processing times.[172] USCIS reported a substantial increase in processing times from 3 months in December 2015 to 5 months in February 2016.[173]

During the reporting period, the Ombudsman received over 20 requests for case assistance where USCIS denied I-601A applications because the DOS system did not reflect payment of the immigrant visa fee, even where the applicant submitted a copy of the DOS fee payment receipt to USCIS with the application.[174] It was later determined that the DOS system accidentally deleted payment records for a number of applications during the summer of 2015, and USCIS stated it would identify and reopen these cases.[175] USCIS has not yet disclosed whether it has notified all of the identified applicants or their legal representatives of the error and reopened their applications. In cases where the Ombudsman intervened, USCIS is reviewing and

Request for Case Assistance: Denial based on failure to establish continuous residence

A 24 year-old applicant entered the United States in 2005 and submitted a DACA application in March 2015 with numerous documents demonstrating her continuous presence, but did not have documents demonstrating her presence for one year due to abusive circumstances (resulting in her not working or going to school). In response to an RFE, the applicant submitted a declaration explaining the extenuating circumstances during that year and why she was unable to provide documentation for this period of time. In addition to her own statement, the applicant submitted two declarations from friends stating that they had visited with the applicant during 2009. Nonetheless, despite the Ombudsman's intervention, USCIS denied the DACA application and declined to reopen it.

[164] Draft USCIS Policy Manual, Volume 9: Waivers Part B: Extreme Hardship (Oct. 7, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Policy%20Review/DRAFT_Extreme_Hardship_Policy_Manual_Guidance_for_public_comment.pdf (accessed Feb. 9, 2016).

[165] *Id.* (USCIS lists the following factors and considerations for extreme hardship: family ties and impact, social and cultural impact, economic impact, health conditions and care, and country conditions. USCIS notes that this list is not exhaustive).

[166] *Id.* (Special circumstances include (1) Qualifying Relative (QR) previously granted asylum or refugee status; (2) QR or related family member's disability; (3) QR's active duty military service; (4) DOS warnings against travel to or residence in certain countries; and (5) substantial displacement of care of applicant's children).

[167] *Id.* at 26-28.

[168] *Id.*

[169] Information provided through requests for case assistance. USCIS has denied applications where applicants had minor criminal arrests or convictions for minor offenses. Ombudsman's Annual Report 2014, p. 11.

[170] Information provided through requests for case assistance.

[171] Information provided through requests for case assistance.

[172] *Id.*

[173] USCIS Processing Times posted on December 22, 2015 and March 14, 2016.

[174] Information provided by American Immigration Lawyers Association (AILA) and requests for case assistance (Nov. 9, 2015). AILA also presented to USCIS 14 cases that USCIS improperly denied due to failure to pay the immigrant visa fee. USCIS agreed to reopen all of these cases. Information provided by USCIS (Dec. 7, 2015). USCIS identified a total of 4,706 I-601A applications that were denied and affected by the DOS fee issue since 2013. Of the 4,706, USCIS stated it improperly denied 186 applications due to the immigrant visa fee issue with the DOS system and that it is in the process of retrieving the files to issue reopening notices where appropriate.

[175] Information provided by USCIS (Dec. 7, 2015).

Figure 2.3: I-601A Denials Issued between April 1, 2015 and March 12, 2016

Denial Grounds	Total	Percent by Type
Total	**9,189**	
Abandonment Denial	641	7.28%
Administratively Closed	340	3.92%
Denied—Discretion	2	0.02%
Denied—In Removal Proceedings	114	1.28%
Denied—May Be Subject to Additional Grounds of Inadmissibility	2,929	32.92%
Denied—No Approved Immediate Relative or Widow(er) Petition	145	1.70%
Denied—No Extreme Hardship to Spouse or Parent	3,999	41.45%
Denied—No Qualifying Relative	305	3.42%
Denied—Other	206	2.08%
Denied—Pending Adjustment of Status	24	0.29%
Denied—Prior I-601A	0	0.00%
Denied—Scheduled Interview Prior to January 3, 2013	8	0.08%
Denied—Subject to Final Removal Order	433	5.04%
Withdrawn	45	0.53%

Source: Information provided by USCIS (Apr. 6, 2016).

reopening applications that meet qualifying criteria for further adjudication.[176]

The Ombudsman recognizes the determination of whether the identified hardships are "extreme" requires a case-by-case evaluation of all evidence and the totality of the circumstances. It is the adjudicator who affords weight to the evidence and makes a discretionary decision. A review of the requests for case assistance received this reporting period, however, show inconsistencies in USCIS' application of the preponderance of the evidence standard regarding the requirement of extreme hardship. Without a formal appeal process, many applicants turn to the Ombudsman for assistance seeking further review of waiver applications.

USCIS has also denied applications on the "reason to believe" ground without providing a detailed explanation for the decision. Currently, the only option to obtain this information is to file Freedom of Information Act (FOIA) requests. The request must be filed not only with USCIS, but also CBP, ICE, FBI, and DOS to determine whether the applicant's record contains any evidence that would give USCIS a reason to believe the applicant may be subject to another ground of inadmissibility, such as prior unlawful entries, fraud, or apprehensions. USCIS should issue clear decisions delineating the specific incident or issue that led to the denial on the basis it had "reason to believe" the applicant is subject to additional grounds of inadmissibility. Templated denials do not provide adequate notice to applicants or a fair process to adequately address issues of ineligibility.

Expansion of the provisional unlawful presence waivers is a significant aspect of executive action. The Ombudsman welcomes the proposed regulatory amendments to expand the program to all statutorily eligible applicants, and the draft policy guidance clarifying factors and special circumstances to consider when determining extreme hardship, and will monitor I-601A adjudications as USCIS officers are trained to implement its final rule and policy guidance. The Ombudsman also continues to urge USCIS to give applicants the option to file Motions to Reopen/Reconsider or appeal denials of provisional waiver requests, which is essential to achieving full program integrity through a review of errors of law, interpretation of facts, application of relevant policy, and inconsistencies in the agency's exercise of discretion.

[176] Information provided through requests for case assistance.

Recommendation Update: Special Immigrant Juveniles

Responsible USCIS Offices: Field Operations Directorate, Office of Policy and Strategy, and Office of Chief Counsel

For more than 25 years, the Special Immigrant Juvenile (SIJ) program has protected vulnerable youth in the United States who would be at risk if returned to their country of nationality or residence.[177] The program relies on the "best interests of the child" standard to protect children who cannot be reunified with one or both parents as a result of abuse, neglect, abandonment, or a similar basis under state law.[178] Congress has entrusted state courts to make these determinations[179] while acknowledging only DHS can issue immigration benefits.[180]

SIJ is a complex benefit adjudication that has undergone substantial statutory changes, which now supersede existing regulations.[181] State courts play an important role in the SIJ adjudication process by establishing requisite findings under state law. After the state court issues an order, USCIS grants or denies SIJ immigration benefits.[182]

In response to concerns and requests for assistance received from the public, on December 11, 2015, the Ombudsman issued a second formal recommendation on the SIJ program.[183] The recommendation focused largely on USCIS' practice of requesting evidence to review the state court process and findings before the agency will consent to SIJ status.[184] Specifically, the recommendation addressed the USCIS practice of reviewing underlying facts of abuse, abandonment, neglect—evidence that has already been evaluated by a state court—as well as drafting legal opinions determining whether courts have exercised their jurisdiction properly. The Ombudsman's recommendation also discussed the disproportionate weight USCIS applies to forms completed during CBP intake procedures,[185] burdensome RFEs, and interviews that are not age-appropriate.

The Ombudsman recommended that USCIS: (1) centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations; (2) take into account the best interests of the child when applying criteria for interview waivers; (3) issue final SIJ regulations that fully incorporate all statutory amendments; and (4) interpret the consent function consistently with the statute by according greater deference to state court findings.[186]

Since the release of the Ombudsman's recommendation, concerns regarding how USCIS is exercising its "consent" authority remain. In addition to concerns covered by the recommendation, the Ombudsman has received reports USCIS is not granting consent if state courts issued orders that appear limited in timeframe or are continued for subsequent hearings, or are in any way "temporary."[187] State courts issue temporary orders that allow them to monitor the progress of minors, rehabilitation of parents, or to appoint care-givers and potential custodians to care for the minors.[188] The temporary nature of the state court order is not relevant to the factual findings supporting an SIJ petition. Those findings—abuse, abandonment, neglect, or similar behaviors that occurred and prevented a child from reunifying with a parent(s)—are not temporary in nature as they occurred at a fixed time in the past. The appointment of temporary guardians and custodians pursuant to these findings of fact should not invalidate the state court order supporting SIJ eligibility.

USCIS has communicated that temporary orders generally are not sufficient for SIJ purposes, relying on a statutory

[177] *See* Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J), 104 Stat 4978 (Nov. 29, 1990).

[178] INA § 101(a)(27)(J)(i),(ii) (setting forth the requirements for the SIJ classification).

[179] INA § 101(a)(27)(J)(i),(ii); H.R. Conf. Rep. 105-405, at 130 (Nov. 13, 1997).

[180] *See* INA § 101(a)(27)(J)(iii).

[181] Congress amended the SIJ classification under the TVPRA. SIJ regulations have not been updated since 1993. "Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule," 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993).

[182] *See* INA § 101(a)(27)(J)(iii).

[183] Ombudsman Recommendation 59, "Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications" (Dec. 11, 2015). The Ombudsman released a previous formal recommendation on the SIJ program in 2011, Ombudsman Recommendation 47, "Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices" (Apr. 15, 2011).

[184] The Secretary of DHS, through USCIS, must "consent … to the grant of special immigrant juvenile status[.]" INA § 101(a)(27)(J)(iii).

[185] During the processing of individuals immediately after their apprehension, CBP officers complete a form titled "Record of Deportable/Inadmissible Alien" (Form I-213). Through stakeholder engagements and requests for assistance, the Ombudsman has learned that the vulnerable state of children when they are interviewed after apprehension, often in a detention setting, has contributed to errors on the forms. In addition, stakeholders have shared that USCIS accords significant weight to information on these forms and if the information on the form differs from accounts children later give to a judge or USCIS, this information may be considered an indicator of fraud.

[186] Ombudsman Recommendation 59, "Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications" (Dec. 11, 2015).

[187] Information received from stakeholders.

[188] Ombudsman interviews with state court judges and attorneys.

Figure 2.4: Top 5 Offices for SIJ Receipts, RFEs, NOIDs, and Denials
(Oct. 1, 2013 to May 27, 2015)

Total Receipts		Total RFEs***		Total NOIDs***		Total Denials	
New York**	(432)	San Antonio	(266)	Charlotte	(66)	New York*	(107)
Atlanta	(305)	Washington	(63)	San Antonio	(25)	Newark	(50)
San Antonio	(247)	Harlingen	(36)	Chicago	(10)	Charlotte	(47)
Dallas	(240)	Kansas City	(17)	New York**	(12)	Harlingen	(45)
Baltimore	(232)	Norfolk	(12)	Los Angeles****	(10)	San Antonio	(27)

**Cumulative total from 3 field offices that share overlapping jurisdictions (New York, Long Island, and Queens)
***199 RFEs and 105 NOIDs did not have an identifiable field office
**** Cumulative total from 3 field offices that share overlapping jurisdictions (Los Angeles, Los Angeles County, and Santa Ana)

Source: Information provided by USCIS, May 29, 2015.

provision that expanded protections for UACs.[189] The provision upon which USCIS is relying states that departments, state agencies, and individuals appointed by courts and "acting in loco parentis, shall not be considered… legal guardian[s]."[190] USCIS has interpreted this language to mean that temporary court orders are not sufficient for SIJ purposes because short-term court-appointed caregivers should not be regarded as legal guardians.[191] USCIS' interpretation of temporary legal guardians, even if not intended, may extend to bar UAC-based protections to all children under court orders that grant short-term custody to the U.S. Government,[192] a foster home, or any legal guardian, out of necessity due to abuse, abandonment, neglect, or a similar risk under state law. The agency's treatment of temporary orders, if continued, limits the reach of the SIJ program in ways Congress did not intend.[193]

In May 2016, the Ombudsman requested that USCIS amend posted educational materials for state court judges and child welfare professionals to remove language stating temporary orders generally would not be sufficient. USCIS added language explicitly stating the important role of the juvenile court in the applications process and further clarified what supporting documentation USCIS requires to support the application.

On April 22, 2016, the Ombudsman received USCIS' response to its December 2015 recommendations regarding aspects of the SIJ program.[194] USCIS accepted the Ombudsman's recommendation to centralize adjudication of SIJ petitions and SIJ-related adjustment applications at the NBC.[195] The Ombudsman has requested a review of USCIS training materials being developed for centralized SIJ adjudicators and will continue to monitor the implementation of this important change. USCIS stated that numerous offices and directorates in addition to the Fraud Detection and National Security Division (FDNS) are providing input on interview waiver criteria, specifically mentioning the Office of Policy and Strategy and the Office of Chief Counsel.[196] We presume the contributions of these other offices will be weighed and prioritized evenly with the interests of FDNS. In response to a call for updating the regulations implementing SIJ, USCIS explained that the process is ongoing but anticipates it will issue policy guidance later in 2016 to clarify and consolidate SIJ policies in the short term.[197]

[189] Information provided by stakeholders, including RFEs and NOIDS citing TVPRA.

[190] TVPRA § 235(d)(5).

[191] Information provided by stakeholders, including RFEs and NOIDs citing TVPRA.

[192] The U.S. Department of Health and Human Services (HHS) has statutory authority and responsibility over the care and custody of unaccompanied immigrant children. *See* 6 U.S.C. § 279.

[193] The definition of an unaccompanied immigrant child includes a child who has "no parent or legal guardian in the United States." 6 U.S.C. § 279(g)(C)(i). USCIS appears to rely on this language to exclude SIJ petitioners with temporary orders because custodians "acting in loco parentis, shall not be considered a legal guardian for purposes of this section [§ 235 of the TVPRA] or § 462 of the Homeland Security Act of 2002 (6 U.S.C. § 279)." By referencing § 235 of the TVPRA and 6 U.S.C. § 279, Congress preserved the ability for minors to fit within the definition of UAC and qualify for the care and protection of HHS. Congress also preserved the UAC protections of TVPRA § 235 in its entirety, rather than exclude children with temporary guardians from a subsection of vital SIJ protections.

[194] USCIS Response, "Response to Recommendations on Special Immigrant Juvenile Adjudications" (Apr. 19, 2016); https://www.dhs.gov/sites/default/files/publications/USCIS%20Reponse%20to%20CISOMB%20SIJ%20Recommendation%20R.pdf (accessed June 13, 2016).

[195] *Id.*

[196] *Id.* With respect to this recommendation, the Ombudsman notes that USCIS misstated the Ombudsman's discussion of FDNS' role. The Ombudsman did not assume that FDNS was the only component developing interview waiver criteria, only that FDNS' input should not be prioritized over other components. The Ombudsman reiterates that recommendation here.

[197] *Id.*

While it is encouraging that USCIS is continuing to move toward centralizing SIJ adjudications and finalizing regulations implementing the program, the agency failed to acknowledge other needed changes, such as the manner in which it exercises its consent authority. As a result, USCIS will continue to exercise its consent authority in ways that yield confusion, cause adjudication delays, and result in contentious denials. USCIS also did not respond to the Ombudsman's recommendation regarding interview techniques in the SIJ context. As a result, the agency has missed an opportunity to commit to age-inappropriate interviewing techniques.

Further complications for the SIJ program were announced on April 12, 2016, when the DOS issued the May 2016 *Visa Bulletin*.[198] The EB-4 category, where SIJ visa numbers are located, retrogressed for applicants from El Salvador, Guatemala, and Honduras.[199] This meant no visa numbers would be available for SIJ applicants from those countries whose applications for adjustment of status were received after January 1, 2010.[200] Though some SIJ applicants were able to submit Form I-485, *Application to Register Permanent Residence or Adjust Status* before the end of April, all adjustment applicants must wait for new visa numbers to become available before adjusting to permanent resident status through the SIJ program.

The inability to file to adjust status presents enormous challenges for this population of children. Without a permanent resident card or a pending application for a permanent resident card, they lack, among other things, an important form of identification, the ability to work (for those old enough to do so), and a sense of stability. In addition, these particularly vulnerable children may be subject to removal. These severe consequences call for USCIS to provide assurance that children with approved Forms I-360, *Petition for Amerasian, Widow(er), or Special Immigrant* will not be subject to immigration enforcement and will have access to employment authorization while they wait for visa numbers to become available again.

The Ombudsman will continue monitoring USCIS' centralization of SIJ adjudications, training of staff, development of interview waiver criteria, compliance with statutory processing times,[201] and release of regulations, policies and practices for granting consent. In addition, the Ombudsman will continue engaging with stakeholders locally and nationally to learn more about these issues and the impact of visa retrogression on this vulnerable population.

[198] "Visa Bulletin For May 2016," DOS Webpage (Apr.12, 2015); https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-may-2016.html (accessed May 4, 2016).

[199] *Id.*

[200] *Id.*

[201] TVPRA §235(d)(2) requires that USCIS complete SIJ adjudications within 180 days of filing.

Interagency, Customer Service, and Process Integrity

Applicants and petitioners continue to experience delays in receiving their immigration benefits. In this Annual Report, the Ombudsman delves into the background checks and security screening process. The Ombudsman continues to focus on the proper delivery of USCIS notices and documents, USCIS' processing times, and efforts in implementing Transformation. The Ombudsman also encourages USCIS and DOS to continue to work together to resolve issues pertaining to consular returns.

Processing Times and Processing Delays

Responsible USCIS Offices: Service Center Operations and Field Office Directorates, and Office of Performance and Quality

Stakeholders seeking immigration benefits have long been frustrated with the way posted processing times seem to bear little resemblance to their own experiences. The manner in which processing times are determined and presented is confusing, and the delays between calculation and posting leave considerable room to doubt their accuracy. More importantly, however, posted processing times now exceed certain mandates set out in statute and regulations, or are beyond internal processing goals. Over the last several years, the Ombudsman has raised awareness of the steady increase in adjudication times for a number of benefits, from naturalization to employment authorization to extensions for nonimmigrant workers. The Ombudsman's analysis confirms increases in USCIS processing times across the entire spectrum of immigration benefit applications. As this Report is being finalized, it is evident that processing times are being missed on major product lines.[202]

During a recent public teleconference with the Ombudsman, USCIS conceded that its methods of calculating and posting processing times need improvement and that the agency is actively working toward that

[202] For example, in the first quarter of 2016, the processing goal for naturalization applications of 5 months was only met in 33 of 85 adjudication offices (field offices and service centers) (or approximately 39 percent); the processing goal for adjustment of status applications of 4 months was being met in fewer than 8 of 91 adjudication offices (approximately 12 percent). In the business product line, the processing goal for H-1B petitions was not being met in either service center adjudicating them. In other areas, USCIS exceeded the processing goal of 3 months for Form I-751, *Petition to Remove Conditions on Residence*, of 3 months was exceed in FY 2015, in which the average processing time was 6.8 months. Information provided by USCIS (Apr. 14, 2016); *see also* USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed June 2, 2016).

goal.[203] The Ombudsman commends USCIS for this commitment to improved transparency and looks forward to enhanced reporting accuracy. However, USCIS also needs to commit to the use of real time data to develop reports that better reflect true processing times, with the goal of adequately resourcing product lines and improving the full adjudication cycle. The Ombudsman urges the agency to undertake concrete and holistic measures to address lengthening processing times as a serious and pervasive issue for the agency—perhaps the most important operational issue facing the agency today.

Background

Goals for the completion of adjudication (processing time goals) for some immigration benefit filings are established by statute.[204] USCIS has also committed itself through regulation to a processing time goal for some product lines.[205] For other immigration filings, USCIS publicly announces processing time goals.[206] USCIS committed itself to meeting new and aggressive processing time goals as it implemented a new Fee Rule in 2007 in some of its largest product lines: Form I-485, *Application to Register Permanent Residence or Adjust Status* and Form N-400, *Application for Naturalization*.[207] In short, USCIS is charged with taking processing times and goals seriously.[208]

Processing times are provided to inform customer expectations on how long the agency is taking to adjudicate immigration benefit filings.[209] Since 2010, the collection, analysis, and posting of processing times have been the function of USCIS' Office of Performance and Quality (OPQ).[210] USCIS Service Center Operations (SCOPs) and Field Operations Directorates (FOD) report actual completion data by form type to OPQ on a monthly basis.[211]

The processing times that USCIS posts publicly, however, are not a direct representation of the actual processing time for a given form in the month reported. As discussed in some length in the 2015 Annual Report, USCIS' current methodology uses the number of cases pending in the responsible office against the monthly completion rate (number of cases completed in that location and product line) to arrive at its processing times.[212] These cycle times are vetted with the responsible offices before being posted to remove statistical anomalies and ensure they accurately reflect the correct product line; this accounts for the lengthy time (typically 45 days) between the data capture and the date it is made public.[213] Another reason for the delay is the removal from its calculation of all cases that are actively suspended (cases that have issued an RFE or a NOID).[214] Response time can add weeks or months to a case's processing time.

If the form's cycle time is under or at the goal that has been set by the agency, the report will reflect that goal, in a monthly format, on the processing times page on the USCIS website (e.g., 3 months). If the cycle time is taking longer than the goal, the actual receipt date of the applications or petitions currently being processed in the office or service center is posted (e.g., November 13, 2015).[215]

If the monthly completion rate is not equal to or greater than the receipt rate, the calculation results in increased posted

[203] Ombudsman's Teleconference, "Processing Times" (Apr. 27, 2016); https://www.dhs.gov/ombudsmans-public-teleconference-series (accessed June 6, 2016).

[204] For example, there is a statutory requirement of 30 days for Form I-129L, *Petition for Nonimmigrant Managers and Executives*, INA § 214(c)(2)(C); 180 days for Form I-360, *Petition for Amerasian, Widow, or Special Immigrant*, TVPRA § 235(d)(2).

[205] *See, e.g.*, 8 C.F.R. § 274a.13(d) (application for employment authorization).

[206] *See, e.g.*, "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. 29851, 29858-59 (May 30, 2007) (4-month processing goal for Form I-485, *Application to Register Permanent Residence or Adjust Status*, and 5-month goal for Form N-400, *Application for Naturalization*).

[207] Specifically, USCIS set a 4-month processing time for Forms I-485, *Application to Register Permanent Residence or Adjust Status*; I-140, *Petition for Immigrant Worker*; and I-90, *Application to Replace Permanent Resident Card*. It also announced a processing goal of 5 months to adjudicate Form N-400, *Application for Naturalization* to completion. For all other immigration filings, USCIS committed to reducing processing times by 20 percent. *See* "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. 29851, 29858-59 (May 30, 2007).

[208] *See* American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. 106-313, 114 Stat. 1251 ("It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application….").

[209] "We generally process cases in the order that we receive them. On this page you can find an estimate of how much time the office handling your case currently takes to process your type of application, petition, or request." USCIS webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed May 21, 2016).

[210] DHS webpage, "Telecon Recap: Application Processing Times: A Conversation with USCIS Office of Performance and Quality" (Apr. 27, 2011); https://www.dhs.gov/telecon-recap-application-processing-times-conversation-uscis-office-performance-and-quality (accessed May 21, 2016).

[211] Ombudsman Teleconference, "Processing Times" (Apr. 27, 2016); https://www.dhs.gov/uscis-processing-times-teleconference-recap (accessed June 17, 2016); *see also* Telecon Recap: Application Processing Times: A Conversation with USCIS (Apr. 27, 2011), *supra* note 210.

[212] Ombudsman's Annual Report 2015, pp. 84-86; *see also* Processing Times, *supra* note 211.

[213] Processing Times (Apr. 27, 2016), *supra* note 211.

[214] Telecon Recap: Application Processing Times: A Conversation with USCIS Office of Performance and Quality, *supra* note 210.

[215] Processing Times (Apr. 27, 2016), *supra* note 211.

processing times. While the agency generally works cases on a first-in-first-out basis, customers should not assume an application will be or should have been completed by the reported date, regardless of whether USCIS posts processing time in months or as a specific date.[216] Until updated processing times are posted the following month, applications received after the posted processing date are not considered outside of normal processing times, and USCIS will not entertain inquiries on those applications.[217]

Stakeholders have long expressed confusion over these calculations, particularly with reading processing times against processing goals, and the difficulties of comparing posted processing times that are not aligned with their own experiences. Few customers understand, for example, time expended responding to RFEs is not included in the cycle time calculations because USCIS is unable to accurately gauge proper calculations for those cases.[218] Processing moves forward during the 75-day period while a given processing time is being collected, analyzed, posted, and used. As a result, the reported processing times have become little more than representative proxies bearing little resemblance to the petitions and applications that are actually being adjudicated.

Ongoing Concerns

Processing Goals and Backlogs. From FY 2010 through FY 2013, USCIS generally met, or missed by a short timeframe, goals in the key areas of naturalization and adjustment of status.[219] However, in FY 2014 and FY 2015, the Ombudsman reported problems with USCIS' ability to meet its processing time goals, especially as reflected in the increasing number of requests for case assistance involving adjudication delays.[220] In FY 2015, the percentage of requests for case assistance received by the Ombudsman involving filings beyond posted processing times increased to 61 percent, up 3 percent from 2014, and spanned across most product lines.[221] During the first two quarters of FY 2016, the Ombudsman received 2,965 requests for case assistance pending past posted processing times out of 4,740, or a rate of almost 63 percent. These requests reflect a further decline in USCIS' ability to meet many of its processing goals.

In 2015, the Ombudsman reported at length on the delays in adjudicating DACA related renewals, in particular applications for employment authorization emanating from approved applications, and the role the Ombudsman played in pointing out to USCIS the problems inherent in its reporting of processing times for DACA recipients.[222] The Ombudsman also reported its observations during the last reporting period regarding seasonal delays in EAD processing times.[223] In this reporting period, we have observed and raised with USCIS concerns regarding processing times of: Form I-539, *Application to Change Status* for nonimmigrant student populations at the VSC; Form I-821, Application for Temporary Protected Status, in which substantial delays beyond 6 months have occurred; H-1B extensions;[224] Form I-765;[225] and Form I-526, *Petition by Immigrant Petition by Alien Entrepreneur*, delays of which now exceed 16 months.[226] The agency's national average processing time for processing Form I-485 is at 6.9 months, exceeding the goal of 4 months, and for N-400, it is beyond the 5-month processing goal at 5.7 months.[227]

Attempts to Deal with Processing Backlogs

In its recent Notice of Proposed Rulemaking (NPRM) to increase fees, the agency acknowledged processing times have increased, resulting in backlogs that fail to meet its own

[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *See, e.g.*, Ombudsman's Annual Report 2013, p. 42; Ombudsman's Annual Report 2011, p. 36; Ombudsman's Annual Report 2010, p. 13.
[220] Requests for case assistance involving filings beyond posted processing times accounted for 58 percent of the requests received at the Ombudsman's Office in 2014, and 61 percent of requests received in 2015.
[221] In FY 2015, the top ten applications inquired about in descending order were Forms I-821, I-765, I-485, I-130, N-400, I-526, I-539, I-589, I-751 and I-140. Further, these figures are slightly skewed downward, as the Ombudsman does not accept requests for case assistance until a filing is 60 days or more past the posted processing time for that form type and adjudication office.
[222] Ombudsman's Annual Report 2015, pp. 17-20.
[223] Ombudsman's Annual Report 2015, pp. 48-50.
[224] The Ombudsman also hosted a teleconference with USCIS and DHS in February 2016 regarding issues related to these delays with respect to Department of Motor Vehicles benefits and their interaction with nonimmigrant extension delays. Ombudsman Teleconference, "Impact of USCIS Delays on U.S. Department of Motor Vehicles (DMV) Benefits" (Feb. 25, 2016); https://www.dhs.gov/dmv-benefits-teleconference-recap (accessed June 2, 2016).
[225] *See infra* "Recommendation Update: Employment Authorization Documents" in this Report.
[226] *See* "USCIS Processing Time Information for the Immigrant Investor Program Office, Average Processing Times as of March 31, 2016" (updated May 12, 2016); https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=abcD6qEZEPS0UeOuudTtv (accessed May 25, 2016).
[227] N-400 and I-485 FY 2016 first quarter data taken from information provided by USCIS on Apr. 13, 2016 and May 12, 2016.

goals.[228] The backlogs stem in part from the elimination of the surcharge previously applied to applications and petitions to recover costs related to refugee and asylum adjudications. By replacing the surcharge on non-refugee applications and petitions, USCIS anticipates there will be sufficient funds to ensure adequate resources to meet earlier goals.[229]

The agency has begun taking steps to meet backlog challenges, such as issuing the recent email message to USCIS stakeholders and the interested public reacting to the backlog reports:

> Current personnel resources do not align with the present caseload, but we are working to address the staffing shortages and workload issues that are causing the delays…. We continually review our workload capacity at each service center and, based on our findings, redistribute the work among the service centers. This type of planning allows us to maximize our resources and minimize any delays when work is transfer[r]ed.[230]

Impact of Processing Delays on USCIS Customers. The Ombudsman welcomes the agency's acknowledgment of its processing times challenges, but the attempt to rein in backlogs cannot be employed quickly enough. The impacts of processing delays include: separation of family members, lost jobs, financial hardships, forced travel delays, and educational delays. Naturalization application delays stall hopes of voting in elections as well as the ability to petition for loved ones or to pursue certain job opportunities. Lengthy processing times also negatively impact businesses, where an employee's start date is critical and reliable processing times needed to plan assignments months in advance. Current and prospective foreign national employees similarly rely on the accuracy and reliability of posted processing times to give ample notice, relocate, or begin work before an employment offer expires. To gain some level of certainty, business petitioners are increasingly using USCIS' 15-day premium processing option, by paying the $1,225 additional fee, when it is available.[231]

Recommendations

Over the last 3 reporting years, the Ombudsman has seen increases in requests for case assistance to address USCIS processing time delays. Customers continue to express their frustration with the increasingly lengthy processing delays, which is further exacerbated by the lack of transparency and unreliability of the posted processing times. The Ombudsman strongly believes that, as a fee-for-service agency, USCIS must develop and implement a process that accurately reflects the time it takes to process applications and petitions from receipt to completion. The Ombudsman recommends USCIS revamp processing times calculations to align with actual adjudications, which would assist the agency in assessing more realistic processing time goals and timely address failures to meet those goals.

The Ombudsman urges USCIS to immediately address the problems preventing the agency from meeting the processing time goals promised in its 2007 final fee rule, goals it recently recommitted to meeting in the future.[232] The significant increases in filing fees under the 2007 rule were justified, in some part, by promises to reduce processing times, presumably through the use of additional resources funded by the increased filing fees. Those promises have not always been met, primarily as a result of the significant resources USCIS has had to divert to the adjudication of humanitarian applications, especially asylum applications and credible fear determinations in expedited removal cases, which have depleted agency resources on a significant scale.[233]

USCIS has announced its exploration of and commitment to more accurate processing times based on actual, real-time data.[234] More realistic processing times, including times that reflect those percentage of cases for which a longer processing time is anticipated (whether due to a broad impact, such as a surge of applications or a specific impact, such as an RFE), will provide stakeholders information more reflective of their actual experiences and enable them to better manage outcomes.

Equally important, USCIS adjudicators must be afforded adequate time to perform thorough file reviews, consistent

[228] "USCIS acknowledges that since it last adjusted fees in FY 2010, the agency has experienced elevated processing times compared to the goals established in FY 2007. These processing delays have contributed to case processing backlogs." "U.S. Citizenship and Immigration Services Fee Schedule; Proposed Rule," 81 Fed. Reg. 26903, 26910 (May 4, 2016).

[229] *Id.*

[230] USCIS email to stakeholders, "Processing Times" (Apr. 28, 2016).

[231] The Ombudsman has not examined whether increased business use of premium processing inversely affects regular filing processing times as USCIS shifts adjudicators to meet its "Premium Processing" commitment.

[232] U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 26904.

[233] *See supra* "Asylum Backlogs and Continuing Assessment Problems" of this Report.

[234] Processing Times (Apr. 27, 2016), *supra* note 211.

with the agency's "Quality in the Workplace" initiative.[235] The agency should thoroughly assess and establish appropriate staffing levels, allowing for anticipated as well as current workloads, and set hiring plans to meet the demands placed on it. The possibility of realigning product lines should be examined, and the concept of center specialization should be reevaluated given current imbalances that exist between and among some decentralized operations nationwide. The current activities around workload transfers are an encouraging beginning of such efforts. With sufficient funding and staffing, USCIS can reduce its processing times, improve the quality of its adjudications, and overall strengthen the integrity of the programs it administers.

The Challenges of Background Checks and Clearances on Case Adjudication

Responsible USCIS Offices: Field Operations, Service Center Operations, Fraud Detection & National Security, and Immigration Records and Identity Services Directorates

Background

While background and security checks are essential features of immigration processing, many elements of the process are classified or otherwise cannot be disclosed, leading to stakeholder confusion, anxiety, and frustration. The variety of checks and agencies involved contribute to processing delays that can last years. As a result, there is a need for increased transparency and communication regarding the processing goals as USCIS and its partner agencies execute critical national security and program integrity objectives involved in the adjudication of immigration benefits applications.

During this reporting period, Congress and the public renewed their focus on USCIS' security screening measures, which was largely in response to the terrorist attacks in Paris on November 13, and San Bernardino on December 2, which focused on the visa waiver and fiancé(e) visa programs, the role of social media in security vetting, and the resettlement of Syrian refugees in the United States.[236] Ensuring that background and security checks are thoroughly completed in a timely manner achieves both customer service and national security goals. The customer receives a timely decision, and the agency ensures that applicants already residing in the United States, or seeking to enter the country, are appropriately and fully vetted.

Longer Periods of Review

When the Ombudsman receives confirmation from USCIS that a case is on hold for any type of background or security check, the Ombudsman tracks the case until a decision is issued by USCIS.

By tracking requests for case assistance on long-term review at the agency, the Ombudsman is able to monitor individual case statuses as well as track larger policy issues. Additionally, the Ombudsman monitors cases on hold under terrorism-related inadmissibility grounds (TRIG) by tracking individual requests for case assistance and participating in quarterly USCIS stakeholder meetings.

The Basics of Security Checks

USCIS uses a variety of internal and external checks to ensure the integrity of the immigration system.[237] Limited information is available to an applicant or petitioner regarding the details of USCIS security checks. When an individual learns that an immigration application is on hold for what is often termed "background checks," the only option is to wait for a resolution from USCIS. Prolonged processing delays can lead to serious consequences for legitimate applicants, including loss of employment or

[235] *See* DHS webpage, "Written testimony of USCIS for a Senate Committee on the Judiciary, Subcommittee on Immigration and The National Interest hearing titled 'Oversight of U.S. Citizenship and Immigration Services: Ensuring Agency Priorities Comply with the Law' (Mar. 3, 2015); https://www.dhs.gov/news/2015/03/03/written-testimony-uscis-senate-judiciary-immigration-and-national-interest-hearing (accessed June 2, 2016).

[236] "The Syrian Refugee Crisis and Its Impact on the Security of the U.S. Refugee Admissions Program" before the Subcommittee on Immigration and Border Security *of the* U.S. House Judiciary Committee, 114th Congress, 1st Sess. (2015); https://judiciary.house.gov/hearing/hearing-the-syrian-refugee-crisis-and-its-impact-on-the-security-of-the-u-s-refugee-admissions-program/ (accessed Apr. 14, 2016); "Oversight of the United States Citizenship and Immigration Services" before the Subcommittee on Immigration and Border Subcommittee of the U.S. House Judiciary Committee, 114th Congress, 1st Sess. (2015); https://judiciary.house.gov/hearing/oversight-of-the-united-states-citizenship-and-immigration-services/ (accessed Apr. 14, 2016).

[237] The scope of this article references background checks (checks via name and identity to address admissibility issues) and security checks (identification of any national security concerns) of individual applicants and petitioners filing for benefits with USCIS. It is not intended to be a comprehensive review of the separate security screening process for refugees, nor a comprehensive review; certain national security issues are outside the purview of the Ombudsman.

other income, and inability to secure or renew drivers' licenses, as well as family separation.

By statute and regulation, USCIS conducts certain verifications on all applications and petitions to confirm eligibility, including admissibility, of the individual applicants or petitioners through interactions with agencies possessing relevant information.[238] While background checks are made on all filings, there appears to be a certain amount of discretion exercised with regard to additional checks made for security reasons.

From USCIS' perspective, there are two tracks for background and security checks: internal and external. FDNS and the SCOPS Background Check Unit (BCU) oversee internal checks, which include the Automated Biometric Identification System (IDENT) fingerprint check and TECS Name Check.[239] If checks implicate national security concerns, USCIS conducts an additional review through its Controlled Application Review and Resolution Process (CARRP).[240] Meanwhile, agencies other than USCIS, such as U.S. Department of Justice (DOJ), CBP, ICE, and FBI, all perform "external" checks and investigations for certain applications.[241]

In 2010, FDNS was elevated to a Directorate within USCIS to promote FDNS' mission throughout the agency.[242] FDNS is the point of contact within USCIS for cases involving suspected fraud, national security, or public safety concerns,[243] but, it does not perform background checks.[244] The FDNS Data System (FDNS-DS) is the central case management system used by FDNS to recognize fraud and track potential problems.[245] In addition to its work within USCIS, FDNS is also the liaison between USCIS and the intelligence community and law enforcement.[246]

FDNS' use of social media as part of the security vetting process came under scrutiny during the reporting period. The agency's most recent publicly available guidance states that USCIS "is finalizing its policy for use of Social Media," clarifying that fraud, national security, or public safety determinations are not to be made solely based on publicly-available information due to its inherent lack of data integrity."[247] Instead, FDNS states it uses social media as a means to verify information already provided by the applicant or petitioner.[248] In cases where FDNS finds derogatory information, USCIS must give the applicant or petitioner an opportunity to explain any conflicting information.[249]

The BCU administers background check services for USCIS Service Centers. Publicly available information on the BCU is limited. Its work focuses on the oversight of performance of background (name and fingerprint) checks on applicants and beneficiaries. SCOPS performs TECS checks on the primary name and date of birth, including on all aliases and name and date of birth variations, and positive results, or "hits," are forwarded to the BCU for resolution.[250]

USCIS administers CARRP as a supplementary security screening for cases that involve national security concerns. A national security concern is defined as an "articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), and (F), and 237(a)(4)(A) and (B) of the INA" (terrorist activity; espionage; sabotage; and illegal transfer of goods, technology, or sensitive information).[251] As with other security processes, there is limited publically available information regarding CARRP.

[238] USCIS relies upon authority contained in 8 U.S.C. § 1101 *et seq*. as requiring background checks to be conducted for certain immigration benefits.

[239] DHS Privacy Impact Assessment, "Immigration Benefits Background Check Systems" (Nov. 5, 2010) pp. 3, 4; https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf (accessed Mar. 1, 2016).

[240] USCIS Fact Sheet, "Refugee Security Screening" (Dec. 3, 2015); https://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf (accessed Mar. 1, 2016).

[241] See DHS Privacy Impact Assessment, "Immigration Benefits Background Check Systems" (Nov. 5, 2010); https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf (accessed Mar. 1, 2016).

[242] USCIS Webpage, "Fraud Detection and National Security Directorate" (Nov. 18, 2011); https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate (accessed Mar. 1, 2016).

[243] DHS Privacy Impact Assessment, "Fraud Detection and National Security Directorate" (Dec. 16, 2014) p. 2; https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdns-september2015.pdf (accessed Mar. 1, 2016).

[244] Information provided by USCIS (Apr. 14 2016).

[245] DHS Privacy Impact Assessment, "Fraud Detection and National Security Data System (FDNS-DS)" (Jul. 29, 2008) p. 1; https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdnsds-july2008.pdf (accessed Mar. 1, 2016).

[246] DHS Privacy Impact Assessment, "FDNS," *supra*, note 243.

[247] *Id.* at 5-6, 15.

[248] *Id.* at 14.

[249] *Id.* 5-6 Beneficiaries of petitions are not considered to have standing and are not given an opportunity to address allegations. *See infra* "Regulatory and Policy Developments in Employment-Based Petitions" in this Report.

[250] Information provided by USCIS (Apr. 14, 2016).

[251] CARRP Adjudicator Training PowerPoint, ADOTC (Mar. 5, 2013) p. 19; https://www.aclusocal.org/wp-content/uploads/2014/07/CARRP-Adjudicator-Training-ADOTC-v-1-Mar-5-2013.pdf (document obtained by the American Civil Liberties Union through Freedom of Information Act request).

In addition to the internal processes described above, USCIS also collaborates with other government agencies to perform additional external vetting. The FBI performs two checks for almost all USCIS forms—Fingerprint Checks and Name Checks. The FBI Fingerprint Check involves an automated search of a national fingerprint and criminal history system maintained by the FBI[252] and are performed on all applicants 14 years and older who seek to remain in the United States for more than 1 year.[253] FBI Name Checks involve a search of "main files" for instances where the applicant was the subject of an FBI investigation, as well as a search of "reference files" where the individual's name is mentioned but is not the main subject of the investigation.[254] Figure 3.2 identifies the applications that require FBI Name Checks for applicants over 14 years old.

According to the FBI, the length of time to process a name check varies.[255] Its processing goal is to complete a majority of checks within 30 days, with the remainder completed within 90 days.[256] FBI is returning name check results in 30 days 93 percent of the time.[257] The average response time is difficult for USCIS to track because the name checks are submitted several different ways from more than one national system.[258] FBI's National Name Check Program (NNCP) receives over 65,000 requests for name checks each week, with about half of all inquiries coming from USCIS.[259] FBI expedites only a limited number of name checks. Further, expedite requests can only be initiated by the requesting agency, not by an individual.[260]

According to USCIS, resolving background and security checks "is time-consuming and labor-intensive; some cases legitimately take months or even several years to resolve."[261] Vetting can delay case processing for numerous reasons, including error by the applicant, petitioner, or agency; antiquated and insufficient technology; inadequate resources; and legitimate investigations. For example, in 2012, DHS Office of Inspector General (OIG) found that aliases and spelling variations of names complicated USCIS background checks.[262] In that same report, OIG noted that USCIS relies on "cumbersome and outdated" systems to run security checks, causing officers to "conduct labor-intensive, system-by-system checks to verify or eliminate each possible match to terrorist watch lists and other derogatory information."[263] In a 2014 report on USCIS Information Technology, OIG found that

> … [USCIS] systems do not fully provide desired functionality, and system reliability is also a challenge .... As a result, the processing of benefits is delayed, and USCIS customers may have to wait longer for a decision on their applications for benefits. In addition, staff members are not always sure which systems to use or which systems are available to perform specific job functions ... [USCIS] staff may not be accessing information that is available to make informed decisions on adjudication of benefits, and staff's ability to carry out USCIS' mission may be hampered.[264]

USCIS has stated its Transformation efforts will improve many of these issues by consolidating data systems and alleviating inefficiencies caused by officer review of paper files.[265] However, as discussed elsewhere in this Report, Transformation implementation has been problematic and continues to exceed timelines for implementation.[266]

Individuals experiencing prolonged background checks can request information relating to their cases from USCIS by making a FOIA or Privacy Act Request.[267] Some or all of the information requested may be exempt from disclosure

[252] DHS Privacy Impact Assessment, "Immigration Benefits Background Check Systems" (Nov. 5, 2010) p. 2; https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf (accessed Mar. 1, 2016)

[253] *Id.*

[254] *Id.* at 3.

[255] FBI Webpage, "Name Checks FAQ;" https://www.fbi.gov/stats-services/name-checks/name-checks-faqs (accessed Mar. 1, 2016).

[256] The Interagency Agreement between USCIS and the FBI states, "The FBI will endeavor to process 90 percent or more of name check requests submitted to the FBI within 30 days of receipt, with the remaining requests completed within 90 days of receipt." Information provided by USCIS (Apr. 14, 2016).

[257] Information provided by USCIS (Apr. 14, 2016).

[258] *Id.*

[259] Name Checks FAQ, *supra* note 255.

[260] *Id.*

[261] USCIS Fact Sheet, "Immigration Security Checks—How and Why the Process Works" (Apr. 25, 2006); https://www.uscis.gov/sites/default/files/files/pressrelease/security_checks_42506.pdf (accessed Mar. 1, 2016).

[262] DHS OIG, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers," OIG-12-24 (Jan. 2012) p. 8; https://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan12.pdf (accessed Mar. 1, 2016).

[263] *Id.* at 9.

[264] DHS OIG, "U.S. Citizenship and Immigration Services Information Technology Management Progress and Challenges," OIG-14-112 (July 2014) p. 1; https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-112_Jul14.pdf (accessed May 23, 2016).

[265] DHS OIG, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers," *supra* note 262, at 9.

[266] *See infra* "Transformation Update: E-Filing for Immigration Benefits Expands" in this Report.

[267] *See* 6 C.F.R. § 5.21 for request process procedures. *See* DHS Privacy Impact Assessment, Immigration Benefits Background Check Systems, *supra* note 239, at 20.

Figure 3.1: USCIS Adjudications Requiring FBI Name Checks

Form	Individual Requiring FBI Name Check (designated with "x")					Special Instructions
	Applicant	Petitioner	Beneficiary	Derivatives	Household (HH) Members	
I-192	X					
I-485	X					FBI Name Check not required on an individual who is more than 80 years and one day old.
I-589	X			X		
I-590	X			X	X	For certain refugee applicants, FBI and CIA name checks are conducted through the SAO process.
I-601	X					Except when filed overseas
I-601A	X					Except when filed overseas
I-687	X					
I-698	X					
I-730			X			When the beneficiary is in the United States
I-881	X					
N-400	X					

Source: Information provided by USCIS (Apr. 14, 2016).

if it relates to law enforcement sensitive information.[268] Nonetheless, if USCIS has disclosed information that is not accurate, the individual may notify USCIS by calling its National Customer Service Center (NCSC) or by correcting the information in an in-person interview with a USCIS officer pursuant to benefit adjudication,[269] and USCIS will update FDNS-DS records.[270] However, due to the sensitive nature of background and security vetting, it is likely that most customers will be unaware of the presence of incorrect or derogatory information, making it likely that few stakeholders will be able to avail themselves of this correction process.

Ongoing Plan of Action

USCIS officers engage daily in the complex balancing act of evaluating eligibility while vetting applicants for fraud and security concerns. At the same time, officers in a service agency are expected to adhere to processing goals and provide good customer service. Through its extended review casework, the Ombudsman will continue to track the impact of security-related delays on the USCIS customer and on the agency's ability to timely achieve its security vetting objectives. For bona fide applicants, extended delays based on background and security vetting can cause significant distress, family separation, and other hardships. Meanwhile, adjustment and other cases involving applicants who may pose actual security threats should be prioritized when those individuals are already living in the United States during the pendency of their cases.

The Ombudsman therefore recommends USCIS strengthen its internal procedures to more closely monitor and follow up on processing of background and security checks, in particular pending FBI name checks and ICE investigations. Each USCIS field office and service center has its own guidance for reviewing and tracking the status of pending background checks.[271] Without a unified agency monitoring process, legitimate cases can become backlogged without recourse, while security vetting is delayed. More significantly, in instances where cases will remain on review for indefinite periods, USCIS should give the applicant or petitioner notice and an opportunity to pursue alternative options, including withdrawing the application. For example, refugees can potentially pursue resettlement with third countries rather than continue to wait for the completion of their background checks

[268] *Id.*

[269] *Id.* at 21.

[270] DHS Privacy Impact Assessment, "Fraud Detection and National Security Data System (FDNS-DS)" (July 29, 2008) at 13; https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdnsds-july2008.pdf (accessed Mar. 1, 2016).

[271] Information provided by USCIS (Apr. 14, 2016).

with USCIS. All U.S. agencies involved in background and security vetting should communicate clearly about processing goals and timelines regarding this critical piece of the U.S. immigration system.

Ensuring the Delivery of Secure Documents

Responsible USCIS Offices: Office of Intake and Document Production; and the Field Operations, Service Center Operations, and Customer Service and Public Engagement Directorates

Every year, USCIS sends millions of secure documents[272] to applicants and their legal representatives through the U.S. Postal Service (USPS), including EADs, Travel Documents, and Permanent Resident Cards. Applicants use these documents to verify work and travel authorization, as well as for identity and proof of lawful status in the United States.

Background

USCIS mails secure documents to customers via USPS Priority Mail with Delivery Confirmation.[273] Customers are generally not notified if or when delivery of a secure document has been attempted, and neither USCIS nor USPS notifies the customer of the anticipated delivery day. It can take up to 30 days for the applicant or legal representative to receive a secure document.[274] As a result, a customer may not learn about a delivery problem until weeks after it has occurred.

Customers and their representatives may contact USCIS' NCSC to obtain the tracking number for their document and monitor delivery.[275] Alternatively, applicants and their representatives can create an account through USCIS' website to receive updated approval and mailing information through email or text message.[276]

USCIS instructs customers who learn their documents are missing to visit their local USPS office to seek information about the delivery of their documents. USPS can track the exact address of delivery using the tracking number, though the tracking tool available to the public on the USPS website only shows delivery to the city, state, and zip code—not to a particular address.[277] USPS may also contact the individual letter carrier for delivery confirmation; in some cases, contacting the carrier has led to locating a missing document.[278]

Some mailing issues are the result of customers failing to timely notify USCIS of their change of address. Other reasons are outside the customer's control. USCIS may err in entering the customer's address or may not use the most recent address provided by the customer. USPS may not deliver the document at all, or may inadvertently mis-deliver it. Four of the top ten categories of customer service requests received by USCIS for the last four fiscal years were related to non-delivery of secure documents and other notices.[279]

If USPS has returned the document to USCIS, the agency will attempt to re-send it to the customer. When the secure document is not returned to USCIS, the customer must file a new application with the filing fee, unless they can show that USCIS or USPS is responsible for the delivery issue.

Ongoing Concerns

USCIS facilities process thousands of pieces of mail per day and millions per year,[280] the majority of which are delivered without error.[281] For those who do not timely receive their documents, or simply never receive them, the difficulties they encounter working to obtain their documents are exacerbated by the problems encountered as a result of not having them. Severe consequences include job loss, inability to attend a family member's wedding or funeral in another country, and difficulties proving lawful immigration status. Applicants pay thousands of dollars to file additional applications because they are in desperate need of their secure documents.

[272] USCIS Webpage, "Number of Service-wide Forms By Fiscal Year To-Date, Quarter, and Form Status, 2015" (Dec. 4, 2015); https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2015_qtr4.pdf (accessed May 20, 2016).

[273] USPS Domestic Mail Manual, "Section 503: Extra and Additional Services" (April 10, 2016); http://pe.usps.com/text/dmm300/503.htm#1233442 (accessed May 3, 2016).

[274] Information provided through requests for case assistance.

[275] USCIS Webpage, "USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative" (May 2, 2011); https://www.uscis.gov/news/uscis-improves-delivery-immigration-documents-through-secure-mail-initiative (accessed May 20, 2016).

[276] USCIS Webpage, "Sign up for myUSCIS;" https://egov.uscis.gov/casestatus/disclaimer.do (accessed May 23, 2016).

[277] In one recent request for case assistance, an applicant was able to reach out to USPS directly to obtain exact location delivery and confirm that his document was delivered to the wrong floor in a large apartment building.

[278] Information provided by USCIS (Mar. 2, 2016).

[279] Information provided by USCIS (Apr. 14, 2016).

[280] Number of Service-wide Forms By Fiscal Year To-Date, Quarter, and Form Status, 2015, *supra* note 272.

[281] Information provided by USCIS (Jan. 13, 2016 and Jan. 14, 2016).

There are many causes of mail delivery failure that can be attributed to USCIS and USPS. Some stem from the lack of system compatibility across the USCIS enterprise, which can cause USCIS to mail secure documents to former or incorrect addresses.[282] A slight error in data entry, such as an incorrect apartment or floor number, can lead to non-delivery and "frustration," both "financially and emotionally" for customers.[283] USPS may deliver a correctly labelled document to an incorrect address. The Ombudsman has also encountered situations where USPS indicates a secure document was returned to USCIS, but USCIS incorrectly reports it as delivered to the customer.[284] Sometimes USPS can neither confirm nor deny delivery; in one case, USPS stated, "Unfortunately, we cannot determine exactly what P.O. Box this package was delivered to or what happened to it."[285]

According to USCIS, if USPS does not return the secure document to USCIS, and no change of address has been submitted, USCIS will consider the secure document properly delivered.[286] To obtain a replacement document, the applicant must refile the application and again pay the fees.[287] Applicants avoid paying the fee a second time if they can demonstrate USPS either delivered the document to an incorrect address or did not deliver the document at all.[288] Applicants and legal representatives can also show they notified USCIS of their change of address prior to the approval of the application or prior to card production to avoid having to pay additional filing fees.[289] USCIS informed the Ombudsman that it updates its databases within 5 days of receiving a change of address notification.[290]

Applicants have difficulty showing incorrect or non-delivery or return to USCIS because tracking numbers provided by USPS are sometimes invalid or non-existent.[291] Further adding to the frustration, mail rooms and lockbox facilities have rejected, often multiple times, applications with sufficient evidence showing re-payment of fees is not required.

While it is understandable USCIS seeks to closely control the issuance of secure documents to reduce the potential for fraud, requiring the applicant to file a new application and repay the fees when USCIS or USPS caused delivery issues is inherently unfair. This onerous and expensive process causes additional frustration for applicants.

When the customer files a new application with the full fee, USCIS apportions part of the funds to cover the cost of biometrics. According to the agency, this fee cannot be separated out even when biometrics taken in connection with the prior application have not yet expired and do not need to be taken again. USCIS may or may not generate a biometrics appointment notice if the prior biometrics are still valid.[292]

Ongoing Plan of Action

The Ombudsman has previously encouraged USCIS to use prepaid couriers or certified mail to track delivery of secure documents, increasing security and certainty in the process.[293] Sending secure documents to applicants and their legal representatives through certified mail, with a signature confirmation or through a commercial courier that can more accurately track delivery, may come at an additional cost. However, applicants may be increasingly amenable to the costs associated with a more transparent mechanism for document delivery, and should be afforded that choice.

By the end of 2016, USCIS expects to begin a "Hold for Pickup" pilot program[294] for permanent resident cards issued after approval of Form I-90, *Application to Replace Permanent Resident Card.* USCIS will send emails notifying participating customers their cards are available for pickup at a local USPS office. Applicants or representatives will have 5 days to pick up the document from USPS. If the document is not collected by the fifth day, USCIS will send a reminder postcard. After the fourteenth day, if the document is still not claimed, USPS will return it to the issuing card production facility. When the applicant or representative learns (from Customer Service or other USCIS case status updates) the document has been returned to USCIS, they may request it be resent to the post office or to an updated address.

The Ombudsman is pleased USCIS is working closely with USPS to test improved protocols for delivering secure documents, and recommends USCIS be more proactive in notifying customers when secure documents are returned. The responsibility should be on the agency to deliver the

[282] Information provided by USCIS (Mar. 2, 2016). *See also* information provided through request for case assistance.
[283] Information provided through request for case assistance.
[284] *Id.*
[285] *Id.*
[286] Information provided through requests for case assistance; s*ee also* information provided by USCIS (Apr. 18, 2016).
[287] *Id.*
[288] *Id.*
[289] Information provided by USCIS (Mar. 2, 2016).
[290] *Id.*
[291] Information provided through request for case assistance.
[292] Information provided by USCIS (Apr. 28, 2016).
[293] Ombudsman's Annual Report 2015, p. 83.
[294] Information provided by USCIS (Mar. 2, 2016).

benefit and document for which the customer paid. In addition, the Ombudsman recommends USCIS separate biometrics fees from application fees where possible, to save the customer the additional time and money, as well as to preserve agency resources. The Ombudsman will continue to monitor and keep USCIS aware of ongoing delivery issues and looks forward to seeing progress as a result of the "Hold for Pickup" pilot.

Transformation Update: E-Filing for Immigration Benefits Expands

Responsible USCIS Office: Office of Transformation Coordination

Nearly 900,000 customers[295] filed and tracked USCIS benefits online using the agency's emerging digital platform that facilitates e-filing and enhanced case-status monitoring. The majority of e-filings were processed timely and accurately by USCIS, but stakeholders notified the Ombudsman of challenges and frustration with locating or obtaining processing times, locating up-to-date filing information, and timeliness of customer service. Of greater concern is the release in March 2016 of a major audit report by DHS's OIG, critiquing the "deeply troubled" Transformation program and noting USCIS has resisted "independent oversight" and "minimized the shortcomings of the program."[296]

Transformation is USCIS' multi-year effort to digitize its paper-based filing and adjudication systems into a single electronic environment.[297] Out of more than 90 form types and activities associated with them, only two can currently be e-filed. One is the Form I-90, A*pplication to Replace Permanent Resident Card*, and the other is the payment of the Immigrant Visa Fee.[298] As of the time this Report is being finalized, USCIS has begun entering data provided in select paper-filed forms and adjudicating them electronically, including Form I-821D, *Consideration for Deferred Action for Childhood Arrivals,* and the N-400*, Application for Naturalization.*[299]

Customer participation in e-filing initiatives has grown this reporting period, with the e-filings for the Form I-90 totalling 291,099, nearly as many as the 351,156 paper-based filings.[300] The agency finally implemented Ombudsman and stakeholder suggestions to allow third parties to pay the Immigrant Visa Fee, thereby enhancing the usability for stakeholders. Citizenship and certain filings for TPS and Adjustment of Status are slated to be offered later in 2016. Full implementation of the N-400 was expected earlier this year, but has been delayed.[301]

Ongoing Concerns

Despite e-filing progress, the OIG Report notes adjudicators "struggled" with the new technology, which is "missing

Request for Case Assistance: Mailing Issue

A customer contacted the Ombudsman for assistance obtaining an EAD mailed out by USCIS 7 months earlier. He reported being unemployed for months as a result of not receiving his card. The Ombudsman determined USCIS mailed the card to the applicant's previous address, despite the fact that the applicant had timely and successfully submitted his change of address information to USCIS. Though USCIS acknowledged its error, it advised the Ombudsman to instruct the applicant to refile his application with a fee waiver request. The fee waiver process further extended the receipting and re-adjudication process. Because the mailing error was attributable to USCIS, the Ombudsman challenged the agency's response. The Ombudsman's actions resulted in the application being refiled and adjudicated expeditiously. The customer was issued a 2-year EAD and was able to return to work.

[295] Information provided by USCIS (Apr. 14, 2016). According to USCIS, this number is comprised of 588,454 payment of the immigrant visa fee and 291,099 e-filings of Form I-90 *Application to Replace Permanent Resident Card,* from April 2015 through February 2016.

[296] DHS OIG, "USCIS Automation of Immigration Benefits Processing Remains Ineffective," OIG-16-48, Memorandum for the USCIS Director from the Inspector General (Mar. 9, 2016); https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf (accessed May 4, 2016).

[297] Slated to conclude in 2013, the initial e-filing system was outdated by 2014 and shut down in 2015. (For more information, *see* Ombudsman Annual Report 2015, p. 86.) New cloud-based architecture has been implemented, which has both expanded the capabilities of Transformation services and storage capabilities and further delayed the timeline for completion into late 2019.

[298] USCIS Webpage, "File Online" (Feb. 23, 2016); https://www.uscis.gov/file-online (accessed May 17, 2016).

[299] Information provided by USCIS (Feb. 11, 2016).

[300] Information provided by USCIS (Apr. 14, 2016).

[301] *Id.*

critical functionality."[302] The Ombudsman continues to be concerned about development delays and the impact they have on the agency's effectiveness. The OIG found USCIS' shift to cloud-based system architecture failed to include "stakeholder involvement, performance metrics, system testing, or user support needed for [e-filing] to be effective."[303] Since 2005 there have been six audits on the information technology efforts, demonstrating continuing concerns with the effectiveness of the program:

> We undertook this audit to answer a relatively simple question: after 11 years and considerable expense, what has been the outcome—right now—of USCIS' efforts to automate benefits processing? We focused on benefits processing automation progress and performance outcomes. The answer, unfortunately, is that at the time of our field work, which ended in July 2015, little progress had been made.[304]

Although USCIS established a Help Desk for customers submitting e-filings,[305] stakeholders continue to express concern about the lack of accuracy with regard to e-filing processing times and the agency's inability to timely resolve issues that arise.[306]

During the reporting period, more than 500 customers reached out to the Ombudsman with e-filing concerns.[307] Customers were unable to resolve e-filing errors and experienced delays or non-delivery of permanent resident cards after paying the Immigrant Visa Fee electronically.[308] USCIS' NCSC referred some to the Ombudsman because their repeated SRMT requests remained unresolved. Others contend they were referred to the Ombudsman without first being referred to the e-filing Help Desk. The majority of customers seeking case assistance from the Ombudsman did not indicate they were aware of or had previously accessed USCIS' e-filing Help Desk.[309] The Ombudsman previously observed the e-filing Help Desk's access deficiencies and noticed USCIS' website has undergone a number of recent revisions to improve visibility and accessibility of the Help Desk's "Online Help Form."[310]

The OIG report noted that both internal and external users had limited opportunities to provide input.[311] Stakeholders were disappointed by the elimination of e-filing for Form I-526, *Immigrant Petition by Alien Entrepreneur* and Form I-539, *Application to Extend/Change Nonimmigrant Status* for change of status.[312] However, during an Ombudsman's teleconference on Transformation held January 2016, practitioners using e-filing noted recent efforts have streamlined access to case information and processing features.[313]

Recommendation

The Ombudsman recommends USCIS improve its customer service, including increasing customer awareness of the e-filing Help Desk and its internal coordination with the NCSC and field offices to timely resolve expedite requests. The OIG was unequivocal regarding the need for increased and more effective communication with external and internal stakeholders on Transformation, as well as improved stakeholder involvement throughout the entire cycle of system development.[314] Input at all stages from users of the program—external and internal—is essential to ensuring system effectiveness. USCIS needs to examine ways to increase responsiveness to user feedback, and to allow for more external user involvement. The Ombudsman recommends USCIS consult other governmental agencies, such as the U.S. Internal Revenue Service, that manage robust e-filing programs, to identify ways to allow for broader user feedback and interaction with a wide range of interested stakeholders.

[302] USCIS Automation of Immigration Benefits Processing Remains Ineffective, *supra* note 296, at 11. Adjudicators stated to the OIG that they were unable "to undo data entry errors or enter comments once a case is processed," that they deemed it efficient only for cases that are "straightforward," but should a case need additional checks or review, such "efficiencies of electronic processing were lost."

[303] *Id.* at 8.

[304] *Id.*

[305] *See* USCIS Webpage, "Help and Customer Support for Filing Online;" https://www.uscis.gov/uscis-elis/uscis-elis-help-and-customer-support/help-and-customer-support-filing-online (accessed May 4, 2016).

[306] USCIS Automation of Immigration Benefits Processing Remains Ineffective, *supra* note 296, at 33.

[307] Information provided through requests for case assistance.

[308] *Id.*

[309] USCIS e-filing Help Desk worked on 55,233 requests during FY 2016. When those matters are not resolved or when an expedite is needed, the agency has stated that customers must access the NCSC, not the Help Desk. Information provided by USCIS (Apr. 14, 2016).

[310] *See* USCIS Webpage, "Help and Customer Support Filing Online" (Apr, 18, 2016); https://www.uscis.gov/file-online/uscis-elis-help-and-customer-support/help-and-customer-support-filing-online (accessed May 17, 2016).

[311] USCIS Automation of Immigration Benefits Processing Remains Ineffective, *supra* note 296, at 17-18. The lack of technical support was specifically referenced by the OIG in its report; note was made of the use of help desk tickets to find and correct deficiencies for all users.

[312] Information provided to the Ombudsman (Aug. 27, 2015).

[313] Ombudsman teleconference, "Transformation of USCIS Systems," Jan. 28, 2016; https://www.dhs.gov/transformation_USCIS_systems_teleconf_recap (accessed Jun. 2, 2016).

[314] *See* USCIS Automation of Immigration Benefits Processing Remains Ineffective, *supra* note 296, at 16-48.

Recommendation Update: Consular Returns

Responsible USCIS Office: Service Center Operations Directorate

Background

Stakeholders whose approved petitions are returned to USCIS by DOS experience uncertainty and ongoing challenges due to resource limitations, poor interagency communication, and antiquated file transmission between USCIS and DOS. USCIS is inconsistent in its procedures and prioritization of consular returns, causing concern and confusion among stakeholders.

If during review of the visa application and the visa interview, DOS discovers material derogatory information or comes to believe the petition was approved in error, it will refuse to issue the visa and return the file to USCIS with further action requested.[315] DHS has the sole statutory authority to approve or revoke immigrant visa petitions.[316] Consulates return petitions to USCIS based on statutory ineligibility, fraud, missing or incorrect information, withdrawal of the petition, or death of the petitioner or qualifying relative.[317]

When a consulate returns a petition to USCIS via the NVC or the Kentucky Consular Center (KCC), the packet includes a cover sheet, memoranda of consular interview(s), relevant translations, and a memorandum drafted by the consular officer explaining the reasons for the petition return.[318] The memorandum must clearly show the factual and concrete reasons for recommending revocation.[319] Upon receipt, USCIS may (but does not always) issue notice to the petitioner that the petition has been returned by DOS.[320] Upon review of the consular return package, the USCIS officer may issue a Notice of Intent to Revoke (NOIR) or an RFE.[321] Depending on the respective service center's procedures and the reason for the return, it may take weeks, months or even years for USCIS to take action on the return.[322] If USCIS revokes the petition, the petitioner is notified of the right to appeal the decision, where applicable.[323]

If USCIS reaffirms the petition, the file is transferred back to the consulate through the NVC or KCC (depending on whether it is an immigrant or nonimmigrant petition) for continued processing, assuming the petition's validity period has not expired. The consulate will again return the file to USCIS after reaffirmation if it continues to find strong evidence that supports revocation.[324]

Prior Recommendations and Ongoing Concerns

In August 2007, the Ombudsman made a formal recommendation to USCIS to issue petitioners formal notice upon receipt of returned petitions from DOS, alerting customers to the location and status of their files.[325] The Ombudsman also recommended USCIS establish and report processing goals for taking action on returned petitions.[326] Without posted processing times, customers do

[315] Ombudsman Teleconference, "Consular Returns: A Conversation with the Department of State and USCIS" (Oct. 28, 2015); https://www.dhs.gov/topic/consular-returns-teleconference-recap (accessed Apr. 29, 2016).

[316] *See* INA §§ 204(b), 205; 8 C.F.R. §§ 204, 205.

[317] Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315. (Oct. 28, 2015); https://www.dhs.gov/topic/consular-returns-teleconference-recap (accessed Apr. 29, 2016). A family-sponsored immigrant visa petition may be automatically revoked if the petition is withdrawn or the petitioner or beneficiary dies; upon legal termination of the marriage upon which the petition was based; upon the marriage of a second preference unmarried son or daughter; or upon the termination of U.S. status of a legal permanent resident petitioner. 8 C.F.R. § 205.1(a)(3)(i)-(ii). An employment-based immigrant visa petition may be automatically revoked if the labor certification is invalidated, if the petitioner or beneficiary dies, if the petition is withdrawn, or if the petitioner goes out of business. 8 C.F.R. § 205.1(a)(3)(iii). Automatic revocation may also occur due to failure to apply for an immigrant visa or adjustment of status within 1 year of receiving notice that a visa is available. INA § 203(g). Finally, USCIS may revoke an approved immigrant visa petition, upon notice to the petitioner on any ground other than those specified for automatic revocation. 8 C.F.R. § 205.2. USCIS must issue a NOIR, explaining the reasons the approved petition should be revoked, and the petitioner must be given the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. 8 C.F.R. § 205.2.

[318] *Id.* The packet is sent to the KCC or NVC via express mail or diplomatic pouch. *Id.*

[319] 9 Foreign Affairs Manual 504.2-8(B)(2)(a)(2).

[320] When a nonimmigrant petition is returned through the KCC, for example, an affiliated attorney or representative is not notified. However, the return is supposed to be reflected in USCIS' online "My Case Status" information tool. *See* Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315.

[321] For files with missing information or inaccuracies, USCIS may issue a RFE. If the agency has reason to believe that fraud is involved, USCIS may issue a NOIR, requiring the petitioner to present new evidence supporting eligibility for the benefit sought. *See* Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315.

[322] USCIS does not post processing times for consular returns. *See* Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315. USCIS has informed the Ombudsman that the service centers do review petitions returned by a consulate on a first-in and first-out order, based upon when the centers receive the consular returns. Information provided by USCIS (Apr. 14, 2016).

[323] 8 C.F.R. § 205.2.

[324] Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315.

[325] Ombudsman Recommendation 33, "Recommendation on the Processing of Petitions that are Returned by the U.S. Department of State for Revocation/Revalidation" (Aug. 24, 2007).

[326] *Id.*

not know when to expect action on their returned petitions. In addition, the Ombudsman recommended USCIS provide information about the revocation and revalidation processes on its website, linking to information provided on the DOS website so customers can better understand the roles each agency plays in the process.[327]

In response to the Ombudsman's recommendations, USCIS indicated it issues a notice to the petitioner once a returned petition is received from DOS.[328] USCIS agreed that posted processing time information would be helpful, but stated it would not be practical to establish standards for processing returned petitions because some returned cases (for example, in the case of suspected fraud) require lengthy investigations, and therefore longer processing times, than other returned petitions.[329]

In spite of USCIS' 2008 assurance that customers receive notice of a consular return, customers continue to report lack of notice the file has been returned, as well as issues with file transfers between DOS and USCIS (specifically, where DOS claims it has sent the file to USCIS, but USCIS claims it has not received the file), files being sent to the wrong service center, and a general lack of action on returned petitions.[330] Inconsistent notification of the return, coupled with a lack of posted processing times, leads to uncertainty for the individuals involved. While less than one-half percent of nonimmigrant cases and less than one percent of immigrant cases are returned by DOS to USCIS each year,[331] the impact of delays and, in some cases, complete lack of notice to individuals, families, and employers is tangible. Issues concerning the processing of consular returns continue to be reflected in the more than 100 requests for case assistance made to the Ombudsman in the past 2 years.

In addition, petition approvals with short validity periods expire before the beneficiary can benefit from the approval if the file is returned to USCIS from the consular post. This causes customers to incur additional expense to file a second petition, almost always without knowledge of what led to the return. Fiancé petitions in particular suffer from this issue as they are valid for only 4 months from the date of approval.[332] USCIS affirmed it will not reopen expired Form I-129F, *Petition for Alien Fiancé(e)* unless there is clear error regarding statutory eligibility in the record at the time of the original adjudication of the petition.[333]

The returned petition is typically returned to the USCIS service center or field office where the petition was originally adjudicated. However, the Ombudsman has handled requests for case assistance in which the file was erroneously sent to the National Records Center (NRC).[334] The file remains at the NRC until the petitioner requests the file be transferred to the USCIS office where the petition was originally approved.

Ongoing Plan of Action

In October 2015, the Ombudsman hosted a public teleconference on issues pertaining to consular returns, in which both DOS and USCIS participated.[335] During the teleconference, stakeholders reported continued delays, some reflecting more than 3 years for resolution. Processing times remain indeterminate and inconsistent between the service centers. Teleconference participants from DOS and USCIS confirmed the agencies' awareness of concerns related to delayed responses and reiterated their shared goal of processing returns efficiently while taking into account the competing priorities.[336]

The Ombudsman recommends files be digitized to ensure efficient processing, eliminating significant delays caused by physical file transfers between the two agencies. DOS acknowledged there is currently a pilot project to digitize immigrant files for transfer to and from a consular post.[337] Communication regarding the return of files from DOS to USCIS should be done via secure email; alternatively, electronic transmission, with the proper security protections, could offer a secure way to store, organize,

[327] *Id.*

[328] USCIS, Response to Recommendation #33 (May 23, 2008); https://www.dhs.gov/xlibrary/assets/cisomb_uscisresponse_recommendation33_2008-05-23.pdf (accessed Apr. 29. 2016).

[329] *Id.* While the agency should certainly be thorough in its investigations, all USCIS product lines have a certain percentage of cases outside normal processing times because of factors beyond the control of the petitioner and the adjudicator (security concerns, fraud investigations, responses to complex RFEs, etc.).

[330] Information provided through requests for case assistance. The majority of requests for assistance received by the Ombudsman involving consular returns dealt with cases pending longer than 12 months.

[331] Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315.

[332] As of July 1, 2009, USCIS considers all Form I-129F petitions returned by DOS that have expired in accordance with 8 C.F.R. § 214.2(k)(5) to remain expired. *See* USCIS Presentation, "Form I-129F – Petition for Alien Fiancé(e)," https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/I-129F%20Petition%20for%20Alien%20Fiance%28e%29.pdf (accessed May 19, 2016).

[333] *See Id.*

[334] Information provided through request for case assistance.

[335] Consular Returns: A Conversation with the Department of State and USCIS, *supra* note 315.

[336] For example, USCIS confirmed that expediting a consular return review as possible, and is handled on a case-by-case basis. *Id.*

[337] *Id.*

share, and access files. Until USCIS and DOS find a way to transfer the files electronically, the Ombudsman recommends stakeholders ask for more information about the method of transmittal (diplomatic pouch or express mail); if the latter, the customer should obtain the tracking information from the express mail service in order to better track its movement.[338]

The Ombudsman also recommends the receiving USCIS service center verify the file is in the right place before storing. The Ombudsman reiterates USCIS should consistently send a receipt notice to the petitioner, regardless of where the petition is received. For example, if USCIS issued a notice indicating the file was received at the NRC, the customer would be alerted to contact USCIS to request a file transfer to a service center. Instead, files may languish at the NRC for an extended period of time when they should be with adjudicators at the originating service center.

Most importantly, the Ombudsman calls upon USCIS again to post on its website processing goals for consular returns. USCIS should also provide clear guidance to the public regarding the process and timeline for case resolution. Processing time goals need to be enforced across the service centers to ensure returned petitions do not languish in file rooms, even after allowing for higher and competing priorities. While USCIS stated in October 2015 that it tries to respond within 120 days after a response to a NOIR is received,[339] requests for case assistance to the Ombudsman reflect different response times. Setting realistic expectations provides affected petitioners with knowledge and the ability to determine the most appropriate course of action—to allow the return to take its course (if possible) or to attempt to refile the petition.

[338] According to DOS, the speed of immigrant visa petition returns depends upon the location of the post and the available mail services. *Id.*

[339] *Id.*

Business and Employment

U.S. immigration policy helps foster economic growth, seeks to respond to labor market needs, and enhances U.S. global competitiveness. In this year's Annual Report, the Ombudsman reviews issues involving the mobility of employment for immigrants, the integrity of investor immigrant petitions, challenges faced by employees and employers in the H-2 programs, and delays in obtaining employment authorization documents. The Ombudsman continues to be concerned with the longstanding problems of quality and consistency of adjudications and unduly burdensome RFEs.

Regulatory and Policy Developments in Employment-Based Petitions

Responsible USCIS Offices: Service Center Operations Directorate and Office of Policy and Strategy

During the reporting period, USCIS took a number of steps to implement President Obama's Immigration Accountability Executive Action[340] for businesses and immigrant workers, as outlined in the *White House Visa Modernization Report* (July 2015 Visa Modernization Report).[341] On November 20, 2015, the agency published the draft policy memorandum *Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability.*[342] Subsequently, on December 31, 2015, it published an NPRM[343] to implement certain provisions of the American Competitiveness in the Twenty-First

[340] The White House, Office of the Press Secretary Webpage, "Fact Sheet: Immigration Accountability Executive Action" (Nov. 20, 2014); https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action (accessed Mar. 15, 2016).

[341] The White House issued what is known as the July 2015 Visa Modernization report after receiving feedback from internal and external stakeholders, and after consultation with affected federal agencies, in response to the Executive Action announced by the President on November 20, 2014. The report provided several recommendations related to the modernization of the immigration system, including recommendations related to employment-based immigrant visa issuance. White House Memorandum, "Modernizing & Streamlining our Legal Immigration System for the 21st Century" (July 2015); https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf (accessed Mar. 15, 2016).

[342] USCIS Draft Policy Memorandum, "Determining whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability" (Nov. 20, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Same_or_Similar_Policy_Memorandum_-_11.20.15.pdf (accessed Dec. 16, 2015).

[343] "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Proposed Rules," 80 Fed. Reg. 81900, 81916 (Dec. 31, 2015). The comment period for the NPRM ended on February 29, 2016.

Century Act of 2000 (AC21).[344] These policy changes followed USCIS' publication of draft *L-1B Policy Guidance Memorandum* on March 24, 2015—nearly 4 years after first advising the public it intended to issue updated L-1B guidance—which went into effect on August 17, 2015.[345]

While these policy developments are expected to improve the adjudication of employment-based immigrant petitions, one persistent issue remains unaddressed: the legal standing of foreign worker beneficiaries. In the 2015 Annual Report, the Ombudsman recommended[346] USCIS recognize the legal standing of beneficiaries of Forms I-140, *Immigrant Petition for Alien Worker*.[347] Unreconciled differences continue to exist between federal appellate court decisions that recognize employee standing as a due process issue, and USCIS' regulatory position that Form I-140 beneficiaries lack standing in the petition process.[348]

Given the significant backlog encountered by nationals of certain countries due to per country limitations on visa allocation, not recognizing the legal standing of Form I-140 beneficiaries can negatively affect thousands of intending immigrants. For example, absent legislative action to increase annual immigrant visa allotments, many intending immigrants already living and working in the United States will wait a decade or longer for an immigrant visa to become available. Absent portability, those individuals would be required to work for the same company, in the same position, performing the same job duties. The agency's position that the beneficiary has no such standing creates a contradiction between the statutory right of immigrant portability in AC21 and the regulatory limitation on who is an "affected party."[349] As a result of USCIS' position, the agency does not notify beneficiaries of actions that alter or extinguish their abilities to complete the immigration process. Consequently, the beneficiaries are in the United States for often lengthy periods, believing they are on track to become legal permanent residents.

[344] AC21, Pub. L. No. 106-313, 114 Stat. 1251.

[345] USCIS Policy Memorandum, "L-1B Adjudications Policy" (Aug. 17, 2015); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf (accessed Feb. 8, 2016).

[346] Ombudsman's Annual Report 2015, p. 50.

[347] The U.S. Supreme Court established that constitutional standing applies once a person demonstrates (1) an injury-in-fact; (2) that is fairly traceable to the challenged conduct of the defendant, and (3) can likely be redressed by a favorable decision by the district court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

[348] *See Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015) (holding that 8 C.F.R. § 103.3(a)(1)(iii)(B) does not bar a beneficiary as a recognizable plaintiff in federal court).

[349] *Compare* INA § 204(j) *with* 8 C.F.R. § 103.3(a)(1)(iii)(B).

Presidential Executive Action

In November 2014, the President called on DHS, DOS, and DOL to modernize, improve, and clarify existing immigrant and nonimmigrant visa programs to benefit the U.S. economy, create jobs, and fully recognize the contributions of high-skilled foreign workers.[350] He also called upon the agencies to clarify adjustment of status portability to provide relief to foreign national workers facing lengthy adjustment delays.[351]

The July 2015 Visa Modernization Report resulting from the President's Executive Action specifically directed DOS to consider revising the Visa Bulletin and ensure maximum usage of the annual allotment of immigrant visas.[352] Beginning with the October 2015 Visa Bulletin, DOS established "filing dates" to be used by foreign national applicants in the United States who are expected to adjust status to legal permanent residence within a year of their respective priority dates.[353]

The report also directed DHS to clarify and expand protections for employment-based immigrants and nonimmigrants, recommending H-1B employees receive confirmation of the filing of a petition on their behalf, and employers update former employees on the status of previously filed petitions.[354] These small but important changes, if carried out, would bring immigration procedures in alignment with AC21's "porting" provisions,[355] giving employees improved awareness of their immigration status, and better enabling them to make fully informed career decisions.

For many years after Congress enacted the AC21 portability provisions, USCIS followed interim guidance issued in 2005[356] that directed adjudicators how to determine if the

[350] Fact Sheet: Immigration Accountability Executive Action, *supra* note 340.

[351] *Id.*

[352] Modernizing & Streamlining our Legal Immigration System for the 21st Century, *supra* note 341.

[353] Consequently, eligible applicants (and their derivative family members) are able to file Form I-485, *Application to Register Permanent Residence or Adjust Status* and other related forms that confer "interim benefits" (i.e., employment authorization and advance parole) while awaiting the conclusion of the adjustment process.

[354] Modernizing & Streamlining our Legal Immigration System for the 21st Century, *supra* note 341.

[355] AC21 § 105. Specifically, section 105 of AC21 permits nonimmigrant workers in H-1B status to begin working for a new employer-petitioner immediately upon USCIS' receipt—not adjudication—of Form I-129, *Petition for a Nonimmigrant Worker* from the new employer. AC21 also authorizes employers of certain H-1B nonimmigrants to file H-1B extension petitions beyond the 6-year time-period otherwise set by statute.

[356] USCIS Interoffice Memorandum, "Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-Frist Century Act of 2000 (AC21) (Public Law 106-313)" (December 27, 2005); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm122705.pdf (accessed Apr. 27, 2016).

position with the new employer is in a "same or similar occupational classification" as the original job. However, the guidance did not sufficiently address I-140 withdrawals or revocations, and how they impact the ported employee seeking to adjust to permanent resident status.

On November 20, 2015, USCIS posted for public comment the draft policy memorandum *Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability.*[357] The policy memorandum instructed USCIS employees to use DOL's Standard Occupational Classification[358] (SOC) codes and other evidence to determine if a new job is in the same or similar occupational classification as the original job offer in an approved I-140 petition. On March 18, 2016, USCIS issued the memorandum in final form,[359] which contained several modifications based on stakeholder feedback but did not address many of the larger concerns raised.

For example, stakeholders' public comments[360] suggested the memorandum was (1) unnecessary, (2) ill-timed (given the agency's NPRM encompassing a variety of other important AC21 provisions), (3) out of alignment with the President's Executive Action Directive and July 2015 Visa Modernization Report, and (4) unduly restrictive (given its selective use of definitions[361] that arguably narrow the meaning of the term "similar"). More specifically, stakeholders expressed concern with the heavy emphasis on DOL's SOC codes in conducting a "same or similar" analysis and adjudication.[362] For some occupations, DOL's SOC codes do not accurately capture changes in the nature and type of work emerging in the U.S. economy—something DOL has acknowledged requires updating.[363] Stakeholders believed this new guidance will likely result in increased uncertainty, confusion, and controversy, not less.[364] The Ombudsman recommends USCIS track these issues and address through policy guidance the need for deviation from SOC codes when sector specific patterns reflect new ways of doing business.

NPRM on AC21 and Other Employment-Based Issues

The NPRM published on December 31, 2015 addressed the effect of a petitioner withdrawing an approved I-140 petition. A petitioner's withdrawal of the I-140 or termination of the petitioner's business would not cause an automatic revocation of an I-140 that has been approved for 180 days or more, provided the agency is not seeking to otherwise revoke the petition due to fraud, material misrepresentation, invalidation or revocation of a permanent labor certification, or USCIS error. To effectuate this proposed regulatory provision, a new Form I-140 must be filed by an employer, and, if approved, will be assigned the earlier petition's priority date.[365]

Beneficiary Standing

Currently, USCIS does not recognize the standing of a beneficiary in a petition filed on behalf of an employee. USCIS cites to its longstanding regulatory definition of "affected party," found in 8 C.F.R. section 103.3(a)(1)(iii)(B), that defines an affected party as "the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition…." Consistent with this provision, USCIS does not provide notice to the ported

[357] Determining whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability, *supra* note 342.

[358] *See* DOL Bureau of Labor Statistics, http://www.bls.gov/soc/ (accessed Apr. 5, 2016).

[359] Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability, *supra* note 342.

[360] *See, e.g.,* Council for Global Immigration's letter to USCIS Office of Public Engagement, "Re: Comments on Draft PM-602-0122, Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Portability" (Jan. 4, 2016); https://www.shrm.org/Advocacy/PublicPolicyStatusReports/Courts-Regulations/Documents/CFGI%20SHRM%20Same%20or%20Similar%20Comment%20FINAL%201-4-16.pdf (accessed May 20, 2016); American Immigration Lawyers Association's (AILA) letter to USCIS Office of the Director, "RE: PM-602-0122: Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability (November 20, 2015)" (Jan. 4, 2016); http://www.aila.org/infonet/aila-council-comments-same-similar-draft-policy (AILA Doc. No. 16010430) (accessed Apr. 28, 2016).

[361] The memorandum cites Merriam-Webster's Dictionary Online to define the term "similar" as to "share essential qualities," but also includes a second definition—having a "marked resemblance or likeness." This second meaning is drawn from the Oxford English Dictionary Online, http://www.oed.com/view/Entry/179873?redirectedFrom=similar#eid (accessed Apr. 6, 2016). To appreciate this point, the Ombudsman notes that Merriam-Webster's Dictionary Online contains the following definitions of the word similar: "having characteristics in common," "strictly comparable, alike in substance or essentials, corresponding." Merriam-Webster.com, http://www.merriam-webster.com/dictionary/similar (accessed Apr. 6, 2016). In combination these meanings appear to be more expansive than the cited Oxford English Dictionary Online definition—having a "marked resemblance or likeness."

[362] *See, e.g.,* Council for Global Immigration's letter to USCIS Office of Public Engagement, *supra* note 360. AILA letter to USCIS Office of the Director, *supra* note 360. Greg Siskind, "USCIS 'Same or Similar' Memo – An Example of Being Careful What You Wish For?," ILWblog (Nov. 30, 2015); http://blog.ilw.com/gregsiskind/2015/11/30/uscis-same-or-similar-memo-an-example-of-being-careful-what-you-wish-for/ (accessed Apr.28, 2016).

[363] The last DOL SOC was published in 2010. DOL Webpage, "Standard Occupational Classification: 2010 SOC Revision Process Materials;'" http://www.bls.gov/soc/revisions_2010.htm (accessed Apr. 27, 2016). Prior to 2010, the last DOL SOC codes were published in 2000. DOL, SOC Revision Policy Committee, "2000 SOC;" http://www.bls.gov/soc/2000/soc-structure-2000.pdf (accessed Apr. 27, 2016).

[364] Council for Global Immigration's letter to USCIS Office of Public Engagement, *supra* note 360. AILA letter to USCIS Office of the Director, *supra* note 360.

[365] "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Proposed Rules," 80 Fed. Reg. 81900, 81916 (Dec. 31, 2015).

beneficiary or to the new employer if it reconsiders the underlying Form I-140. Typically, reconsideration comes in the form of a Notice of Intent to Revoke (NOIR) to the former employer.[366] USCIS' failure to provide notice and an opportunity to respond to allegations that could effectively extinguish the viability of the approved petition leaves the intended employee and new employer to which the employee lawfully ported unaware of the employee's inability to continue with the permanent residence process. Revocation without notice to the employee and new employer deprives the new employer of its investment in recruiting and developing the ported employee.

The definition of affected party in the regulation was issued in 1990, a decade before Congress enacted AC21.[367] USCIS' reliance on the definition is outdated given the explicit portability provisions contained in AC21. Moreover, various federal courts have considered questions of employee standing as a due process issue.[368]

Since 2013, several U.S. federal courts have considered the question of a ported employee's standing in I-140 adjudications, holding a beneficiary has a cognizable interest in the adjudicatory process, entitling the beneficiary to some type of notification. In *Patel v. USCIS,* 732 F.3d 633, 636 (6th Cir. 2013), the United States Court of Appeals for the Sixth Circuit found the beneficiary of an I-140 visa petition was within the "zone of interests" protected by the I-140 visa petition process because a permanent visa is made directly available to the beneficiary, not the petitioner, upon successful completion of the adjustment process. In *Kurapati v. U.S. Bureau of Citizenship and Immigration Services,* 775 F.3d 1255, 1260 (11th Cir. 2014), the Eleventh Circuit concluded that an I-140 beneficiary is not precluded from having constitutional standing as an "affected party" in federal court.

In *Mantena v. Johnson,* 809 F.3d 721 (2d Cir. 2015), the Second Circuit found that although 8 C.F.R. section 103.3(a)(1)(iii)(B)[369] may not give standing to a beneficiary before USCIS, it does not bar a beneficiary from having standing in federal court. Notwithstanding these court decisions, USCIS continues to take the position the clear language of 8 C.F.R. section 103.3(a)(1)(iii)(B) permits only the initial I-140 petitioner legal standing before the agency, and not the beneficiary.[370]

The Ombudsman shares the concerns of the Second Circuit Court of Appeals that, under this reasoning, beneficiaries may be relegated to "a position of either blind faith in the original petitioner's goodwill and due diligence or a forced and continued relationship with the now-disinterested and perhaps antagonistic original petitioner …."[371]

Recommendation

AC21 included clear Congressional intent to provide certain qualified employees greater employment mobility while awaiting the completion of the permanent residence process. USCIS must reconsider its position on I-140 employee standing and make a corresponding regulatory change, fully aligning its policy to the letter and spirit of AC21. Separately, the Ombudsman recommends USCIS issue additional guidance giving the phrase "same or similar occupational classification" an expansive reading, consistent with the plain meaning of those words as found in INA section 204(j) as well as with Congressional intent in enacting AC21.

[366] 8 C.F.R. § 205.2(b).

[367] *See* "Appeals, Precedents, Certifications and Motions; Final Rule," 55 Fed. Reg. 20767, 20768 (May 21, 1990). The Supplementary Information accompanying the final rule implementing the definition in 1990 explains the beneficiary's exclusion from the definition of "party" by noting that "a visa petition proceeding has long been a proceeding between the petitioner and the Service" and that consequently "[t]he beneficiary of the petition does not have any standing in such a proceeding."

[368] Even before AC21 expanded the view of a foreign national beneficiary as having an interest in the petition at least as strong as that of its employer, courts recognized that the employee stood within the "zone of interest" that entitled him or her to standing in a judicial challenge to agency actions. For example, the Seventh Circuit, in a case of first impression, found that the beneficiary of an I-140 visa petition falls within the zone of interest of the statute, because the provision allowing the admission of qualified aliens was "intended at least for the protection of aliens who are arguably entitled to enter or remain in the United States on the basis of those standards." *Stenographic Machines, Inc. v. Regional Administrator for Employment Training,* 577 F. 2d 521, 528 (7th Cir. 1978). The Fourth Circuit was the first circuit to address specifically a challenge relating to a petition action, finding that a foreign national employee "was in the 'zone of interest' of the statute and has standing to challenge" the denial of his prospective employer's visa application. *Taneja v. Smith,* 795 F.2d 355, 358 n. 7 (4th Cir. 1986). Having put forth that the beneficiary falls within the zone of interest, various courts have since offered further legal insight into the matter of legal standing. *See DeJesus Ramirez v. Reich,* 156 F.3d 1273, 1276 (D.C. Cir. 1998) (a foreign national has legal standing when the statute's text, structure, or legislative history does not preclude such action).

[369] "For purposes of this section and §§ 103.4 and 103.5 of this part, 'affected party' (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter." 8 C.F.R. § 103.3(a)(1)(iii)(B).

[370] It is noted that USCIS solicited *amicus curiae* briefs on this issue in August 2015, but no further action on this issue has been signaled. *See* USCIS Memorandum, "USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs" (Apr. 7, 2015); https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/3-27-15-AAOamicus.pdf (accessed Mar. 1, 2016).

[371] *Mantena v. Johnson*, 809 F.3d 721, 735 (2d Cir. 2015).

EB-5 Immigrant Investor Program Update

Responsible USCIS Offices: Immigrant Investor Program Office and Field Operations Directorate

Prompted by the sunset of the EB-5 Regional Center authority on September 30, 2015,[372] Congress debated whether to continue and modify the EB-5 Regional Center program. Congressional oversight hearings referenced reports critical of the EB-5 program[373] issued by the General Accountability Office (GAO) in August 2015[374] and February 2016,[375] and DHS OIG in March 2015.[376] The confluence of criticism and diverging opinions introduced a new level of uncertainty in the EB-5 program. Yet Congress, in the end, simply extended the Regional Center program sunset date to September 30, 2016,[377] intending to revisit new and longstanding deficiencies in the program at the end of this fiscal year.[378]

As reported in past years, processing times for EB-5 petitions continue to exceed a year and have not improved. As of March 31, 2016, USCIS reported the following processing times at the Investor Program Office (IPO): 16.3 months for Form I-526, *Immigrant Petition by Alien Entrepreneur*; and 16.9 months for Form I-829, *Petition by Entrepreneur to Remove Conditions*. While the processing time for Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program* is 9 months, like the other forms, the processing time has not improved. All the referenced lengths of time are longer than USCIS' posted processing times reported in 2015.[379] The current processing times raise the question whether the IPO is adequately staffed to administer the EB-5 program given the high volume of filings it has received over the past several years.

Stakeholders also shared concerns regarding IPO's regulatory authority to administer the program, outdated regulatory requirements, program integrity in light of allegations and findings of fraud or noncompliance with other federal laws, the manipulation of Targeted Employment Areas (TEAs)[380] through gerrymandering, and the inconsistent implementation of deference policy.[381]

Background

The EB-5 program offers foreign entrepreneurs a way to immigrate to the United States in exchange for their investments.[382] As discussed in the 2015 Annual Report, Congress established requirements for the source and use of the funds, including those invested through Regional Centers, and set limits to the number of visas allocated each year.[383]

Ongoing Concerns

EB-5 Program Processing Times. At the beginning of January 2016, 21,988 Form I-526 petitions were pending with IPO,[384] 15 percent of which were received in December 2015 in advance of the potential sunset of or modification to the EB-5 program.[385]

[372] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 112-176, sec. 1, § 610, 126 Stat. 1325 (2012).

[373] "The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?" *before the* U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. (Feb. 2, 2016); http://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed; "Is the Investor Visa Program an Underperforming Asset?" *before the* House Committee on the Judiciary, 114th Cong. 2nd Sess. (Feb. 11, 2016); https://judiciary.house.gov/wp-content/uploads/2016/02/114-58_98626.pdf (accessed June 20, 2016).

[374] GAO Report, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," GAO-15-696 (Aug. 2015); http://www.gao.gov/products/GAO-15-696 (accessed Mar. 30, 2016).

[375] "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," *before the* U.S. House Judiciary Committee, 114th Cong. 2nd Sess. (2016) (statement of Rebecca Gambler, Director Homeland Security and Justice); http://www.gao.gov/products/GAO-16-431T (accessed Mar. 30, 2016).

[376] DHS OIG Interoffice Memorandum, "Investigation into Employee Complaints about Management of U.S. Citizenship and Immigration Services' EB-5 Program" (Mar. 24, 2015); https://www.oig.dhs.gov/assets/Mga/OIG_mga-032415.pdf (accessed Mar. 30, 2016).

[377] Department of Homeland Security Appropriations Act, 2016, Pub. L. No. 114-113, sec. 575, § 610(b), 129 Stat. 2242, 2526.

[378] *Id.*

[379] USCIS Webpage, "USCIS Processing Time Information for the Immigrant Investor Program Office" (Jan. 31, 2016); https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=abcOv-xVkeER77TdRLipv (accessed Mar. 30, 2016).

[380] "Is the Investor Visa Program an Underperforming Asset?" *before the* House Committee on the Judiciary, 114th Cong. 2nd Sess. 43 (2016) (statement of Jeanne Calderon, Clinical Associate Professor, Stern School of Business, New York University); https://judiciary.house.gov/wp-content/uploads/2016/02/114-58_98626.pdf (accessed May 16, 2016).

[381] "The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?," *before the* U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. (2016) (statement of Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services); https://www.judiciary.senate.gov/imo/media/doc/02-02-16%20Colucci%20Testimony.pdf (accessed May 16, 2016).

[382] Immigration Act of 1990 § 121(b)(5), Pub. L. No. 101-649.

[383] Ombudsman Annual Report 2015, p. 46.

[384] Information provided by USCIS (Apr. 28, 2016).

[385] Separately, as of January 2016, 912 Forms I-924 were pending with the IPO, which was adjudicating applications receipted in FY 2014. In addition, 4,314 Forms I-829 were awaiting decisions. Information provided by USCIS (Mar. 17, 2016). *See also* USCIS Webpage, "Data Set: All USCIS Application and Petition Form Types" (Sept. 2015); https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types (accessed Apr. 26, 2016).

On February 2, 2016, during the Senate Judiciary Committee hearing "On the Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?," the IPO shared information on its hiring plans currently underway.[386] At the time of the hearing, IPO staff, excluding FDNS professionals and counsel, totaled 110 employees (60 adjudicators, 28 economists, and 22 additional staff responsible for the direct support and management of the program).[387] The IPO Director testified the office is "currently recruiting to fill vacancies to bring IPO to its FY 2016 authorized staffing level of 171 in an effort to reduce our backlog."[388]

Address Abuse and Increase Integrity of the EB-5 Program. IPO is working with DOJ, the FBI, the U.S. Securities and Exchange Commission, and other components of the Federal Government to detect, deter, and eliminate abuse in the EB-5 program.[389] To increase integrity in the EB-5 program, IPO proposed the following to Congress: grant IPO the authority to act quickly on criminal and security concerns, and regulate regional center principals and associated commercial enterprises; enhance requirements for regional center annual reporting processes; and authorize USCIS to fine or temporarily suspend regional centers, as appropriate.[390] IPO also recognized the need for a statutory change to increase the EB-5 program's capital investment, which has not changed in 25 years.[391] Furthermore, IPO opened a dialogue with stakeholders to discuss changes to the program, TEAs, geographical scope of regional centers, and the value of exemplar filings, among other areas of concern.[392]

Configuration of Targeted Employment Areas. The establishment of TEAs in affluent urban areas and the geographic manipulation of these investment areas pose tensions with those from rural areas. According to testimony before the House Judiciary Committee, IPO does not have statutory authority to challenge a TEA designation, as state authorities make this determination under the current regulations under 8 C.F.R. section 204.6(i).[393]

Verifying Source of Funds. Confirming the legitimacy of fund sources remains another major area of concern in the EB-5 program. According to a GAO report presented before the House Judiciary Committee on February 11, 2016:

> USCIS's 2012 risk assessment identified the source of EB-5 petitioner funds as an area at risk for fraud…. USCIS officials said that some petitioners may have strong incentives to report inaccurate information about the sources of their funds on their petitions or use fraudulent documents in instances when the funds come from illicit—and thus ineligible—sources, such as funds obtained through drug trade, human trafficking, or other criminal activities. USCIS and State officials noted that verifying a lawful source of funds was difficult as they did not have authority to access and verify banking information with many foreign countries, and USCIS officials said that therefore IPO and FDNS did not have a means to verify self-reported immigrant financial information stated to come from these foreign banks.[394]

The same GAO report stated, "USCIS had taken some steps to enhance its fraud risk management efforts. These included establishing a dedicated entity to design and oversee its fraud risk management activities, creating an organizational structure conducive to fraud risk management, conducting fraud-awareness training, and establishing collaborative relationships with external stakeholders, including law enforcement agencies."[395]

Apply Deference Principles More Consistently. Per the IPO's May 2013 EB-5 *Adjudications Policy Memorandum,*[396] the grant of deference in appropriate circumstances is to ensure IPO will not reexamine determinations made in previous EB-5 filings. "Where USCIS has evaluated and approved certain aspects of an EB-5 investment, that favorable

[386] The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?, *supra* note 381 (statement of Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services).

[387] *Id.* at 3.

[388] *Id.*

[389] Information provided by IPO (Mar. 1, 2016).

[390] Is the Investor Visa Program an Underperforming Asset?, *supra* note 373 (statement of Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services).

[391] *Id.*

[392] USCIS Teleconference, "EB-5 Immigrant Investor Program: Listening Session" (Apr. 25, 2016).

[393] "Is the Investor Visa Program an Underperforming Asset?," *before the* House Committee on the Judiciary, 114th Cong. 2nd Sess. 16-17 (2016) (statement of Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services); https://judiciary.house.gov/wp-content/uploads/2016/02/114-58_98626.pdf (accessed May 16, 2016).

[394] "Is the Investor Visa Program an Underperforming Asset?," *before the* House Committee on the Judiciary, 114th Cong. 2nd Sess. 28-29 (2016) (statement of Rebecca Gambler, Homeland Security and Justice Director, GAO); https://judiciary.house.gov/wp-content/uploads/2016/02/114-58_98626.pdf (accessed May 16, 2016).

[395] *Id.*

[396] USCIS Policy Memorandum, "EB-5 Adjudications Policy" (May 30, 2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf (accessed May 16, 2016).

determination should generally be given deference at a subsequent stage in the EB-5 process."[397]

However, stakeholders have provided evidence of IPO's inconsistent use of this policy, where IPO approves some EB-5 regional center petitions, while issuing RFEs and denying other petitions for the same project. The Ombudsman has brought this issue to the attention of IPO leadership, and it has declined to respond.[398]

Ongoing Plan of Action

USCIS has signaled it intends to start rulemaking in this area.[399] In addition, Congress is expected to legislate reforms in the EB-5 program when it revisits the September 30, 2016 sunset date of the Regional Center program.[400] The Ombudsman will continue to address stakeholders' concerns with the quality, consistency, and timeliness of IPO's adjudication of applications and petitions under the EB-5 program.

[397] *Id.*

[398] Information provided by IPO (Mar. 1, 2016).

[399] USCIS Teleconference, "EB-5 Immigrant Investor Program: Listening Session" (Apr. 25, 2016).

[400] Department of Homeland Security Appropriations Act, 2016, Pub. L. No. 114-113, sec. 575, § 610(b), 129 Stat. 2242, 2526.

H-2 Temporary Workers and Labor Trafficking

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

During the reporting period, the Ombudsman heard from U.S. employers about challenges navigating DOL and USCIS processes to fill temporary agricultural (H-2A) and non-agricultural (H-2B) jobs.[401] Simultaneously, the Ombudsman heard from workers' rights organizations regarding the vulnerabilities to exploitation suffered by H-2 workers in the form of involuntary servitude or forced labor. Victims of human trafficking and related workplace-based crimes may seek humanitarian immigration relief by applying to USCIS for U or T nonimmigrant status.[402] During this reporting period, the Ombudsman has monitored interagency activities to address stakeholder concerns, and

[401] INA §§ 101(a)(15)(H)(ii)(a)-(b); 8 C.F.R. §§ 214.2(h)(5)-(6); *see infra,* "H-2B Temporary Non-Agricultural Workers—Program Developments and Challenges."

[402] U nonimmigrant status is available to individuals who have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, who possess information concerning criminal activity and have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of criminal activity. *See* INA § 101(a)(15)(U)(i). T nonimmigrant status is available to victims of severe forms of trafficking in persons who comply with reasonable requests for assistance from law enforcement in the investigation or prosecution of human trafficking cases. INA § 101(a)(15)(T)(i). There is no statutory cap in the T visa, but filings for T principal applicants have remained low.

worked to resolve requests for case assistance by workers encountering challenges in their pursuit of protective immigration benefits.

Background

Federal agencies responsible for worker protections seek to protect all workers from exploitation and violations of their rights, regardless of immigration status. Nevertheless, many workers are deterred or prevented from asserting workplace rights and protections because of their immigration status, or because they are not aware of the protections available to them. In March 2015, the GAO published a report on the need for increased protections for H-2A and H-2B workers.[403] Despite the commitment of additional federal resources to educate and empower seasonal and other workers over the past decade, unscrupulous employers and criminal enterprises continue to exploit H-2 workers who remain vulnerable to human trafficking.[404] Stakeholders continue to contend gaps in the institutional structure of the H-2 programs have exacerbated existing vulnerabilities. In response to President Obama's series of Executive Actions on immigration announced on November 20, 2014, DOL established an interagency working group to identify policies and procedures promoting the consistent enforcement of federal labor, employment, and immigration laws to protect all workers in the United States.[405]

Congress created the U and T visas as part of VTVPA to protect non-citizen victims of violent crimes as well as strengthen the ability of law enforcement agencies, including labor enforcement agencies, to investigate and prosecute certain criminal activities against immigrants.[406] The VTVPA offers important protections to victims who fear cooperating with law enforcement due to their immigration status. By including governmental labor agencies as a certifying authority, Congress explicitly recognized the challenges in gaining the trust of the immigrant workforce and enforcing consistent employment protections across American industries. Federal, state, and local labor and civil rights enforcement agencies have taken an active role in certifying U nonimmigrant status petitions for immigrant victims of workplace-based criminal activity, and providing declarations for T nonimmigrant status applications for labor trafficking crimes[407] to enhance cooperation in key enforcement investigations.[408] ICE Homeland Security Investigations supports labor trafficking investigations in state and local communities as well.[409]

USCIS conducts regular cross-trainings with federal and state labor agencies to improve understanding of how it can support enforcement of labor and anti-trafficking laws through deferred action, parole, or protections for immigrant victims like the U and T visas. Through these trainings, USCIS provides guidance on best practices to law enforcement authorities for certification.[410] In December 2015, the Ombudsman coordinated an update to the *DHS U/T Law Enforcement Resource Guide,* and contributed additional information on labor trafficking and workplace based crimes.[411]

Enhanced Federal Engagement

Stakeholders made recommendations to strengthen protections for workers across visa categories, leading to a renewed effort by federal partners, including DHS, DOL, and DOS, to work together to address program vulnerabilities.[412] Recommendations received included improving transparency in the recruitment process, creating accountability in employment relationships, ensuring access to justice, regulating the causes of economic

[403] GAO Report, "H-2A and H-2B Visa programs: Increased Protections Needed for Foreign Workers," GAO-15-154 (Mar. 2015); http://www.gao.gov/assets/670/668875.pdf (accessed May 2, 2016).

[404] *Id.*

[405] DOL Fact Sheet, "Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws;" http://www.dol.gov/general/immigration/interagency-working-group (accessed Mar. 16, 2016).

[406] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8 U.S.C.)

[407] To qualify for the U and T visa, the victims must prove to USCIS that they have cooperated with law enforcement. *See* INA § 101(a)(15)(T)-(U). A primary way a victim may demonstrate cooperation is by submitting a signed statement from law enforcement as part of the application or petition. *See* 8 C.F.R. § 214.14. In the U visa context, this statement is a required part of the petition and is known as USCIS Form I-918, *Supplement B, U Nonimmigrant Status Certification* (Form I-918B or certification). In the T visa context, this statement is known as USCIS Form I-914, *Supplement B, Declaration of Law Enforcement Officer for Victim in Trafficking of Persons* (Form I-914B or declaration). *See* 8 C.F.R. § 214.11. While not required for a T visa, the signed declaration provides valuable evidence of the victim's cooperation. Exceptions to the cooperation requirement exist for U and T visa applicants and petitioners who are under age 18 or who have suffered trauma. INA § 101(a)(15)(T)(i), (a)(15)(U)(i)(I).

[408] DOL Fact Sheet, "The Department of Labor's Wage and Hour Division Will Expand Its Support Of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS;" http://www.dol.gov/general/immigration/u-t-visa (accessed Mar. 1, 2016).

[409] DHS Webpage, "Human Trafficking;" https://www.ice.gov/human-trafficking (accessed Mar, 16, 2016).

[410] DOL Fact Sheet, "Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws: Action Plan Update" (Dec. 2015); http://www.dol.gov/dol/fact-sheet/immigration/IWGDecember2015ProgressReport.htm (accessed Mar. 16, 2016).

[411] Odom and Fong, *supra* note 25. (accessed Mar. 1, 2016).

[412] Information provided during public meeting with International Labor Recruitment Working Group (ILRWG) hosted by DOL, (Feb. 24, 2016). *See also* GAO Report, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403.

coercion, and prohibiting discrimination and retaliation.[413] As Blue Campaign Chair, the Ombudsman will continue to facilitate the DHS response to these recommendations, including guiding internal conversations with DHS partners and encouraging dialogue with stakeholders to identify sub-regulatory solutions that can be started both in the short and long term.[414]

Whistleblower Protections for H-2 Workers

Stakeholders allege employers retaliate against, or otherwise coerce, workers believed to be involved in various labor rights actions by falsely reporting to USCIS that employees have absconded, or abandoned their employment, or the employer no longer needs to fill the position. An employer's retaliatory conduct jeopardizes a worker's ability to change employers or obtain future visas enabling them to return to the United States.[415] Although USCIS' regulations require an employer to report abscondments,[416] the agency does not have a formal process to notify the named worker or investigate claims of retaliation.[417] Accordingly, workers may be unaware of employer abscondment allegations until they appear for a future visa interview at an overseas consular post. While at times a worker is able to provide evidence to disprove false claims, having to do so results in significant visa issuance delays, and may result in a visa refusal and loss of future employment.

Disincentives to Reporting Illegal Recruiting Fees

By signing Form I-129, *Petition for a Nonimmigrant Worker,* employers attest to the truthfulness of all documents submitted with that petition, including representations that petitioners are subject to U.S. law.[418] This is more specific with respect to H-2A and H-2B petitioners, which are required to attest that neither they nor their agents collected from the foreign workers any fee in exchange for being recruited, or other prohibited fees.[419] However, stakeholders report overseas recruiting agents continue to collect illegal recruiting fees.[420] Workers are reluctant to report collection of illegal fees for fear they will subsequently lose their jobs and the income that would be used to repay debt incurred from fees.[421]

When USCIS or DOS discovers a fee violation, the visa will be denied and the petition subsequently revoked by the responsible agency. DHS regulations provide a 30-day extension of stay or other limited immigration relief to a worker who is the beneficiary of a revoked petition based on the worker's payment of a prohibited fee, but it is unclear whether USCIS consistently provides this protection.[422] Additionally, recruiting fee violations may serve as a basis to prohibit a petitioner from future use of the H-2 programs.[423]

While employers must sign a statement that they will assume full responsibility for all representations made by agents in the United States used in the recruitment process,[424] there appears to be little legal authority to impose regulatory requirements on H-2 agents or entities located outside of the United States.[425] Stakeholders report employers use recruitment agents who then sub-contract to third-party recruiters located in the workers' home countries.[426] The third-party recruiters pocket these illegally paid fees, which then place dependent workers in debt, and

[413] *Id.*

[414] *See generally* ILRWG, "The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse" (Feb. 2013); https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/resource/final-e-version-ilrwg-report_0.pdf (accessed May 3, 2016); Urban Institute, "Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States" (Oct. 21, 2014); http://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states (accessed May 3, 2016).

[415] Public meeting with ILRWG hosted by DOL, *supra* note 412. *See also* H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403, at 37.

[416] 8 C.F.R. § 214.2(h)(5)(vi) (H-2A abscondment) and 214.2(h)(6)(i)(F) (H-2B abscondment).

[417] Public meeting with ILRWG hosted by DOL, *supra* note 414. *See also supra* note 405, at 56-57.

[418] *See infra* "H-2B Temporary Non-Agricultural Workers Program Developments and Challenges" (discussing the filing process and requirements for H-2 visas); *see also* USCIS Form I-129, *Petition for a Non Immigration Worker*, p. 6 (Aug. 13, 2015); https://www.uscis.gov/sites/default/files/files/form/i-129.pdf (accessed Mar. 16, 2016).

[419] 20 C.F.R. § 655.135(j); *see also* DOL Memorandum, "H-2A "Prohibited Fees" and Employer's Obligation to Prohibit Fees," Field Bulletin No. 2011-2 (May 6, 2011); http://www.dol.gov/whd/FieldBulletins/fab2011_2.pdf (accessed Mar. 1, 2016).

[420] H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403, at 30, 37.

[421] Public meeting with ILRWG hosted by DOL, *supra* note 412. *See also Id.*

[422] *See* 8 C.F.R. § 214.2(h)(5)(xi)(B), 214.2(h)(6)(i)(C).

[423] *See* 20 C.F.R. §§ 655.182(d)(viii), 655.73(f)(10); *see also* 8 C.F.R. § 214.2(h)(5)(xi), 214.2(6)(i)(B).

[424] *See* 20 C.F.R. §§ 655.20(aa), 655.135(k); USCIS Form I-129, *Petition for a Non Immigration Worker*, p. 6 (Aug. 13, 2015); https://www.uscis.gov/sites/default/files/files/form/i-129.pdf (accessed Mar. 16, 2016).

[425] *See* 20 C.F.R. §§ 655.22(g)(2), 655.182(b); 29 C.F.R. § 501.20(d)(1)(viii). Employer agents and attorneys may also be subject to debarment if they participated in the employer's violation, but only if they are within the United States.

[426] *See also* H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403, at 28-29.

in many cases serves as an underlying reason that compels the worker to stay in bondage.

Human Trafficking and Victims of Certain Crimes

Victims of human trafficking may seek humanitarian relief by applying for T nonimmigrant visa status.[427] T applicants must show they are a victim of a severe form of trafficking in persons, which includes "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, *through the use of force, fraud, or coercion* for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (emphasis added)." [428]

Victims of certain qualifying crimes, including human trafficking and a workplace-based crime, may also seek U nonimmigrant status.[429] U visa petitioners must show they have suffered "substantial" physical or mental abuse from the qualifying criminal activity.[430] USCIS considers several factors when determining whether an applicant has suffered substantial physical or mental harm.[431] No single factor is a prerequisite and together, a series of acts may rise to the level of "substantial" abuse.[432]

The Ombudsman has received examples of RFEs and petition denials where the agency failed to recognize that multiple minor labor violations could collectively constitute "substantial" abuse or amount to involuntary servitude or debt-bondage. Additionally, stakeholders report receiving boilerplate RFEs and denials from USCIS that allegedly demonstrate USCIS is not consistently applying the preponderance of the evidence legal standard in adjudicating claims of substantial abuse.[433] The Ombudsman has raised these concerns with USCIS and intervened in those cases, as appropriate.

Over the past year, the VSC, which adjudicates petitions for protection submitted by victims of workplace-based crimes and labor trafficking, has initiated adjudicator training focused on the link between workplace based crimes and labor trafficking, and has sought additional training from non-profit organizations on this topic.[434] USCIS has also shared that it is developing new U and T visa petition guidance for its adjudicators.[435]

In FY 2015, USCIS' inventory of received and pending T and U nonimmigrant status applications and petitions from victims was over 31,000.[436] Increasingly, those applications and petitions involve workplace-based crimes or labor trafficking. According to the GAO's review, from fiscal years 2009 through 2013, 49 H-2A and 137 H-2B workers obtained T visas. Men comprised almost 90 and 75 percent of H-2A and H-2B victims granted T visas, respectively.[437] GAO also found in calendar years 2012 and 2013 that DOJ-funded service providers assisted 340 workers who were identified as victims of human trafficking in typical H-2 industries,[438] and over 93 percent of these workers were reported to be victims of labor trafficking or workplace-based violence.[439]

The Ombudsman will continue to review how USCIS can collaborate with federal agency partners to address employee exploitation and human trafficking by participating in interagency efforts to strengthen protections for foreign workers. In addition, the Ombudsman will convene DHS representatives to discuss how to enhance protections within the Department's authorities. Stakeholders should continue to provide the Ombudsman examples of questionable RFEs or denials related to workplace-based crimes, labor trafficking, or abscondments.

[427] 8 C.F.R. § 214.11; USCIS Form I-914, *Application for T Nonimmigrant Status* (Jul. 29, 2014); https://www.uscis.gov/sites/default/files/files/form/i-914.pdf (accessed Mar. 10, 2016).

[428] 22 U.S.C. § 7102(9)(B); *see also* 8 C.F.R. § 214.11(a).

[429] 8 C.F.R. § 214.14; USCIS Form I-918, *Petition for U Nonimmigrant Status*, (Jan. 15, 2013); https://www.uscis.gov/sites/default/files/files/form/i-918.pdf (accessed Mar. 10, 2016).

[430] INA § 101(a)(15)(U)(i)(I).

[431] 8 C.F.R. § 214.14(a)(8).

[432] 8 C.F.R. § 214.14(b)(1).

[433] Information provided through requests for case assistance.

[434] Information shared by VSC during Ombudsman site visit (June 5, 2016).

[435] Public meeting with ILWRG hosted by DOL, *supra* note 412.

[436] USCIS Report to Congress, "Annual Report on Immigration Applications Made by Victims of Abuse—Fiscal Year 2015."

[437] *See also* H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403, at 74.

[438] *See infra* "H-2B Temporary Non-Agricultural Workers—Program Developments and Challenges" of this Report (reporting "[t]he majority of U.S. employers that petition for H-2B nonimmigrant workers are found in landscaping, hospitality, horse racing, traveling carnivals, forestry, and seafood processing industries.")

[439] *See also* H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, *supra* note 403, at 36-37.

H-2B Temporary Non-Agricultural Workers—Program Developments and Challenges

Responsible USCIS Office: Service Center Operations Directorate

Recent regulatory and legislative developments have exacerbated conditions affecting both employers and employees contributing to an overall increase, at least temporarily, in H-2B processing delays. Stakeholders have reported an increase in the number of RFEs, denials, and NOIRs challenging the nature of the temporary labor need. More specifically, USCIS has questioned the "dates of need" stated by employers in petitions with the same "dates of need" that were approved in prior years by both DOL and USCIS. USCIS posted to its website guidance previously shared with the service centers clarifying "statement of need" and the evidence required to meet one of the standards of temporary need.[440]

Since 2014, the Ombudsman has hosted interdepartmental meetings with the three principal federal agencies involved in the H-2 program administration: DOL, USCIS, and DOS. These meetings provide the operational components an opportunity to cross-train, share information, and discuss opportunities for program improvement.

Background

The H-2B program permits U.S. employers to hire foreign workers on a temporary, seasonal basis for nonagricultural positions where there is a shortage of able, willing, and qualified domestic workers to perform the work needed.[441] The majority of U.S. employers that petition for H-2B nonimmigrant workers are found in landscaping, hospitality, horse racing, traveling carnivals, forestry, and seafood processing industries.

Congress set a numerical limit (or cap) on the total number of foreign workers to whom the Federal Government may issue an H-2B visa or grant H-2B status during a fiscal year.[442] The statutory limit is 33,000 for workers who begin employment in the first half of the fiscal year (October 1 to March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 to September 30), totaling no more than 66,000 in each fiscal year.[443] The DHS Appropriations Act of 2016 (Public Law 114-113) exempted "returning" H-2B temporary workers from the annual visa cap,[444] provided they previously held H-2B status between October 1, 2012, and September 30, 2015.[445]

Under the current H-2B program process, before an employer files an H-2B petition with USCIS, it must apply for and receive a temporary labor certification for H-2B

[440] USCIS Webpage, "H-2B Clarifying Guidance" (Mar. 25, 2016); https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-clarifying-guidance (accessed Apr. 2, 2016).

[441] *See* INA § 101 (a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii).

[442] INA § 214(g)(1)(B), 214(g)(10).

[443] USCIS Webpage, "H-2B Temporary Non-Agricultural Workers" (Feb. 5, 2016); https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers (accessed Feb. 23, 2016).

[444] Department of Homeland Security Appropriations Act, 2016, Pub. L. No. 114-113, sec. 565, § 214(g)(9)(A), 129 Stat. 2242, 2523 (codified as amended at 8 USC § 1184(g)(9)(A) (2016) by striking "2004, 2005, or 2006 shall not again be counted toward such limitation during fiscal year 2007." and inserting "2013, 2014, or 2015 shall not again be counted toward such limitation during fiscal year 2016."). The annual cap exemption for returning workers is limited to FY 2016 and is set to expire on September 30, 2016.

[445] USCIS Webpage, "H-2B Temporary Non-Agricultural Workers" (Feb. 5, 2016); https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers#returning (accessed Feb. 29, 2016). The Department of Labor Appropriations Act of 2014, Pub. L. 113-76, § 113, 128 Stat. 5, 362, also contained a provision permitting the "staggering" of workers. DOL, Office of Foreign Labor Certification, "2015 H-2B Interim Final Rule FAQs: Round 9: Staggered Crossing of H-2B Nonimmigrants Working in the Seafood Industry" (July 15, 2015); https://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_IFR_FAQs_Round9.pdf (accessed Feb. 29, 2016). That provision has been continued in subsequent appropriations legislation. *See, e.g.,* Department of Labor Appropriations Act, 2015, Pub. L. 113-235, § 108, 128 Stat. 2130, 2464; Department of Labor Appropriations Act, 2016, Pub. L. No. 114-113, § 111, 129 Stat. 2242, 2599.

workers from DOL.[446] The employer then files Form I-129, *Petition for a Nonimmigrant Worker* with USCIS with the temporary labor certification.[447] USCIS independently determines whether the employer's needs are "temporary," and whether all other regulatory requirements have been met. Once USCIS approves the petition, the foreign worker applies for an H-2B nonimmigrant visa at a U.S. Consulate or Embassy. DOS interviews the workers to determine admissibility, and to assess their awareness of the location and specific work they will perform. If deemed qualified and otherwise admissible, DOS issues H-2B visas to the foreign workers to apply for admission to the United States.

Ongoing Concerns

Since publication of the 2015 Annual Report, important regulatory and legislative actions have affected the H-2B program's performance and, at least temporarily, resulted in H-2B processing delays at DOL, USCIS and DOS. On April 29, 2015, DOL and DHS jointly published the Interim Final Rule and Final Wage Rule governing the H-2B program process at DOL,[448] which expanded recruitment procedures for U.S. workers, strengthened protections for all workers, and allowed for the continued but limited use of employer-provided prevailing wage surveys under certain conditions.[449] The 2016 DOL Appropriations Act contained several provisions affecting the H-2B program including providing flexibility in the employment start date for H-2B seafood workers, permitting the use of employer-provided wage surveys, and redefining "temporary need."[450]

DOL's Office of Foreign Labor Certification (OFLC) experienced a 123 percent increase in H-2B application filings in the 3-week period from December 26, 2015 to January 15, 2016, compared to the same period the previous year.[451] These increases in filings led in turn to considerable delays, which were further exacerbated by "a 17-day certification processing pause at the Chicago National Processing Center needed for OFLC to implement changes to comply with the revisions to the H-2B prevailing wage and certification standards contained in the 2016 [DOL] Appropriations Law."[452] Additionally, on January 27, 2016, OFLC announced it was experiencing "technical problems with its electronic filing system, iCERT Visa Portal System, which resulted from the implementation of required IT security specifications."[453] DOL acknowledged these delays created backlogs that prevented employers from bringing in a temporary workforce by the requested "dates of need."[454] To address these problems, DOL invoked existing regulatory emergency procedures.[455] The Ombudsman engaged USCIS to understand the agency's capacity and plan to address the expected surge of filings likely to occur as a result of processing delays at DOL.

The Ombudsman observed that while USCIS may have increased its corps of adjudicators available to process H-2 petitions, some were not appropriately trained. Stakeholders complained USCIS issued RFEs and denials that revealed incorrect application of H-2B law and regulations. For example, adjudicators issued RFEs and denials in petitions where the employers regularly used the H-2B program each year for the same time period, finding erroneously that such regular use of temporary workers made the positions part of the employer's regular workforce and a permanent, not temporary, need.[456] On March 25, 2016, in part as a result of the work of the Ombudsman in bringing egregious RFE examples to the agency, USCIS issued "clarifying guidance" noting an increase in RFEs, "which often occurs as officers familiarize themselves with a new type of adjudication."[457] The issuance of these templated RFEs compounded DOL processing delays, resulting in financial hardship to employers unable to meet their temporary labor

[446] *See* 20 C.F.R. § 655; DOL Webpage, "H-2B Temporary Non-agricultural Program" (Feb. 25, 2016); https://www.foreignlaborcert.doleta.gov/2015_H-2B_IFR.cfm (accessed Feb. 25, 2016); DOL Webpage, "H-2B Certification for Temporary Non-Agricultural Work" (Feb. 25, 2016); https://www.foreignlaborcert.doleta.gov/h-2b.cfm (accessed Feb. 25, 2016).

[447] *See* USCIS Webpage, "H-2B Temporary Non-Agricultural Workers" (Feb. 5, 2016); https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers (accessed Feb. 29, 2016).

[448] 20 C.F.R. § 655 Subpart A; 8 C.F.R. § 214.2 (h)(6)(ii).

[449] An employer-provided wage survey may be used as an alternative to the DOL's Online Employment Wage Library, provided it meets certain criteria set forth in 20 C.F.R. § 655 Subpart A; 8 C.F.R. § 214.2 (h)(6)(ii). *See* Ombudsman's Annual Report 2015, pp. 35-39.

[450] Department of Labor Appropriations Act, 2016, Pub. L. No. 114-113, §§ 111-114, 129 Stat. 2242, 2599-2600.

[451] *See* OFLC Webpage, "H-2B Temporary Nonagricultural Visa Program, OFLC Emergency Processing Initiative for Backlogged H-2B Applications" (Feb. 19, 2016); https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Emergency-Processing_Initiative.pdf (accessed Mar. 4, 2016).

[452] *Id.*

[453] *Id.*

[454] *Id.*

[455] *Id.*

[456] Information provided through a request for case assistance.

[457] H-2B Clarifying Guidance, *supra* note 440.

needs by the dates requested; the Ombudsman intervened in several such cases to ensure legally correct reviews.[458]

The Ombudsman will continue to monitor stakeholder concerns about the treatment of both employers and employees in the H-2B program to promote improved program functionality and address concerns of abuse. Additionally, the Ombudsman will continue to make recommendations, as appropriate, to promote more effective interagency communication and coordination to facilitate the lawful and timely entry of temporary workers into the United States.

Requests for Evidence

Responsible Office: Service Center Operations Directorate

H-1B, L-1A, and L-1B Nonimmigrant Petitions

As in previous years, the Ombudsman continues to monitor the rates at which RFEs are issued at the VSC and California Service Center (CSC) in three high-skilled nonimmigrant visa categories: H-1B (Specialty Occupation Workers), L-1A (Intracompany Transferee Managers and Executives) and L-1B (Specialized Knowledge Workers).[459]

The FY 2015 RFE rate for H-1B petitions at the CSC declined 10 percent from FY 2014, and is now aligned with the VSC rate, which also decreased slightly in FY 2015, to 23 percent.[460] By contrast, L-1A RFE data shows inverse trending between the CSC and the VSC. For example, CSC's L-1A rates surged to 55 percent in FY 2015, its highest level in 20 years, while in the same period, VSC's rate dropped dramatically from a high of 44.6 percent in FY 2014, to 29 percent in FY 2015. The number of L-1B RFEs dropped in FY 2015 at both service centers, to 44 percent at the CSC and 33 percent at the VSC.

In the absence of any changes to the laws or regulations governing L-1As, or any evidence of a disparate application of policy, it is unclear why L-1A RFE rates differ so significantly between USCIS service centers. With respect to L-1B petitions, although the agency issued draft L-1B guidance on March 24, 2015,[461] it does not appear that RFE rates in FY 2015 were affected by this guidance, as it did not become final until August 17, 2015.[462] The Ombudsman calls on USCIS to undertake careful examination of the disparities between service centers in processing these form types.

In *Matter of Simeio,* 26 I&N Dec. 542 (AAO 2015), the Administrative Appeals Office held petitioners must file an amended or new H-1B petition with the corresponding labor condition application (LCA) based on the agency announcement that the movement of an employee to a new work location that is outside the area of employment covered by the previous LCA constitutes a a material change in the terms and conditions of employment. The impact of this precedent decision on H-1B RFE rates has not yet become apparent, as the agency's guidance[463] on how it would operationalize *Simeio* was not issued until late in FY 2015. At the Ombudsman's Fifth Annual Conference, stakeholders contemplated a marked impact on employers in order to achieve compliance with *Simeio*, especially with respect to additional costs to prepare and file amended petitions.[464] During the processing of these amended petitions, stakeholders reported receiving RFEs requesting information unrelated to the reason for filing the amendment, which resulted in a re-evaluation of the job opportunity or the foreign national's qualifications.[465]

Ongoing Concerns

The FY 2015 RFE data in other employment-based nonimmigrant visa categories reveals high rates in two product lines at the VSC: O-1 (Individuals with Extraordinary Ability or Achievement), reported at 49 percent, and P-1 (Internationally Recognized Athletes),

[458] Information provided through a request for case assistance where USCIS issued a denial finding that the employer did not demonstrate a temporary need because the employer's need for workers only during certain months constituted a regular, permanent need. The Ombudsman was able to have the decision reversed on the ground that USCIS misinterpreted the employer's need to hire more workers for a specific short period of time as a permanent need rather than as a peakload need.

[459] Ombudsman Annual Report 2015, pp. 39-41; Ombudsman Annual Report 2014, pp. 21-23; Ombudsman Annual Report 2013, pp. 28-30.

[460] Information provided by USCIS (Apr. 14, 2016).

[461] USCIS Draft Policy Memorandum, "L-1B Adjudications Guidance," PM-602-0111 (Mar. 24, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf (accessed May 18, 2016).

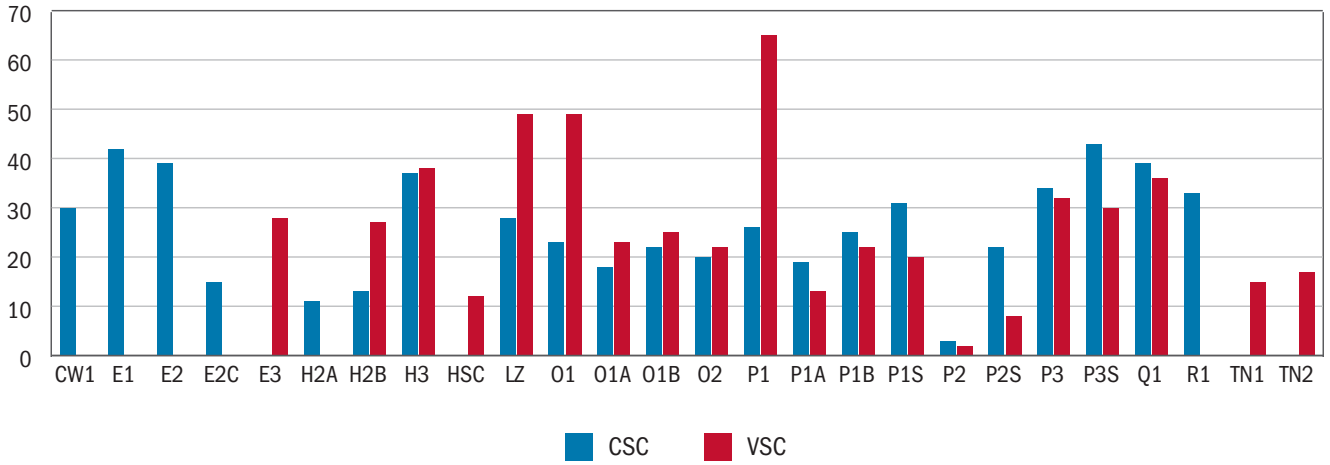
[462] USCIS Policy Memorandum, "L-1B Adjudications Guidance," PM-602-0111 (Aug. 17, 2015); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf (accessed May 18, 2016).

[463] USCIS Interoffice Memorandum, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity" (Apr. 23, 2004); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/readjud_042304.pdf (accessed May 18, 2016).

[464] Ombudsman 2015 Annual Conference (November 6, 2015).

[465] Information from the Council for Global Immigration based on a survey provided to the Ombudsman on April 17, 2016.

Figure 4.1: FY15 RFE Rates—California Service Center and Vermont Service Center



Source: Information provided by USCIS (Apr. 14, 2016).

which increased to 65 percent.[466] Over the past 2 years, stakeholders have raised concerns about lengthening processing times for O-1 petitions, including the longstanding issue of USCIS' requests for consultations from incorrect industry peer groups,[467] particularly within the performing arts sector. The Ombudsman will engage the VSC to better understand the various factors that account for these elevated RFE rates.

Stakeholders have speculated for years that USCIS engages in a pattern or practice of issuing RFEs in the final days of the 15-day Premium Processing period as a tactic to "stop the clock" on petitions to avoid having to issue a refund to petitioners if adjudication cannot be competed in time. The Ombudsman requested and reviewed H-1B RFE data within the Premium Processing line for FYs 2013 and 2014, segregated by service center and by day of issuance, to determine if a pattern could be detected.[468]

The data provided by USCIS clearly evidences that in FYs 2013 and 2014, the VSC issued more RFEs than the CSC during the last 3 days of the Premium Processing period. However, the data also showed that very few RFEs were issued on day 15 at either service center. Further analysis of the aggregate data for FYs 2013 and 2014 provided additional insight into the occurrence and timing of RFEs at each service center. For example, the data revealed the highest 3 days of RFE issuance during the Premium Processing period by service center were as follows (a qualitative analysis of the RFEs was not conducted):[469]

Service Center	Day of RFE Issuance
VSC	Day 14 (16%) Day 13 (12%) Day 9 (12%)
CSC	Day 7 (15%) Day 6 (12%) Day 8 (12%)

Analysis also disclosed that of the H-1B submissions filed Premium Processing in 2013 and 2014, the VSC issued a significant number of RFEs after the 16th day, with almost 34 percent of RFEs being issues after the 16th day in FY 2013, and almost 34 percent in FY2014; the CSC had much lower rates of 2 percent in FY 2013 and 6 percent in FY 2014.[470]

USCIS continues to issue significantly high rates of RFEs, particularly in L-1A, L-1B, O-1, and P-product lines. The Ombudsman will continue to monitor and engage USCIS on issues pertaining to the quality and frequency of issuance of RFEs, and call for more transparency regarding RFE rates, enhanced training on the preponderance of the evidence standard, and supervisory review to ensure appropriateness of issuance.

[466] Information provided by USCIS (Apr. 14, 2016).

[467] Information provided through requests for case assistance. *See also,* USCIS Webpage, "Listening Session on O and P Nonimmigrant Classifications" (Sept. 1, 2010); https://www.uscis.gov/outreach/notes-previous-engagements/notes-previous-engagements-topic/employment-based-immigrant/listening-session-o-and-p-nonimmigrant-classifications (accessed May 25, 2016).

[468] Information provided by USCIS (Nov. 24, 2014 and May 21, 2015).

[469] *Id.*

[470] *Id.*

Recommendation Update: Employment Authorization Documents

Responsible USCIS Offices: Service Center Operations Directorate and Office of Intake and Document Production

In 2006, 2008, and 2011, the Ombudsman issued recommendations to address USCIS processing delays for EADs, including the issuance of multi-year EADs, more efficient processing and meeting regulatory timeframes, and minimizing the adverse impact of delays on individuals and employers.[471] USCIS adopted certain recommendations in part, but did not acknowledge that EAD processing times were delayed.[472]

Since that time, the Ombudsman has seen requests for case assistance regarding EAD processing delays only increase. USCIS noted in 2009: "… unfortunately, there is a small percentage of applicants whose cases are not adjudicated timely, and we understand that this imposes a significant burden on them, but we respectfully disagree with the perception that EAD processing, as a whole, is a significant issue."[473] However, given that more than 2 million EAD applications were filed with the agency in FY 2015, missing the current 90-day regulatory adjudication timeframe by even one percent equates to as many as 20,000 customers suffering adverse consequences.[474] The consequences include income interruption, loss of employment and related health insurance, and disruption or delay in receipt of other benefits. The number of adjudications that are completed beyond 90 days, discussed in more detail below, appear to be far higher than one percent. With a proposal to eliminate the 90-day processing requirement currently under consideration by the agency, timeliness remains a real concern for processing of this product line.[475]

Background

In the past, USCIS has informed customers they may file a Form I-765, *Application for Employment Authorization* up to 120 days in advance of the expiration of their current EAD.[476] By current regulation, USCIS must adjudicate most EADs within 90 days of receipt.[477] Interim EADs are no longer issued by the agency, despite regulatory language allowing for that option after 90 days.[478] Generally, USCIS issues an EAD with a validity period of 1 year,[479] but some classes of individuals receive EADs in increments of 2 years.[480]

Having a valid EAD in one's possession is necessary for authorized employment but is also required for other reasons. In many states, a foreign national cannot obtain or renew a driver's license without valid proof of authorized presence in the United States, and in many situations, an EAD card is the only proof available for this

471 Ombudsman Recommendation 25, "Recommendation to USCIS that it: 1) begin issuance of multi-year Employment Authorization Documents; 2) issue Employment Authorization Documents valid as of the date any previous issuance expires; and 3) amend the regulations such that K-1 nonimmigrants are not subject to breaks in employment authorization" (Mar. 20, 2006); Ombudsman Recommendation 35, "Recommendations on USCIS Processing Delays for Employment Authorization Documents" (Oct. 2, 2008); Ombudsman Recommendation 49, "Employment Authorization Documents: Meeting the 90 Day Mandate and Minimizing the Impact of Delay on Individuals and Employers" (July 18, 2011).

472 USCIS Response to Recommendation #25 (June 20, 2006); https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_25_EAD_USCIS_Response-06-20-06.pdf (accessed Mar. 29, 2016); USCIS Response to Recommendation #35 (Jan. 2, 2009); https://www.dhs.gov/xlibrary/assets/uscis_response_to_cisomb_recommendation35_01_02_09.pdf (accessed Mar. 29, 2016); USCIS Response to Recommendation #49 (Apr. 11, 2012); http://www.gjpclaw.com/documents/Response-to-CISOMB-49.pdf (accessed Mar. 29, 2016).

473 USCIS Response to Recommendation #35, *supra* note 472.

474 Information provided by USCIS (May 11, 2016).

475 "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," Proposed Rules," 80 Fed. Reg. at 81927-28.

476 USCIS Response to Recommendation #49 (Apr 11, 2012); http://www.gjpclaw.com/documents/Response-to-CISOMB-49.pdf (accessed Mar. 29, 2016). The Ombudsman has confirmed that USCIS will accept Form I-765 applications submitted for adjudication greater than 120 days prior to the expiry date of the applicants' prior card. Information provided by USCIS to the Ombudsman (Apr. 14, 2016).

477 8 C.F.R. § 274a.13(d).

478 USCIS Interoffice Memorandum, "Elimination of Form I-688B, Employment Authorization Card" (Aug. 18, 2006); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/elimi688b_081806r.pdf (accessed Mar. 8, 2016).

479 *See generally*, USCIS Webpage, "Employment Authorization Document" (Oct. 25, 2011); https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document (accessed Apr. 27, 2016).

480 USCIS Webpage, "USCIS to Issue Two-Year Employment Authorization Documents" (June 12, 2008), https://www.uscis.gov/archive/archive-news/uscis-issue-two-year-employment-authorization-documents (accessed Apr. 27, 2016); *see generally* USCIS Webpage "Who is eligible for an EAD that is valid for two years?"; https://my.uscis.gov/helpcenter/article/who-is-eligible-for-an-ead-that-is-valid-for-two-years (accessed Apr. 4, 2016).

purpose.[481] The validity period of the driver's license in most states coincides with the validity period granted on an EAD when it has been used to establish eligibility.[482] Additionally, EADs for certain classes of nonimmigrants are a prerequisite to obtaining a Social Security number and other federal, state and local benefits. While receiving an initial EAD is important to foreign nationals to establish their livelihoods in the United States, the EAD renewal is essential for foreign nationals to continue their employment in the United States without interruption.

To ameliorate the negative impacts of EAD adjudication delays, in 2008 and 2011 the Ombudsman recommended that USCIS:

- Comply with the regulatory processing time;
- Issue interim EADs, as necessary;
- Issue multi-year EADs to more classes of applicants;[483]
- Establish a uniform processing time goal of 45 days to adjudicate Form I-765, issuing the EAD no later than the 60th day;
- Improve monitoring and ensure real-time visibility through an automated system for tracking processing times; and
- Issue replacement EADs with validity dates beginning on the date the prior EAD expired.[484]

In response to these recommendations, USCIS implemented procedures to identify applications that remain unassigned for adjudication more than 60 days after filing, and authorized the NCSC to accept a service request inquiry[485] after day 75.[486]

Ongoing Concerns

Despite the Ombudsman's concerns, and the steps the agency has taken to address EAD adjudication delays, processing times beyond 90 days continue. The Ombudsman received data from USCIS regarding EAD completions from FY 2012 through 2015. FY 2015 data discloses that EAD adjudications after 90 days reached a troublesome 22 percent (449,307 filings).[487] The Ombudsman has seen a corresponding upswing in EAD related requests for case assistance in the same timeframe. In this reporting period, the Ombudsman received 1,226 requests for case assistance on EADs, representing 13 percent of the Ombudsman's overall caseload.[488]

While some delays are due to the customer's failure to file timely or provide required documentation, other delays occur through no fault of the customer. This customer's experience is typical of the delays the Ombudsman handles:

> ….[I]t is now 100 days to be exact [since filing]. This delay is affecting my employment process very much. My previous EAD expired on 03/24/15. My employer requested me to take an unpaid leave of absence as they could no longer continue the employment without the renewed EAD card. Therefore I have been on unpaid leave since then and experiencing severe financial difficulty due to this issue. I was verbally advised by my HR representative that I cannot continue working until I receive the actual physical EAD card.[489]

[481] To obtain a valid driver's license, many states accept an unexpired Form I-765 to prove identity, authorized presence, or status. *See, e.g.,* Virginia Department of Motor Vehicles Webpage, "Proof of Identity;" https://www.dmv.virginia.gov/apps/documentbuilder/proof_of_identification.aspx (accessed May 4, 2016); Georgia Department of Driver Services Webpage, "Renewal of Driver's License or Identification Card" (Apr. 26, 2016); http://www.dds.ga.gov/drivers/dldata.aspx?con=1742949265&ty=dl (accessed May 4, 2016); California Department of Motor Vehicles Webpage, "Birth Date Verification and Legal Presence Requirements;" https://www.dmv.ca.gov/portal/dmv/detail/dl/dl_info#BDLP (accessed May 18, 2016).

[482] *See, e.g.*, Virginia Department of Motor Vehicles Webpage, "Virginia's Legal Presence Law;" https://www.dmv.virginia.gov/drivers/#legal_presqa.asp (accessed May 20, 2016); California Department of Motor Vehicles Webpage, "Limited Term Legal Presence;" https://www.dmv.ca.gov/portal/dmv/detail/dl/dl_info#BDLP (accessed May 18, 2016).

[483] Ombudsman's Recommendation 35, *supra* note 474. Generally, individuals receive an EAD valid for 1 year. USCIS has implemented multi-year EADs for limited applicants. *See generally* 8 C.F.R. § 247a12(a) and (c); USCIS Webpage, "Employment Authorization Document" (Oct. 25, 2011); https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document (accessed Apr. 19, 2016).

[484] *See* Ombudsman Recommendation 49, *supra* note 471.

[485] USCIS Response to Recommendation #35 , *supra* note 472.

[486] SRMT is the USCIS system used to record and respond to a request for service for a variety of reasons. When the customer requests service by calling the NCSC toll-free telephone number, a SRMT is created by NCSC staff if the inquiry cannot be resolved during the call. While the NCSC generates the majority of SRMT requests, SRMTs are also initiated at local field offices. *See* USCIS Policy Manual, "Volume 1—General Policies and Procedures, Part A—Customer Service, Chapter 8—Service Request Management Tool (SRMT)" (Feb. 26, 2016); https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter8.html (accessed May 11, 2016).

[487] Information provided by USCIS (May 11, 2016).

[488] Information provided through requests for case assistance. The Ombudsman's data does not include DACA related EAD applications.

[489] Other cases demonstrate more egregious circumstances. In one such situation, an applicant (whose driver's license was in jeopardy) had his case transferred from one service center to another just prior to the 90th day from its initial filing, then was forced to wait another 90 days for the application to reach resolution with the help of the Ombudsman. Information provided through requests for case assistance.

The agency has proposed eliminating the 90-day processing time requirement "due to fraud and national security concerns, and in light of technological and process advances with respect to document production."[490] This proposal, if adopted, would be countered to some extent by the corresponding proposal to automatically extend certain EAD validity periods for up to 180 days upon the timely filing of a renewal application.[491] USCIS provided no quantitative analysis of this measure, but acknowledged that such a move could "potentially lead to longer processing times whenever the agency is faced with higher than expected filing volumes," which could lead in turn to "potential delays in work employment start dates for first-time EAD applicants…."[492] The agency noted, however, that such situations would be "rare" and "mitigated" by the automatic extension provision, which would allow the agency to move resources where needed in EAD processing.[493]

Ongoing Plan of Action

Thousands of EAD applicants and their employers continue to be negatively impacted by the agency's failure to timely adjudicate Form I-765. The proposed regulatory changes will not improve processing times absent allocation of significant resources to meet processing times goals. The Ombudsman continues to highlight EAD issues as a systemic issue, and will monitor and engage the agency as long as this matter remains unresolved.

[490] "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Notice of Proposed Rulemaking," 80 Fed. Reg. at 81928 (Dec. 31, 2015).

[491] *Id.* at 81927.

[492] *Id.* at 81932.

[493] *Id.*

Families and Children

Family unification and immigrant integration are at the core of U.S. immigration. The Ombudsman observed a 68 percent increase in requests for case assistance involving naturalization applications. In March 2015, USCIS began making changes to the fee waiver form and process, culminating in a proposed rule expanding fee waiver eligibility for naturalization applicants. USCIS has increasingly used its parole authority to reunify families and address humanitarian emergencies. Military personnel are experiencing longer delays in the processing of their naturalization applications. The Ombudsman continues to observe processing delays with petitions to remove the condition on permanent resident status.

Barriers to Applying for Naturalization

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates, and Office of Citizenship

As part of his Executive Actions, President Obama established the White House Task Force on New Americans (Task Force) to coordinate and strengthen the Federal Government's efforts to help immigrants in the United States better integrate into their communities.[494] Naturalization conveys to immigrants nearly all the same rights and responsibilities as native-born Americans. The sharing of these rights and responsibilities creates a sense of belonging and inclusion that fosters integration, making naturalization a key goal of the Task Force.

In addition to last year's reforms, the agency recently issued an NPRM for a new fee schedule that included establishing a three-level fee for Form N-400, *Application for Naturalization*:

(1) The standard N-400 filing fee would increase from $595 to $640 (an eight percent increase), and the biometrics fee would remain the same at $85.

(2) Applicants with household incomes below 150 percent of the Federal Poverty Guidelines pay no N-400 filing or biometrics fee.

(3) Applicants with family income greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines pay $320 (50 percent reduction) for the N-400 filing fee, and $85 for the biometrics fee.[495]

The proposed third level is an expansion of the fee waiver system to increase access to naturalization for low-income

[494] *See* White House Webpage, "White House Task Force On New Americans;" https://www.whitehouse.gov/issues/immigration/new-americans (accessed Mar. 14, 2016).

[495] "U.S. Citizenship and Immigration Services Fee Schedule," 81 Fed. Reg. at 26934.

eligible applicants. The applicant submits a newly proposed Form I-942, *Request for Reduced Fee* along with the naturalization application to apply for the reduced fee.[496]

Over 8 million permanent residents are eligible to apply for citizenship through naturalization.[497] Most of them reside in California, Texas, New York, and Florida.[498] A sizable number of citizenship-eligible legal permanent residents are elderly, poorly educated, or indigent.[499] These vulnerable naturalization applicants face greater difficulty in applying for naturalization and meeting the qualifications to become U.S. citizens.

Background

USCIS' *A Guide To Naturalization*, available on its website, provides an overview of the steps to naturalization and eligibility requirements, which include submission of Form N-400 and required filing fees; undergoing a criminal background check and in-person interview; passing the English and civics tests, with some exceptions; and taking the oath of allegiance.[500] See figure 5.1. The current filing fees to apply for citizenship are $595 for the N-400, and $85 for the biometric fee, which applicants 75 years old and older are not required to pay.[501] USCIS may waive the application and biometric fees for applicants unable to pay the fees because their income is at or below 150 percent of the Federal Poverty Guidelines, or they are receiving a means-tested benefit, or have extraordinary expenses or other circumstances that cause financial hardship.[502] As mentioned earlier in this article, USCIS has proposed increasing the N-400 fee by eight percent and expanding the fee waiver options.

Naturalization applicants who are unable to satisfy the English or U.S. civics and history requirements due to physical or mental challenges may seek a waiver of one or both of these requirements by filing Form N-648, *Medical Certification for Disability Exceptions*.[503]

Nearly 730,000 immigrants became naturalized U.S. citizens in FY 2015.[504] According to USCIS data, it received over 202,000 applications during the fourth quarter of FY 2015, a 14 percent increase from the same quarter in FY 2014.[505]

During this reporting period, USCIS received 851,554 N-400 forms.[506] During the same period, the Ombudsman received 562 requests for case assistance from N-400 applicants—a 68 percent increase over the previous reporting period, making up the largest general form type for which requests were submitted. Four hundred forty-eight of the requests sought the Ombudsman's assistance because applications remained pending beyond posted processing times.

Prolonged Processing Times

Although the *Department of Homeland Security Annual Performance Report (Fiscal Years 2015-2017)* indicated USCIS met its 5-month processing time goal for naturalization in FY 2015 nationally,[507] posted processing times are now longer than 5 months for all field offices except San Diego. See figure 5.2. Moreover, individual field offices show a wide range of problematic timeframes. The Ombudsman began raising the disparity in naturalization processing times among field offices as early as 2006.[508]

Nearly 80 percent of the naturalization-related requests received during this reporting period were applications pending beyond posted processing times. A sample of these requests reflects applicants waiting, on average, about 20.5 months to become citizens. These delays affect their ability to reunite with families, progress in their careers, and fully integrate into the community with all

496 *Id.*

497 Robert Warren and Donald Kerwin, "The US Eligible-to-Naturalize Population: Detailed Social and Economic Characteristics," Journal on Migration and Human Security, vol. 3, no. 4 (2015), p. 306 (reporting 8.6 million U.S. residents eligible to naturalize in 2013). *See also* Nancy Rytina, DHS Office of Immigration Statistics, "Estimates of the Legal Permanent Resident Population in 2012," Population Estimates (July 2013), p. 1 (reporting 8.8 million legal permanent residents in the United States eligible to naturalize).

498 Warren and Kerwin, *supra* note 497, at 31.

499 *Id.* at 315, 316.

500 *See* USCIS Webpage, "A Guide to Naturalization (M-476)" (Jan. 22, 2013); https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/guide-naturalization (accessed Mar. 30, 2016).

501 *See* USCIS Webpage, "Current Naturalization Fees (Form M-479)" (Jan. 28, 2016); https://www.uscis.gov/files/form/m-477.pdf (accessed May 12, 2016).

502 *See* USCIS Policy Memorandum, "Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to *Adjudicator's Field Manual* (*AFM*) chapter 10.9, *AFM* Update AD11-26" (Mar. 13, 2011); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf (accessed Mar. 15, 2016).

503 *See* A Guide to Naturalization (M-476), *supra* note 500.

504 USCIS Webpage, "Naturalization Fact Sheet" (Nov. 6, 2015); https://www.uscis.gov/news/fact-sheets/naturalization-fact-sheet (accessed Mar. 29, 2016).

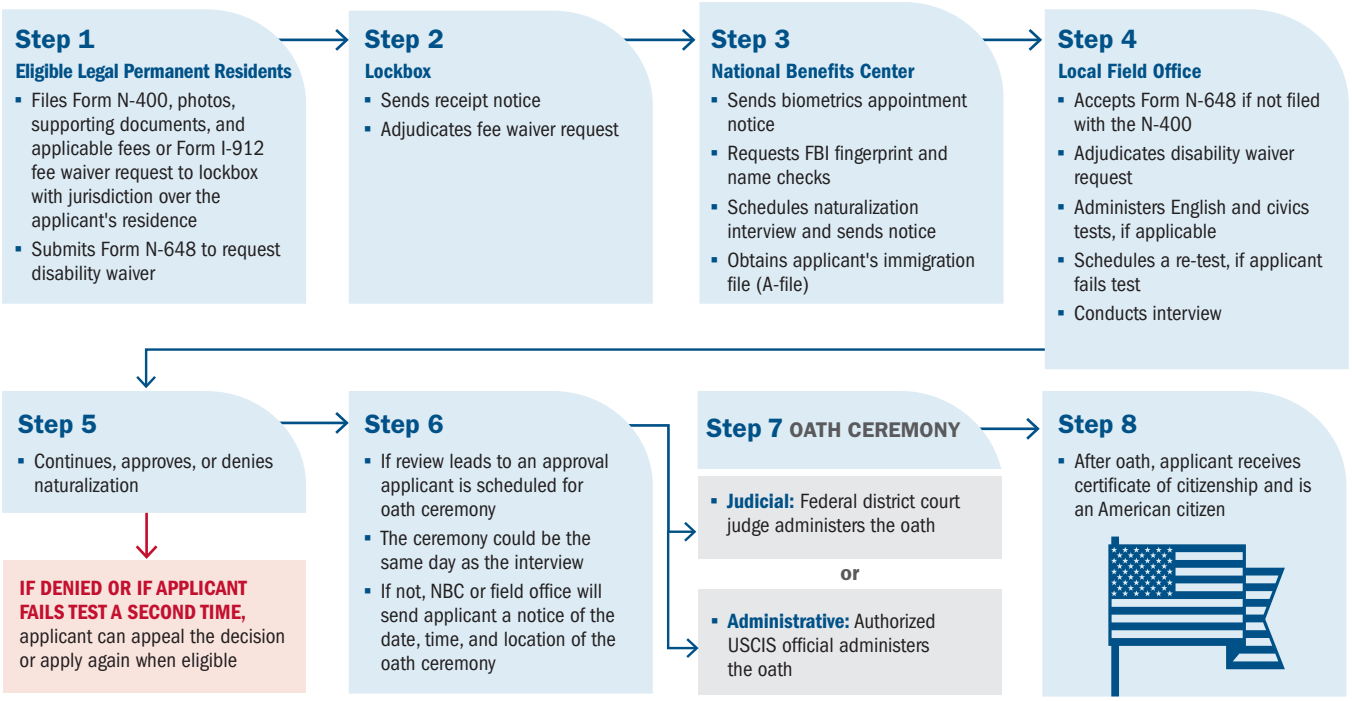
505 *Compare* USCIS Webpage, "USCIS Military and Non-Military Naturalization Form N-400 Performance Data (Fiscal Year 2014, 4th Qtr)" *with* "USCIS Military and Non-Military Naturalization Form N-400 Performance Data (Fiscal Year 2015, 4th Qtr);" https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-n-400-application-naturalization (accessed Mar. 31, 2016).

506 Information provided by USCIS (May 12, 2016).

507 DHS Annual Performance Report (Fiscal Years 2015-2017), p. 41; https://www.dhs.gov/sites/default/files/publications/15-17-APR.pdf (accessed Mar. 16, 2016).

508 Ombudsman's Annual Report 2006, p. 6.

Figure 5.1: Becoming a U.S. Citizen through Naturalization Process



Sources: USCIS, "10 Steps to Naturalization" (Sep. 2012); https://www.uscis.gov/sites/default/files/USCIS/files/M-1051.pdf (accessed May 21, 2016); USCIS blog The Beacon, "The National Benefits Center: What It Is and What It Does" (June 5, 2012); http://blog.uscis.gov/2012/06/national-benefits-center-what-it-is-and.html (accessed May 21, 2016).

the rights and responsibilities of an American citizen, such as participating in elections. In the case of certain eligible refugees, delays also disrupt Supplemental Security Income (SSI) payments.[509]

USCIS conducts a criminal investigation of all naturalization applicants that includes FBI fingerprint and name checks,[510] and an investigation into an applicant's place of residence and employment.[511] USCIS can take no further action on an applicant's application for naturalization until the background check process is complete.[512]

USCIS has informed the Ombudsman during site visits that waiting for the results of background checks from the FBI is causing processing delays for applicants.[513] FBI's goal is to return fingerprint and name check results in 30 days 90 percent of the time, and it is meeting this goal 93 percent of the time.[514] For the applicants who fall outside the goal, adjudication of their applications takes much longer than 5 months. Thirty-two percent of the 562 naturalization applicants who requested the Ombudsman's assistance have experienced delays due to background checks, often waiting over a year for them to be completed.[515]

The delays do not necessarily translate into denials. A sampling of USCIS actions on 44 naturalization-related requests pending on the Ombudsman's maintained list of long-pending cases indicated the agency resolved 31 of the cases, or 70 percent, by granting naturalization.[516] USCIS received most of the applications in this sample between calendar years 2012 and 2014.

Another cause for processing delays is the cancellation of naturalization interviews, which is not always the fault of the applicant. The NBC reviews the evidence submitted to show eligibility for naturalization, conducts the background and security checks, and gathers the applicant's immigration file before forwarding the application packet

[509] *See* "Supplemental Security Income (SSI) for Noncitizens" (Sept. 2015); https://www.ssa.gov/pubs/EN-05-11051.pdf (accessed May 11, 2016).

[510] USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B-Naturalization Examination, ch 2—Background Check and Security Checks (Feb. 25, 2016); https://www.uscis.gov/policymanual/Print/PolicyManual-Volume12-PartB-Chapter2.html (accessed Apr. 14, 2016); *See generally supra* "Background Checks and Clearance" of this Report. A USCIS district director can waive the latter investigation. 8 C.F.R. § 335.1.

[511] 8 C.F.R. § 335.1.

[512] USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B—Naturalization Examination, ch 2—Background Check and Security Checks, *supra* note 510.

[513] Information provided by USCIS (Jan. 13-14, 2016).

[514] Information provided by USCIS (Apr. 2016).

[515] Information provided through requests for case assistance.

[516] Information provided by USCIS (Mar. 10, 2016).

and file to the local field office that will adjudicate the application.[517] Generally, NBC schedules the interview and notifies the applicant of the date, time, and location of the interview.[518] If the field office does not receive the complete file in time, then it will cancel the interview, which can take months or even years to reschedule.[519]

Delays also occur in the scheduling of the oath ceremony—the last step to become a naturalized citizen—resulting from a lack of capacity in some jurisdictions (especially those that have chosen to forego or limit administrative swearings-in),[520] and the need to repeat background checks that have expired during the pendency of the application.[521]

> [Applicant] has not been scheduled for a Naturalization Oath Ceremony since his N-400 application was approved over five months ago. We have contacted USCIS numerous times…but have been told that Naturalization Oath Ceremony appointment time cannot be scheduled due to unavailability.[522]

In 2008, the Ombudsman studied naturalization ceremonies and provided recommendations on how USCIS could address challenges in conducting the naturalization oath ceremony.[523] Currently, of the 83 USCIS local field offices, only 31 have the ability to perform administrative ceremonies.[524] USCIS can and often does schedule applicants' interviews and oath ceremonies on the same day, which has proven to be successful in many USCIS field offices. The courts have elected to maintain exclusive authority to administer the oath of allegiance, affecting 63 percent of the field offices, which gives USCIS less flexibility to quickly accommodate changes in demand.

The Ombudsman recognizes that, absent a change in law, USCIS is limited in its ability to manage oath ceremonies to meet demand in jurisdictions where the court maintains exclusive authority. For jurisdictions where courts do not retain exclusive authority, the Ombudsman encourages USCIS district directors to assess their naturalization volume to creatively address the needs of the community, implementing local models that best serve applicants, increase efficiency, and allow USCIS to meet its processing goals.

All these delays undermine efficacy, causing the USCIS Customer Service Directorate, Congressional offices, and the Ombudsman to expend time and resources to resolve processing delays.

Naturalization of Vulnerable Populations

Based on the Center for Migration Studies' analysis of the U.S. Census Bureau's American Community Survey in 2013, of those eligible to naturalize at that time, 1.16 million did not speak English; 3 million had not attended or completed high school; 1.8 million lived below the poverty line; and slightly over 1.23 million were at least 65 years old.[525] Vulnerable populations—the elderly, less educated, or poor—face barriers to acquiring citizenship that are exacerbated by USCIS practices. Policy or procedural changes, or both, may help address the concerns presented.

USCIS instructs its officers to "provide professional and courteous service at all times and be fair and consistent in the treatment of all USCIS customers."[526] Stakeholders reported that elderly applicants often feel "intimidated and are nervous" during their naturalization interviews.[527] Another stakeholder expressed concern to the Ombudsman for the "lack of sensitivity training with USCIS officers" toward applicants with significant mental illnesses.[528]

Stakeholders have also relayed to the Ombudsman that the cost of applying for naturalization is a barrier to starting the

517 USCIS Webpage, "10 Steps to Naturalization (M-1051)" (Sep. 2012); https://www.uscis.gov/sites/default/files/USCIS/files/M-1051.pdf (accessed May 15, 2016); *See also* USCIS blog The Beacon, "The National Benefits Center: What It Is and What It Does" (June 5, 2012); http://blog.uscis.gov/2012/06/national-benefits-center-what-it-is-and.html (accessed May 21, 2016).

518 Information provided by USCIS (Apr. 14, 2016).

519 Information provided through request for case assistance; 10 Steps to Naturalization (M-1051), *supra* note 517 (stating "[r]escheduling an interview may add several months to the naturalization process[.]").

520 *See* USCIS Response to Recommendation #37, p. 3 (Mar. 27, 2009); https://www.dhs.gov/sites/default/files/publications/cisomb/uscis_response_cis_ombudsman_recommendation_37.pdf (accessed Mar. 31, 2016) (responding a surge in naturalization applications in 2007 led to a 63 percent increase in the number of applicants taking the oath of allegiance from FY 2007 to FY 2008. The "increased demand for services, coupled with the already demanding schedule of court judges, made scheduling oath ceremonies challenging.")

521 USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B—Naturalization Examination, ch 2—Background Check and Security Checks, *supra* note 510.

522 Information provided through request for case assistance.

523 Ombudsman Recommendation 37, "Study and Recommendations on Naturalization Oath Ceremonies" (Dec. 16, 2008).

524 Information provided by USCIS (Apr. 2016).

525 Warren and Kerwin, *supra* note 497, at 308, 499.

526 USCIS Consolidated Handbook of Adjudication Procedures, vol. 12, ch. 2, part J. (Mar. 17, 2016); http://connect.uscis.dhs.gov/workingresources/CHAP/Pages/HTML/CHAP-Volume12-PartE-Chapter2.aspx#S-A (accessed Apr. 27, 2016).

527 Information provided to Ombudsman during stakeholder engagement in Denver (Feb. 2016).

528 Information provided to Ombudsman during stakeholder engagement in Miami (Feb. 2016).

Figure 5.2: Ten Field Offices with the Longest Form N-400 Processing Times*

Processing Time	Field Office
10 months	St. Louis, MO Cincinnati, OH Washington, DC St. Paul, MN
9 months	Jacksonville, FL Des Moines, IA Long Island, NY Harlingen, TX Norfolk, VA Pittsburgh, PA

Ten Field Offices with the Shortest Form N-400 Processing Times

Processing Time	Field Office
4 months	San Diego
7 months	Boise, ID Charlotte, NC Cleveland, OH Columbus, OH Detroit, MI Fresno, CA Hartford, CT Helena, MT Hialeah, FL

* The processing time is the age of the most recent case the office completed as calculated in May 2016, and rounded to the nearest month. The processing time for Chula Vista, CA was not available on the website.

Source: USCIS Webpage, "USCIS Processing Time Information" (as of Feb. 29, 2016; last updated Apr. 28, 2016); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed May 10, 2016).

naturalization process.[529] USCIS accepting credit cards to pay the filing fees, while convenient, does not benefit the millions of permanent residents who still cannot afford the fees.

In addition, the Ombudsman continues to be concerned with the adjudication and processing of fee waiver requests.[530] USCIS is more likely to reject or deny fee waiver requests based on insufficient income despite the inclusion of credible documents, compared to those submitted based on a means-tested benefit.[531] During stakeholder engagements, legal representatives stated they are submitting fee waiver requests three to five times for the same applicant and application before USCIS finally approves it.

These processing inefficiencies discourage legal services providers, whose resources are already limited, from assisting applicants with income-based fee waivers. They also prevent low-income applicants from applying for the benefits they could otherwise obtain, including naturalization.

The recently proposed reduced naturalization filing fee for applicants with household incomes greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines may address economic barriers impeding some eligible naturalization applicants from seeking citizenship. Providing a reduced fee to applicants could promote naturalization, especially if the fee is lower than the cost to renew an expiring green card. Failure to address longstanding problems and inefficiencies in the adjudication of income-based fee waivers will, however, diminish the effectiveness of offering a partial fee waiver.

Fee Waiver Processing Update

Responsible USCIS Offices: Office of Intake and Document Production, Field Operations and Service Center Operations Directorates

Stakeholders report fee waiver processing and adjudication issues continue to negatively impact individuals who wish to apply for immigration benefits. Absent clarification of eligibility guidelines or a simplified process, lower income and indigent applicants and petitioners will continue to experience problems seeking immigration benefits for which they are eligible.

Background

USCIS conducts a fee review every 2 years "to determine whether it is recovering its costs to administer the nation's immigration laws, process applications and provide the infrastructure needed to support those activities."[532] Fees also support important humanitarian efforts, such as the asylum program, where no fee is requested. The complex budgetary needs of the agency must include an accurate

[529] Information provided to Ombudsman during stakeholder engagement in Denver (Feb. 2016). *See also* U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 26916-17 (USCIS justifies limiting N-400 fee increase to eight percent, and estimates the number of applicants who would be eligible to pay proposed option of fifty percent of the new N-400 fee).

[530] Ombudsman's Annual Report 2015, pp. 66-69; *see generally infra* "Fee Waiver Processing Update" of this Report for more on the fee waiver process and challenges faced by applicants.

[531] *See infra* "Fee Waiver Processing Update" of this Report.

[532] USCIS News Release, "U.S. Citizenship and Immigration Services Seeks Public Comment on Proposal to Adjust Fees for Immigration Benefits" (June 9, 2010); http://www.prnewswire.com/news-releases/us-citizenship-and-immigration-services-seeks-public-comment-on-proposal-to-adjust-fees-for-immigration-benefits-95960454.html (accessed Mar. 14, 2016).

assessment of all applications and petitions submitted, and not just those accompanied by a fee. USCIS maintains that: "[w]aiving a fee for one applicant transfers the cost of processing their application to other applicants through higher fees."[533]

While the number of individuals needing a waiver may not be predictable, the method of evaluating fee waiver requests should be. The agency's standardization of the fee waiver process, including the development of Form I-912, *Request for Fee Waiver* and accompanying Policy Memorandum,[534] has gone a long way to achieving consistency. In March 2015, USCIS published a notice of proposed revisions to Form I-912 that greatly expanded the form, doubling the length and adding additional instructions.[535] While USCIS published the required Federal Register notices, it did not advertise the substantial amendments planned for the form. As a result, the 2015 proposed revisions were not informed by stakeholder concerns in the same way that input had been used to develop the initial form in 2010.[536] At the urgent request of the Ombudsman[537] as well as the stakeholder community, in May and June 2015, USCIS extended the reporting period for comments on the proposed Form I-912, accepting comments until July 17, 2015.[538] Although additional time for comments allowed stakeholders to weigh in on the proposed form, concerns about the fee-waiver adjudication process and the updated Form I-912 persist.

Ongoing Concerns

On May 3, 2016, USCIS posted an updated version of Form I-912, dated April 25, 2016.[539] The new form more than doubles the length of the previous version; the revised form and instructions together now total 22 pages.[540]

Additionally, the new form requires more supporting documentation than the old form and adds five pages of attestations, requiring detailed information on the requestor, each family member, the interpreter, and the preparer.[541] Initial review of the new Form I-912 indicates that, while some improvements were made as a result of the comments received from the public, the form still reflects many concerning changes.

On May 4, 2015, USCIS published an NPRM for a new fee schedule, proposing increases with a weighted average of 21 percent, and a partial fee waiver for certain low-income naturalization applicants.[542] By comparison, the last fee increase in 2010 raised overall fees by a weighted average of ten percent.[543] Fee increases inevitably impact access to immigration benefits for low-income and indigent applicants and petitioners. Higher fees affect their ability to renew work authorization documents, reunite with family members, and naturalize, among other consequences. At the same time, as the agency balances the needs of this population, it must take into account operational and resource constraints that impede progress in backlog reduction and service delivery across fee-funded and non-fee-funded application product lines. As a result, and with a proposed fee rule in progress, the fee waiver criteria remains subject to revisions.

Rejection notices lack sufficient specificity. Stakeholders continue to report that denial notices provide insufficient guidance as to the inadequacies of the request.[544] USCIS' failure to provide the reasons for denying a request prevents customers and legal representatives from making corrections that would lead to success in future requests. As a result, applicants often become discouraged and give up on the underlying applications, lacking resources to move forward without a waiver.[545] Customers who do refile fee waiver requests do not often succeed because they do not know why the previous submission was deficient.[546] In addition, other customers continue to submit the same application multiple times, wasting the time and resources of the applicant and USCIS.

533 USCIS Webpage, "Fee Waiver Guidance" (May 10, 2013); https://www.uscis.gov/feewaiver (accessed Mar. 14, 2016); page cached and available at https://www.regulations.gov/#!documentDetail;D=USCIS-2010-0008-0126.

534 Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to the AFM Chapter 10.9, AFM Update AD11-26, *supra* note 502.

535 "Agency Information Collection Activities: Application for Fee Waivers and Exemption, Form I-912; Revision of a Currently Approved Collection," 80 Fed. Reg. 13880 (Mar. 17, 2015); *see also* Ombudsman's Annual Report 2015, p. 66.

536 E-mail from CLINIC to USCIS (May 8, 2015) (on file with the Ombudsman).

537 Letter from the Ombudsman to USCIS Director Leon Rodriguez, May 20, 2015.

538 "Agency Information Collection Activities; Request for Fee Waiver; Form I-912; Request for Fee Exemption; Revision of a Currently Approved Collection; Revision," 80 Fed. Reg. 34687 (Jun. 17, 2015).

539 USCIS Webpage, "I-912, *Request for Fee Waiver*" (May 3, 2016); https://www.uscis.gov/i-912 (accessed May 11, 2016),

540 *Id.*

541 *Id.*

542 U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 26904.

543 "U.S. Citizenship and Immigration Services Fee Schedule, Final Rule," 75 Fed. Reg. 58962 (Sep. 24, 2010).

544 Letter from DePaul College of Law, Asylum and Immigration Law Clinic to USCIS (May 28, 2015); https://www.regulations.gov/document?D=USCIS-2010-0008-0121 (accessed May 23, 2016) and Letter from Asian Americans Advancing Justice, Los Angeles to USCIS (May 28, 2015); https://www.regulations.gov/document?D=USCIS-2010-0008-0120.

545 Information provided by stakeholders (Feb. 17, 2016).

546 *Id.*

Confusing and inconsistent instructions. Requests for case assistance received by the Ombudsman during the 2016 reporting period show common sources of confusion for waiver applicants. For example, while some applicants cannot qualify for federal or state means-tested benefits due to ineligibility as a result of their immigration status, their children's ability to qualify for such benefits can be shown as evidence of the family's financial situation. Applicants often do not realize, however, the agency takes the position that their children's eligibility for a means-tested benefit does not qualify them for a fee waiver; the applicant must also be receiving the benefit or must use another ground in order to qualify for the fee waiver.[547]

When applying for a fee waiver based on income that is at or below 150 percent of the Federal Poverty Guidelines, some customers do not know that the agency requires them to list a spouse's income, even if the spouse is not living with the applicant or is living outside of the United States. Additionally, it can be difficult to document income for spouses living overseas in countries where the available technology and document requirements are different from those available in the United States. Applicants may alternatively provide a detailed explanation as to why they cannot provide the information, but anticipating what constitutes a sufficient explanation can be difficult.[548]

Adding a layer of complexity: The N-400. Form N-400 is one of the most common forms for which applicants request a fee waiver.[549] A large number of eligible applicants for naturalization are eligible for a fee waiver.[550] Even with the assistance of legal services providers, low-income and indigent applicants often face challenges when navigating the current fee waiver request process. Legal service providers in the charitable sector often deal with repeated rejections for qualified applicants, which impose a heavy administrative, and often financial, burden and serves as a disincentive to both providers and applicants alike from pursuing naturalization.[551] Similarly, stakeholders believe a more straightforward process would reduce the amount of time and effort needed to train staff and volunteers to assist at small- and large-scale naturalization workshops, as well as the amount of time volunteers need to guide applicants through the fee waiver process.[552]

Request for Case Assistance: Fee Waiver Denials

An applicant who had received status based on a fee-exempt immigration application applied three times to waive the fee on a Form I-131, *Application for Travel Document*. Form I-131 does not, however, qualify for a fee waiver, except in cases of humanitarian parole (which was not the benefit sought by the applicant). The applicant did not understand this and desperately sought to obtain a refugee travel document to visit his sick mother overseas. The initial rejection notice did not indicate the fee waiver was not available for the type of form he was filing. The applicant's mother died while he awaited a response to his third request for a fee waiver. Had USCIS provided an adequate explanation to the applicant in response to his first submission, he may have sought other resources to timely apply for and be issued a travel document.

DHS recognizes the importance of fee waivers for naturalization applicants.[553] In November 2014, DHS Secretary Johnson asked USCIS to take steps "to address barriers that may impede [access to naturalization]."[554] These steps included the development of a partial fee waiver for naturalization applicants "whose income is more than 150% and no greater than 200% of the federal poverty level, or a scaled adjustment to the fee based on a range of income levels[,]" to be included "as part of the next biennial fee study."[555] The NPRM published on May 4, 2016 includes a proposal for a reduced fee waiver for

[547] *See* USCIS Webpage, "Additional Information on Filing a Fee Waiver;" https://www.uscis.gov/feewaiver (accessed May 11, 2016). *See also* information provided through requests for case assistance.

[548] Information provided through requests for case assistance.

[549] Information provided by USCIS (Apr. 26, 2016).

[550] Warren and Kerwin, *supra* note 497, at 313-314, 318.

[551] A stakeholder that routinely prepares fee waiver requests for applicants seeking immigration benefits informed the Ombudsman that it regularly refers applicants with more complex, income-based fee waiver requests to other legal service providers better equipped to handle such requests. While regretting the additional burden this places on applicants, the stakeholder lacks the time and resources needed to address those fee waiver applications in house. Information provided by stakeholder (June 8, 2016).

[552] Letter from CLINIC to USCIS (May 28, 2015); https://www.regulations.gov/#!documentDetail;D=USCIS-2010-0008-0117 (accessed May 23, 2016).

[553] *See, e.g.,* Memorandum from Jeh Charles Johnson, DHS Secretary, to León Rodríguez, USCIS Director, "Policies to Promote and Increase Access to U.S. Citizenship," (Nov. 20, 2014); https://www.dhs.gov/sites/default/files/publications/14_1120_memo_naturalization.pdf (accessed May 10, 2016). ("The President believes [USCIS] should explore options to promote and increase access to naturalization and to consider innovative ways to address barriers that may impede such access, including for those who lack resources to pay application fees."); U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 26915 (DHS has determined U.S. citizenship "deserves special consideration given the unique nature of this benefit to the individual applicant, the significant public benefit to the Nation, and the Nation's proud tradition of welcoming new citizens"), *citing* "U.S. Citizenship and Immigration Services Fee Schedule; Notice of Proposed Rulemaking," 75 Fed. Reg. 33446, 33461 (June 11, 2010).

[554] Policies to Promote and Increase Access to U.S. Citizenship, *supra* note 553.

[555] *Id.*

"those non-military naturalization applicants with family incomes greater than 150 percent and not more than 200 percent of the Federal Poverty Guidelines."[556]

The Ombudsman supports the expansion of the fee waiver program through the development of a reduced fee waiver but remains concerned the deficiencies in the current program will hinder the success of an expanded reduced fee waiver program for naturalization applicants. Stakeholder feedback indicates waivers based on income at or below 150 percent of the Federal Poverty Guidelines are the most likely to be rejected or denied despite apparent eligibility.[557] To ensure proper administration of the fee waiver program, USCIS should revise and streamline the adjudication process as the program currently stands. Clearer guidelines and more consistent adjudication of Form I-912 would give low income and indigent naturalization applicants the potential means to acquire citizenship, while also benefitting the public and maintaining the United States' welcoming tradition.

The updated fee waiver form will have a negative impact, particularly on *pro se* applicants for whom the new form may serve as a deterrent.[558] Rather than adding to the burden, the agency should focus on clarifying and simplifying the overall fee waiver application process and train adjudicators on its own eligibility guidance to achieve quality and consistency in fee waiver adjudications. The Ombudsman recommends USCIS improve its outreach with stakeholders to seek additional feedback on fee waiver issues. Additionally, the Ombudsman urges USCIS to cite specific deficiencies in denial notices to prevent both unnecessary re-filings as well as unnecessary re-adjudications.

Request for Case Assistance: Multiple Rejections

A legal services provider assisting an adjustment applicant sought to base a fee waiver request on the applicant's receipt of a state-sponsored, means-tested benefit. The applicant submitted a state-issued healthcare membership card to show receipt of the benefit. USCIS rejected the fee waiver request, despite having found the same type of membership card sufficient for other fee waiver requests. The provider ultimately acquired and submitted a letter from the state agency attesting to the applicant's benefit and indicating how long the current benefit period would last, along with additional documents showing eligibility for the waiver. In spite of the newly submitted evidence, USCIS denied the request a second time. The provider discussed the case with a USCIS Customer Service Supervisor and an Infopass Officer; both thought the package was sufficient and recommended that the provider note, "Attention Supervisor: DO NOT REJECT" be added to the package. The application was re-submitted, and USCIS, again, denied the request. The provider then contacted the Ombudsman. With the help of the Ombudsman, on the fourth attempt USCIS accepted the application with a backdated acceptance date.

The Changing Landscape of Parole

Responsible USCIS Offices: Field Operations, Service Center Operations, and Refugee, Asylum and International Operations Directorates

Parole authority has been increasingly used in the past few years to reunify families, address humanitarian emergencies, support circumstances justified by significant public benefits, and facilitate international travel for business and educational purposes.[559] The Ombudsman encourages the use of parole consistent with statutory parameters to accomplish these and related goals.

[556] U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. at 26934.

[557] Information provided by stakeholders.

[558] Letter from CLINIC to USCIS, *supra* note 552.

[559] These include deferred inspection parole, advance parole, port-of-entry parole, humanitarian parole, public interest parole, overseas parole, military parole in place, Cuban Family Reunification Parole, Haitian Family Reunification Parole, the CAM Refugee/Parole Program, Criminal Parole Prosecution, and Conditional Parole.

Background

Parole is temporary permission to enter the United States based upon urgent humanitarian reasons or significant public benefit.[560] Parole does not constitute admission; parolees remain applicants for admission who are required to depart the United States when the conditions supporting parole cease to exist, unless they have alternative means to remain in the United States.[561] Many types of parole exist, and DHS shares parole authority among USCIS, ICE, and CBP.[562]

CBP exercises parole authority at ports of entry, including deferred inspection.[563] That agency also has authority to grant parole for both urgent humanitarian reasons and significant public benefit. ICE exercises parole authority over law enforcement-related requests as well as requests from individuals who have been removed, placed in removal proceedings (including expedited removal), or have a final order of removal. USCIS exercises parole authority for individuals both inside and outside the United States who have not previously been placed in removal proceedings (including expedited removal), or do not have a final order of removal. USCIS reviews requests for advance parole, military parole in place, and humanitarian parole, as well as focused parole such as the HFRP and CAM programs.[564]

Identified Issues

Long-Delayed Advance Parole Guidance: Matter of Arrabally and Yerrabelly. Advance parole is permission granted to qualified foreign nationals currently residing within the United States to allow them to return after temporarily traveling abroad.[565] Foreign nationals commonly request advance parole when they file Form I-485, *Application to Register Permanent Residence or to Adjust Status* with USCIS. If an applicant departs the United States while an I-485 application is pending without first obtaining advance parole, the application will be denied as abandoned, unless the applicant fits into a narrow exception for those maintaining certain categories of nonimmigrant status.[566]

In 2012, the Board of Immigration Appeals (BIA) held in *Matter of Arrabally and Yerrabelly,* 25 I&N Dec. 771 (BIA 2012) a foreign national who has left and returned to the United States under a grant of advance parole has not made a "departure ... from the United States" within the meaning of section 212(a)(9)(B)(i)(II) of the INA, thus not triggering the 3- and 10-year bars to admission.[567] In 2014, DHS Secretary Johnson instructed DHS General Counsel to issue guidance to clarify in all cases when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a "departure" within the meaning of section 212(a)(9)(B)(i) of the INA.[568] As the Ombudsman is finalizing this report, DHS has not issued this guidance.

Military Parole in Place. Parole in place is discretionary permission granted to a foreign national physically present in the United States without lawful admission.[569] USCIS has implemented parole in place guidance for spouses, children, and parents of active-duty, reserve, and guard members of the Armed Forces of the United States. The spouse, child, or parent of a service member requests parole in place from the USCIS office with jurisdiction over their

[560] INA § 212(d)(5)(A); 8 C.F.R. § 212.5.

[561] INA § 212(d)(5); 8 C.F.R. § 212.5(e) (2015).

[562] DHS Memorandum of Agreement, "Memorandum of Agreement Between USCIS, ICE, and CBP for the purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States" (Sept. 2008); https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf (accessed Apr. 12, 2016).

[563] CBP Webpage, "Deferred Inspection;" http://www.cbp.gov/contact/deferred-inspection/overview-deferred-inspection (accessed Apr. 25, 2016) (Deferred inspection is a form of parole used when CBP cannot make an immediate decision concerning the immigration status of an arriving traveler at the port of entry. An individual may be paroled into the United States on a case-by-case basis to report to a Deferred Inspection Site at a future date for that determination).

[564] USCIS Webpage, "Humanitarian Parole" (Aug. 17, 2015); https://www.uscis.gov/humanitarian/humanitarian-parole (accessed Mar. 10, 206).

[565] 8 C.F.R. § 212.5(f).

[566] 8 C.F.R. § 245.2(a)(4)(ii). Effective February 25, 2016, new guidance in the USCIS Policy Manual provides information on the general policies and procedures for adjustment of status to legal permanent residence. *See* USCIS Policy Manual, "Adjustment of Status Policies and Procedures" (Feb. 25, 2016); https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA.html (accessed Apr. 12, 2016).

[567] *See supra* "Provisional Waivers" of this Report for a more detailed discussion of the 3- and 10-year bars to admission and waivers thereof.

[568] DHS Memorandum, "Directive to Provide Consistency Regarding Advance Parole" (Nov. 20, 2014); https://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf (accessed Mar. 10, 2016).

[569] USCIS Policy Manual, "Volume 7—Adjustment of Status, Part B—245(a) Adjustment, Chapter 2—Eligibility Requirements" (Feb. 25, 2016); https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html#S-A (accessed May 19, 2016). *See also* DHS Memorandum, "Families of US Armed Forces Members and Enlistees" (Nov. 20, 2014); https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf (accessed Mar. 10, 2016).

place of residence.[570] Upon a grant of parole, the family member may subsequently apply to adjust to U.S. legal permanent resident status upon filing of a Form I-485.[571] Without parole in place, military family members would need to leave the United States to apply for immigrant visas abroad, with potential issues of inadmissibility and disruption in status. This disruption negatively impacts service-member and family readiness.[572]

Parole in Place: Need for a Streamlined Process. The Ombudsman has raised with USCIS the need for consistent processing and published processing times for parole in place.[573] In this reporting period, the Ombudsman received requests for case assistance from military parole in place applicants who have prior removal orders or otherwise fall under ICE jurisdiction.[574] In these cases, ICE has denied the requests for parole in place and declined to defer its parole authority to USCIS. Unlike USCIS, ICE does not have a military parole in place policy. The lack of ICE guidance creates inconsistent implementation of DHS support for military families, a stated DHS objective.[575] The Ombudsman will continue to assist military families with parole in place requests with USCIS, and facilitate communication with ICE to adopt consistent treatment in line with USCIS' policy.

Humanitarian Parole: Need for Process and Adjudicatory Improvements. Humanitarian parole, which USCIS grants sparingly, permits an individual to enter the United States for a temporary period due to a compelling emergency.[576] The Humanitarian Affairs Branch (HAB) of USCIS' International Operations Directorate has a small staff adjudicating all requests for humanitarian parole.[577]

When adjudicating applications, HAB conducts a two-part analysis:

(1) Has an urgent humanitarian reason or a significant public benefit been established?

(2) Does the applicant merit approval as a matter of discretion?[578]

In FY 2015, HAB received 1,837 parole requests, most of which were based on family emergencies or reunification.[579] While USCIS' internal target processing time for these requests is 90 days, the actual processing time varies substantially. Each case is reviewed as it comes in and the most urgent are prioritized.[580]

All HAB decisions and RFEs receive 100 percent supervisory review.[581] In contrast, most USCIS adjudicatory offices only conduct random spot-checks and supervisory review for new adjudicators' decisions. In FY 2015, USCIS received 40 percent more humanitarian parole requests than in the previous year, and approved more parole requests than in previous years.[582] In FY 2015, USCIS approved 34 percent of parole requests, while in prior years it approved only 25 percent of parole requests.[583]

USCIS maintains applicants must exhaust all other means of legal entry before it will consider a request for humanitarian parole; parole cannot be used to circumvent normal visa processing.[584] USCIS may make an exception in a time-sensitive situation, such as emergency surgery, where an applicant does not have adequate time to pursue other ways to enter the United States.

Stakeholders raised concerns that the humanitarian parole application process lacks standard processing times and adjudicators often produce generic denials providing little

[570] USCIS Policy Memorandum, "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)" (Nov. 15, 2013); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf (accessed Mar. 9, 2016) (describing how an individual requests parole in place).

[571] USCIS Policy Manual, Volume 7—Adjustment of Status, Part B—245(a) Adjustment, Chapter 2—Eligibility Requirements, *supra* note 569 ("If DHS grants parole before the foreign national files an adjustment application, the foreign national meets the 'inspected and paroled' requirement for adjustment.").

[572] INA § 212(a)(9)(i), (ii). *See also* Ombudsman's Annual Report 2015, p. 31.

[573] Information provided at the Ombudsman Annual Conference 2015, "The Changing Landscape of Parole" (Nov. 5, 2015).

[574] Information provided through requests for case assistance.

[575] Letter from then Secretary of Homeland Security Janet Napolitano to Zoe Lofgren, Member of the House of Representatives (Aug. 30, 2010), http://cmsny.org/wp-content/uploads/Napolitano-Letter-08.30.101.pdf (accessed Mar. 10, 2016).

[576] INA § 212(d)(5); 8 C.F.R. § 212.5; information provided by USCIS (Apr. 8, 2016). HAB received 1,957 requests for humanitarian parole during this reporting period, of which 31 percent were approved, 46 percent denied, and 23 percent remained pending).

[577] Information provided at the Ombudsman Annual Conference 2015, "The Changing Landscape of Parole" (Nov. 5, 2015).

[578] *See also* USCIS Webpage, "Humanitarian Parole," (Aug. 17, 2015); https://www.uscis.gov/humanitarian/humanitarian-parole (accessed Mar. 10, 2016).

[579] Information provided at the Ombudsman Annual Conference 2015, "The Changing Landscape of Parole" (Nov. 5, 2015).

[580] Information provided by USCIS (Apr. 8, 2016).

[581] Information provided at the Ombudsman Annual Conference 2015, "The Changing Landscape of Parole" (Nov. 5, 2015).

[582] *Id.*

[583] *Id.*

[584] Humanitarian Parole, *supra* note 578. Information provided by USCIS at the 2015 Ombudsman Annual Conference "The Changing Landscape of Parole" (Nov. 5, 2015).

or no information on how the applicant failed to meet the criteria or why USCIS denied the application as a "matter of discretion."[585] HAB recently reported that it is exploring ways to include in the denial notice the reasons for the denial.[586] USCIS also plans to describe specific types of evidence that should be included with a Form I-131, *Application for Travel Document*, based on the type of parole sought, but USCIS has provided no specific timeline for implementation of these modest reforms.[587]

Specialty Parole. USCIS introduced and implemented several new family reunification initiatives from 2014 to 2016, which included HFRP,[588] Filipino WWII Veterans Parole,[589] and CAM Parole.[590] The programs were modeled after the long-standing Cuban Family Reunification Parole (CFRP) program.[591] Unlike other parole programs, both CFRP and HFRP have appropriated funds that pay for benefits for individuals paroled into the United States.[592]

Ombudsman Recommendation: U Visa Parole Program. The Ombudsman has just issued a formal recommendation asking USCIS to exercise its statutory authority to implement parole for eligible petitioners located abroad who are waiting to receive a U visa.[593] Eligible petitioners residing outside the United States experience extreme uncertainty, not only stemming from the criminal activity that led to the U petition approval, but also from the fact that they often face difficult and dangerous conditions abroad.[594] USCIS already has regulations stating that U visa petitioners will be paroled into the United States.[595] USCIS issues parole on a case-by-case basis, but the individual nature of these requests, evaluated under the requirements for parole, make for inconsistent and inefficient treatment of these petitioners. A U visa parole policy would ensure timely family reunification, provide a more transparent and efficient process to the public, reduce duplicative adjudication efforts, and ultimately further regulatory and statutory goals.

[585] Information provided by stakeholders at the Ombudsman Annual Conference 2015, "The Changing Landscape of Parole" (Nov. 5, 2015).

[586] *Id.*

[587] *Id.*

[588] *See supra* The Haitian Family Reunification Parole Program" of this Report.

[589] "Filipino World War II Veterans Parole Policy; Notice," 81 Fed. Reg. 28097 (May 9, 2016).

[590] *See supra* "Central American Minors Refugee/Parole Program" of this Report.

[591] "The Cuban Family Reunification Parole Program" (Apr. 21, 2015); https://www.uscis.gov/humanitarian/humanitarian-parole/cuban-family-reunification-parole-cfrp-program (accessed May 5, 2016) (USCIS announced the creation of the CFRP program in 2007).

[592] USCIS Webpage, "Cuban Haitian Entrant Program" (Nov. 11, 2015); https://www.uscis.gov/humanitarian/humanitarian-parole/cuban-haitian-entrant-program-chep (accessed Mar. 29, 2016).

[593] "Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad," (June 16, 2016); https://www.dhs.gov/publication/ombudsman-recommendation-parole-eligible-u-visa-principal-and-derivative-petitioners (accessed June 20, 2016).

[594] *See* Ombudsman's Annual Report 2015, p. 65.

[595] *See* 8 C.F.R. § 214.14(d)(2) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list").

Military Immigration Issues

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

Members of Congress and U.S. military leaders have long emphasized the need to assist individuals in the Armed Forces of the United States and their family members with immigration matters. Military naturalization, regularization of military dependent immigration status, and preserving military family unity are essential to military readiness. The Ombudsman strongly supports USCIS' efforts to meet the needs of members of the U.S. military and their family members.

Background

The Ombudsman has previously commented on various USCIS military programs, such as Military Naturalization at Basic Training, parole in place, specialized customer service, and expedited processing. These special programs were implemented to support the unique needs of military members and their families.[596] The Ombudsman continues to work on a wide range of requests for case assistance from military service members and their dependents, including naturalization applications outside processing times, adjudication issues with parole in place requests, and requests to expedite the adjudication of fiancé/spouse petitions due to upcoming deployments or permanent changes of duty stations.

Ongoing Concerns

Recent delays in N-400 Processing. The statutory 6-month processing timeframe for military-related naturalization applications ended in 2013, but the applications are still subject to the 5-month internal processing time goal for all naturalizations.[597] In FY 2015, USCIS conducted 4,756 naturalizations for military service-members.[598] However,

[596] *See* Ombudsman's Annual Report 2015, pp. 29-32; Annual Report 2011, pp. 19-21; Annual Report 2010, pp. 63-66; 2009, pp. 37-39; and Annual Report 2008, p. 58.

[597] Military Personnel Citizenship Processing Act, Pub. L. No. 110-382, sec. 4, 122 Stat. 4089 (2008) (codified as amended at INA § 328(g)).

[598] Information provided by USCIS (April 20, 2016).

requests for case assistance to the Ombudsman during the reporting period indicate that USCIS is not completing some military-related naturalization applications during the Naturalization at Basic Training initiative, and these applications remain pending outside the 5-month processing goal for all naturalization applications.[599] During the first 5 months of FY 2016, the Ombudsman received three times as many requests for case assistance from military service members experiencing delays in the processing of their N-400 applications, as compared with all of FY 2015.[600]

USCIS conducts investigations of all naturalization applicants that include FBI fingerprint and name checks[601] and investigations into the applicants' place of residence and employment.[602] While USCIS expedites investigations for military service members, the FBI checks may only be expedited in the case of a service member with an impending military deployment.[603] All investigations must be completed before USCIS can schedule an applicant for a naturalization interview.[604]

Delays in processing background checks with the FBI are also preventing USCIS from adjudicating N-400 applications for eligible military members while they are still in basic training, as promised.[605] When USCIS does not complete processing during basic training, immigration files must be transferred to multiple field offices in tandem with the ever-changing duty stations for requisite post-basic trainings and assignments.

While USCIS field offices diligently work to mitigate processing delays in naturalization applications by communicating with USCIS military liaison officers, the agency has no control over the FBI background checks and can take no action on an application until the background check process is complete. These delays undermine the purpose of USCIS' "Naturalization at Basic Training" initiative. Delays also affect military readiness because soldiers are unable to deploy with their units abroad or obtain security clearances necessary to their jobs.[606]

The Ombudsman will continue to monitor processing delays, provide assistance to service members, and liaise with USCIS and the FBI to identify opportunities to address and mitigate delays.

Request for Case Assistance: Military Naturalization

An Army Reservist enlisted more than a year ago as a lawful permanent resident. She was not naturalized at Basic Combat Training or at Advanced Individual Training. As a result, USCIS had to transfer her file among three different duty stations within a 6-month period. After her third duty station reassignment, the service member contacted the Ombudsman for assistance. While USCIS could not move her case forward until background checks cleared, the Ombudsman coordinated to have her case file transferred to where she is now stationed after a 3-month wait.

Recommendation Update: Petitions to Remove Conditions on Residence

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

Background

The Ombudsman published recommendations to improve USCIS' processing of Form I-751, *Petition to Remove Conditions on Residence* on February 28, 2013,[607] which

[599] At some field offices, processing times for naturalization applications for military applications are longer than those for non-military. Information provided by USCIS (May 12, 2016).

[600] During FY 2015, the Ombudsman received ten requests for case assistance related to pending or delayed N-400 applications from service members. From October to December 2015, the Ombudsman received 31 requests for assistance relating to pending or delayed N-400 applications from service members.

[601] USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B—Naturalization Examination, ch 2—Background Check and Security Checks, *supra* note 510. *See also supra* section "Background Checks and Clearances" of this Report.

[602] *See* INA § 335(a); 8 C.F.R. § 335.1.

[603] USCIS Update, "USCIS Clarifies Criteria to Expedite FBI Name Check" (Feb. 20, 2007); http://www.legalactioncenter.org/sites/default/files/docs/lac/lac_mandamus_USCISrelease.pdf (accessed May 15, 2016). *See also* The Federal Bureau of Investigation, "Name Checks FAQs;" https://www.fbi.gov/stats-services/name-checks/name-checks-faqs (accessed May 15, 2016).

[604] *See* USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B—Naturalization Examination, ch 2—Background Check and Security Checks, *supra* note 510.

[605] USCIS Webpage, "Naturalization Through Military Service: Fact Sheet" (Nov. 6, 2015); https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet (accessed Apr. 26, 2016).

[606] Generally, a noncitizen serving in the U.S. military is ineligible for a security clearance and cannot serve in any job that requires one, including military linguist, thus affecting the service member's ability to support an assigned unit. *See generally Exec. Order No. 12968, 60* Fed. Reg. 40245, 40250 (Aug. 7, 1995) (providing, except in certain circumstances, employee must be a United States citizen to be eligible for access to classified information).

[607] Ombudsman Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Feb. 28, 2013).

addressed ineffective notice to petitioners and their legal representatives, inefficient processes and inconsistent adjudications, and insufficient training of USCIS officers.[608] Specifically, the Ombudsman recommended USCIS provide timely, effective and accurate notice to petitioners concerning their status; ensure up-to-date and complete information for I-751 adjudications is available; and train officers to apply proper guidance and procedures with an emphasis on waivers, as well as provide an initial review process whereby district offices determine whether transferred I-751 cases were approvable without interview and report back their findings to the service center.[609]

USCIS Response to the Ombudsman's Recommendations

On July 10, 2013, USCIS responded to the Ombudsman's recommendations, concurring in part with the recommendations and outlining the following steps it had taken or would be taking as a result:[610]

- Making a technical fix to allow service centers to obtain the conditional permanent resident's address from the AR-11 change of address information system;
- Updating the Marriage Fraud Amendment System (MFAS) so that copies of notices were being printed for the petitioner as well as the attorney;
- Transitioning to an online, centralized manual of immigration policies to include information for Form I-751 adjudications and ultimately replace the Adjudicators Field Manual (AFM); and
- Working with DHS Office for Civil Rights and Civil Liberties to strengthen safe address protections for spouses seeking protection under the VAWA, as well as T and U nonimmigrant categories, and incorporate these procedures into the centralized policy manual.

Several steps are predicated on the deployment of USCIS Transformation, which has been substantially delayed.[611] As a result, the expectation that Form I-751 processing would be transitioned to Transformation by July 2015 did not occur.

Ongoing Concerns

Despite improvements in the processing and adjudication of petitions to remove conditions on residence, stakeholders continue to express concerns with processing delays. During the reporting period, the Ombudsman received 213 requests for case assistance concerning Form I-751, an increase of almost 30 percent over the previous reporting period, 182 of which remained pending outside normal processing times.

During the reporting period, the average service center processing time for Form I-751 was 7 months at VSC and 6.25 months at the CSC.[612] For petitioners whose cases are transferred to field offices for interview, obtaining a decision can take even longer because the service center processing times do not reflect the time it takes to transfer I-751 petitions to local field offices for adjudication and to conduct in-person interviews when necessary. Moreover, field office processing times for this product line are not posted by the agency.[613]

In FY 2015, service centers transferred 20,871 Form I-751 petitions to local field offices for further adjudication. Of the 88 offices that received them, 71 offices (or 87.5 percent) were processing petitions outside the agency's 3-month goal.[614] Depending on the field office's caseload, petitioners generally must wait 1 to 22 months from the time of filing for their interviews to be scheduled.[615] Because processing times at the field offices are not posted, petitioners are unable to gauge how long the process will take to schedule their interviews or adjudicate their petitions.

[608] *See* Ombudsman Annual Report 2013, p. 24.

[609] Ombudsman Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Feb. 28, 2013).

[610] USCIS Response to Recommendation #56 (July 10, 2013); https://www.dhs.gov/sites/default/files/publications/Response_to_CISOMB_I-751_Recommendation_Signed_7-10-13.pdf (accessed Apr. 1, 2016).

[611] *See supra* "Transformation Update: E-Filing for Immigration Benefits Expands" of this Report.

[612] *See* USCIS Webpage, USCIS Processing Time Information, https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 14, 2016). Form I-751 petitions are filed with the VSC or CSC. *See* INA § 216(c).

[613] Information provided by USCIS (Apr. 14, 2016) indicates an average processing time at the field offices of 6.8 months, and a goal of 3 months. Ordinarily, the petitioner and U.S. citizen or permanent resident spouse are required to appear at a local USCIS field office for an interview. USCIS may waive the interview, if the petitioner has included sufficient documentation showing eligibility for the removal of the conditionality with the Form I-751. *See* 8 C.F.R. § 216.4(a)(5) and (b). *See also* USCIS Interoffice Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence" (June 24, 2005); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/crintwaivr062405. pdf; (accessed on Mar. 15, 2016).

[614] Information provided by USCIS (Apr. 14, 2016 and Apr. 22, 2016).

[615] *See* AILA/USCIS Field Operations Liaison Q&As (Oct. 22, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-Field_Ops_Agenda_October_2015_Cleared.pdf (accessed Apr. 4, 2016).

Delays in adjudication cause substantial problems for petitioners and their families because USCIS does not provide them with sufficient documentation of their lawful status.[616] Some petitioners are unable to pursue job opportunities because they are reluctant to seek employment with an expired green card and a receipt notice referencing a 1-year extension of status, or obtain or renew drivers' licenses or in-state college tuition. A petitioner must attend an Infopass appointment at a local USCIS field office to obtain a stamp showing their continued conditional permanent residence status.

The Ombudsman strongly urges USCIS to acknowledge that longstanding issues in the processing of I-751 petitions persist, and to implement the recommendations made in 2013. The Ombudsman will continue to monitor USCIS processing delays of petitions filed by conditional permanent residents, and engage with USCIS on expanding the publication of processing times at local field offices, as well as completing I-751 adjudications within 1 year of receipt. As the Ombudsman recommended, timely notification to conditional permanent residents, agency guidance, and training for officers will afford USCIS the opportunity to renew its commitment to delivering quality service to families. In addition, waiving interviews in certain cases would enable USCIS to allocate more resources to petitions requiring closer scrutiny, while streamlining processing to avoid the consequences of lengthy delays.

[616] Upon filing Form I-751, VSC or CSC issues a receipt notice to the petitioner that extends the conditional residency period for 1 year. The petitioner may use the receipt notice, together with the expired green card, to show continued work authorization and permission to travel while the I-751 petition is pending. USCIS does not automatically issue additional 1-year extensions. *See* USCIS Policy Memorandum, "Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence" (Dec. 2, 2003); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/crextensn120203.pdf (accessed on Mar. 15, 2016).

Appendices

Recommendations Update

In conformity with statutory requirements, the Ombudsman makes formal recommendations to the USCIS Director. The agency has 3 months to respond in writing.

During Ombudsman Odom's tenure, between September 2012 and March 2016, the Ombudsman issued six formal recommendations to improve USCIS' service and responsiveness. The agency took action on some of the recommendations, and has not implemented others.

Recommendation No. 60—Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad[617] (June 16, 2016); USCIS Response (pending)

Recommendation No. 59—Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications[618] (December 11, 2015); USCIS Response (April 19, 2016)

- Centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations: USCIS concurs with the recommendation and will centralize the processing of Forms I-360 and I-485 based on an approved SIJ petition at the NBC.
- Take into account the best interests of the child when applying criteria for interview waivers: USCIS plans to refer cases for interview only when it is necessary to secure information through an in-person assessment. It will consider input on interview criteria from the Office of Policy and Strategy, FDNS, and the Office of Chief Counsel.
- Issue final regulations that fully incorporate all statutory amendments: USCIS plans to issue clarifying policy guidance through the USCIS Policy Manual in 2016. In addition, USCIS plans to publish a final rule on SIJ in October 2016.
- Interpret consent function consistently with the statute by according greater deference to state court findings. USCIS stated it does not expressly consent to state juvenile court orders. However, it will continue to review the state court order to determine whether the applicant has met eligibility requirements for SIJ classification.

Recommendation No. 58—Improving the Quality and Consistency in Notices to Appear (June 11, 2014); USCIS Response (September 30, 2016)

- Provide additional guidance for Notice to Appear (NTA) issuance with input from ICE and EOIR: USCIS has implemented this recommendation through certain policy guidance.
- Require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training: USCIS did not concur with the recommendation to have USCIS attorneys review all NTAs prior to issuance because it did not have sufficient data on the number of NTAs issued incorrectly. The Ombudsman continues to support a focus on legal sufficiency in NTA training for USCIS staff.
- Create a working group with representation from ICE and EOIR to improve tracking, information sharing, and coordination of NTA issuance: USCIS has not yet implemented this recommendation.

[617] *See supra* "The Changing Landscape of Parole" of this Report for more on this recent recommendation.
[618] *See supra* "Recommendation Update: Special Immigrant Juveniles" of this Report for more on USCIS' actions and stakeholders' concerns.

Recommendation No. 57—Employment Eligibility for Derivatives of Conrad State 30 Program Physicians (March 24, 2014); USCIS Response (June 24, 2014)

- Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program waiver to change to other employment-authorized nonimmigrant classifications: USCIS disagreed that the INA permits J-2 dependents to change to another immigrant or nonimmigrant status, except T or U status.
- Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible: USCIS disagreed that the INA permits J-2 dependents to change to another immigrant or nonimmigrant status, except T or U status.

Recommendation No. 56—Improving the Process for Removal of Conditions on Residence for Spouses and Children[619] (February 28, 2013); USCIS Response (July 10, 2013)

- Provide timely, effective and accurate notice to petitioner(s) and their attorneys or accredited representatives on Form I-751 receipt, processing and adjudication requirements, and decisions: USCIS declined to create a system to ensure it properly conferred conditional permanent residence status because it believes the vast majority of those statuses are accurate. However, USCIS stated it would initiate a technical fix that would allow its service centers to extract the conditional permanent resident's address from the AR-11 change of address information system. It also stated it would update the tracking system to print copies of notices for the petitioner as well as the attorney of record, and that it had revised the interview worksheet to more clearly articulate concerns with possible areas of focus for the interview. USCIS also stated it would provide additional guidance if an officer's RFE is not clear. Other steps USCIS will take are predicated on the deployment of Transformation.
- Ensure AFM Chapter 25[620] is updated, accurate and complete, or create a superseding source of consolidated information for I-751 adjudications. While the Table of Contents for the USCIS *Policy Manual* available online to the public reflects a section on family-based conditional permanent residents, the link to that section is not active.[621]
- Train USCIS staff to apply the updated AFM or superseding guidance with an emphasis on waiver standards and procedures. USCIS stated it planned to begin training in the 4th Quarter of FY 2013 on Form I-751 adjudications.

[619] *See supra* "Recommendation Update: Petitions to Remove Conditions on Residence" of this Report for more on USCIS' adjudication of this form of relief.
[620] The AFM has been superseded by the USCIS Policy Manual.
[621] USCIS Policy Manual, Table of Contents; https://www.uscis.gov/policymanual/HTML/PolicyManual-TableOfContents.html (accessed June 3, 2016).

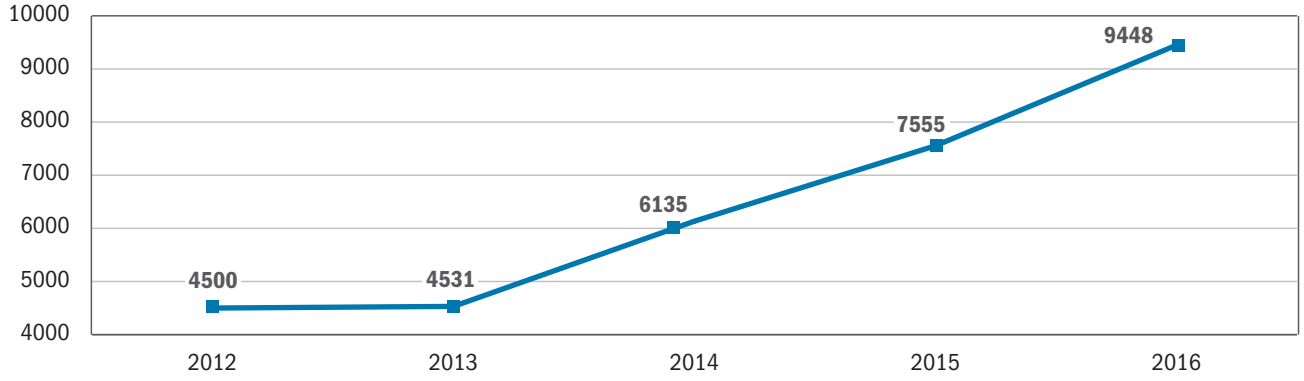
Recommendation No. 55—Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act (November 26, 2012); USCIS Response (June 3, 2013)

- Conduct notice-and-comment rulemaking to create or designate a standard form, establish a receipt protocol and describe an adjudication process consistent with the plain language of INA section 204(l): USCIS stated following the rulemaking process or adopting a formal form would delay implementation of section 204(l) and it could address stakeholders' concerns through alternative means. However, USCIS has recently engaged with the Ombudsman on an alternative proposal by the Ombudsman to add relevant 204(l) questions to an existing form.
- Train USCIS staff to interpret and properly apply INA section 204(l) and stop regarding survivor benefit requests as a form of discretionary reinstatement: USCIS stated it has properly trained its staff to interpret and apply section 204(l). The Ombudsman continues to receive requests for case assistance from applicants experiencing variances and long delays in the handling of their requests for relief.
- Publish instructions for applicants and petitioners as to the nature and extent of INA section 204(l)'s coverage and related benefit request process: USCIS has implemented this recommendation.[622]
- Track and monitor the processing of survivor benefit requests: USCIS stated it would add an action code to its electronic database management system that permits USCIS to indicate in its systems when DOS returns a petition due to the petitioner's death, as well as when the beneficiary requests relief under section 204(l).

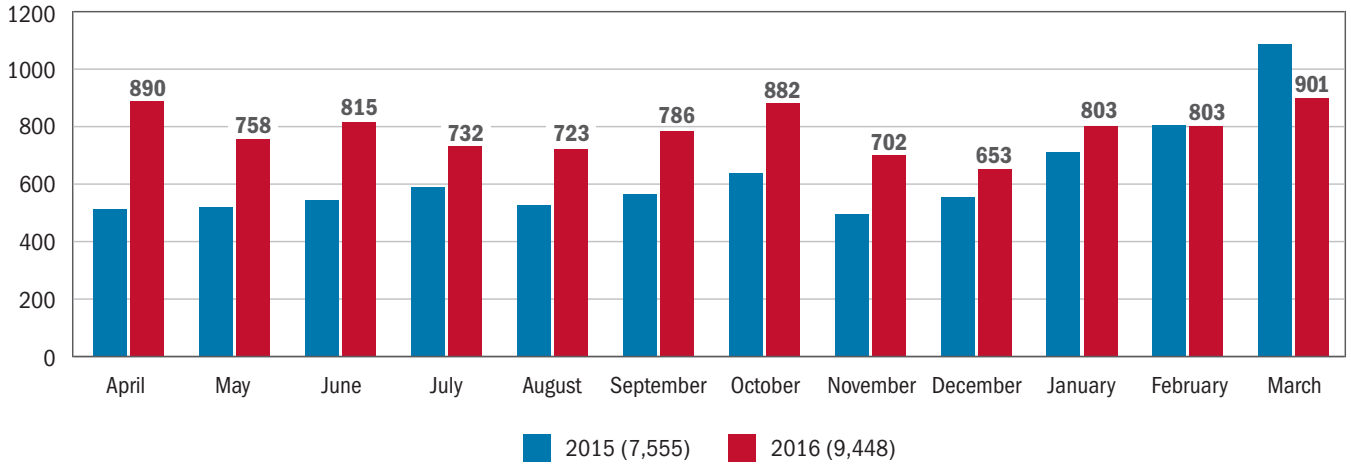
[622] *See* USCIS Webpage, "Basic Eligibility for Section 204(l) Relief for Surviving Relatives" (Feb. 25, 2016); https://www.uscis.gov/green-card/green-card-through-family/basic-eligibility-section-204l-relief-surviving-relatives (accessed May 19, 2016); USCIS Webpage, "How do I apply for relief under INA Section 204(l)?" https://my.uscis.gov/helpcenter/article/2469 (accessed May 19, 2016); USCIS Webpage, "If my petitioning relative dies, can I still immigrate?" https://my.uscis.gov/helpcenter/article/if-my-petitioning-relative-dies-can-i-still-immigrate (accessed May 19, 2016); USCIS Webpage, "What happens if I die before the immigrant I'm sponsoring gets a green card?" https://my.uscis.gov/helpcenter/article/what-happens-if-i-die-before-the-immigrant-i-m-sponsoring-gets-a-green-card (accessed May 19, 2016); *see also* USCIS Policy Memorandum, "Approval of a Spousal Immediate Relative Visa Petition under Section 204(l) of the Immigration and Nationality Act after the Death of a U.S. Citizen Petitioner" (Nov. 18, 2015); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-1118_Approval_of_a_Spousal_Immediate_Relative_Visa_Petition.pdf (accessed May 19, 2016).

The Ombudsman by the Numbers

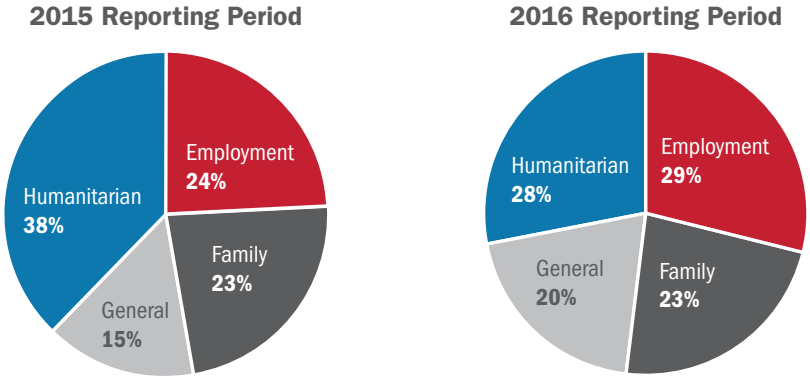
Requests for Case Assistance Received by Reporting Period



Requests for Case Assistance Received by Month for 2015 and 2016 Reporting Periods



Requests for Case Assistance—Submission by Category



General form types include Form N-400, Form I-90, Form I-131, Form AR-11, Form N-600, and Form G-639.

Requests for Case Assistance Received Regarding Select Forms

PRIMARY FORM TYPE	PRIMARY FORM TYPE NAME	2016 REPORTING PERIOD	PERCENT INCREASED FROM 2015
I-765	Application for Employment Authorization (inclusive of DACA)	1,288	42%
N-400	Application for Naturalization	562	68%
I-526	Immigrant Petition by Alien Entrepreneur	418	201%
I-601A	Application for Provisional Unlawful Presence Waiver	177	62%

Top 5 States Where Customers Reside and the Top 5 Primary Form Types

California

Requests Received:	1,419	
Top Primary Form Names:	**Count**	**% of Total**
I-485, Application to Register Permanent Residence or Adjust Status	226	16%
I-821D, Consideration of Deferred Action for Childhood Arrivals	183	13%
I-765, Application for Employment Authorization	173	12%
I-526, Immigrant Petition by Alien Entrepreneur	137	10%
I-130, Petition for Alien Relative	90	6%

Illinois

Requests Received:	769	
Top Primary Form Names:	**Count**	**% of Total**
I-821D, Consideration of Deferred Action for Childhood Arrivals	305	40%
I-485, Application to Register Permanent Residence or Adjust Status	136	18%
I-130, Petition for Alien Relative	88	11%
I-765, Application for Employment Authorization	49	6%
N-400, Application for Naturalization	38	5%

New York

Requests Received:	1,019	
Top Primary Form Names:	**Count**	**% of Total**
I-485, Application to Register Permanent Residence or Adjust Status	264	26%
I-765, Application for Employment Authorization	193	19%
I-130, Petition for Alien Relative	96	9%
N-400, Application for Naturalization	58	6%
I-821D, Consideration of Deferred Action for Childhood Arrivals	57	6%

Florida

Requests Received:	461	
Top Primary Form Names:	**Count**	**% of Total**
I-485, Application to Register Permanent Residence or Adjust Status	90	20%
I-130, Petition for Alien Relative	50	11%
I-765, Application for Employment Authorization	47	10%
N-400, Application for Naturalization	40	9%
I-821D, Consideration of Deferred Action for Childhood Arrivals	25	5%

Texas

Requests Received:	873	
Top Primary Form Names:	**Count**	**% of Total**
I-485, Application to Register Permanent Residence or Adjust Status	192	22%
I-765, Application for Employment Authorization	88	10%
I-130, Petition for Alien Relative	77	9%
N-400, Application for Naturalization	77	9%
I-821D, Consideration of Deferred Action for Childhood Arrivals	68	8%

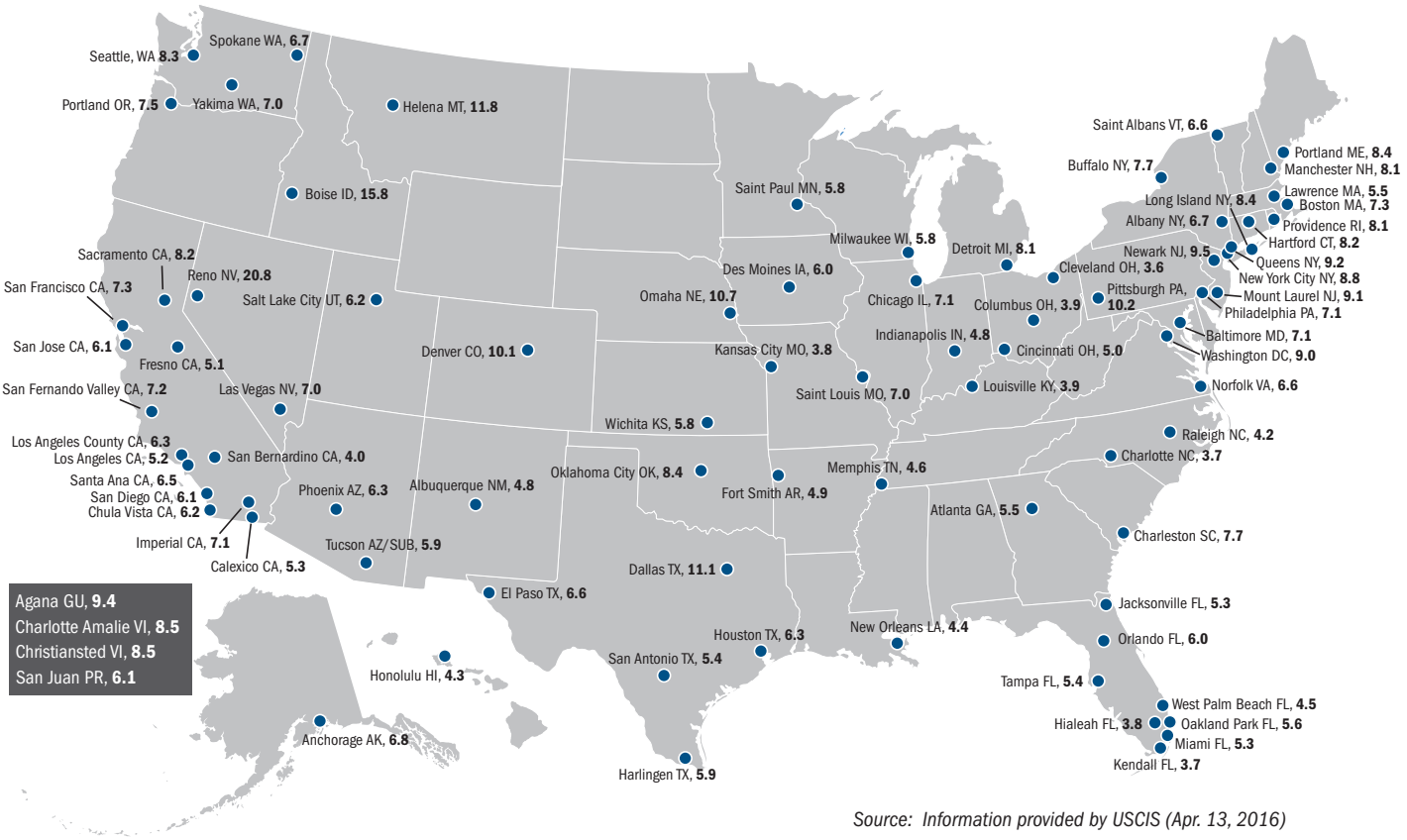
Average Processing Times for USCIS Field Offices for Forms N-400, *Application for Naturalization*

(Oct. 1 to Dec. 31, 2015)

Source: Information provided by USCIS (May 12, 2016)

Average Processing Times for USCIS Field Offices for Forms I-485, *Application to Register Permanent Residence or Adjust Status*

(Oct. 1 to Dec. 31, 2015)



Source: Information provided by USCIS (Apr. 13, 2016)

Homeland Security Act—Section 452—Citizenship and Immigration Services Ombudsman

SEC.452.CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN.

(a) IN GENERAL—Within the Department, there shall be a position of Citizenship and Immigration Services Ombudsman (in this section referred to as the 'Ombudsman'). The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law.

(b) FUNCTIONS—It shall be the function of the Ombudsman—

1) To assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services;

2) To identify areas in which individuals and employers have problems in dealing with the Bureau of Citizenship and Immigration Services; and

3) To the extent possible, to propose changes in the administrative practices of the Bureau of Citizenship and Immigration Services to mitigate problems identified under paragraph (2).

(c) ANNUAL REPORTS—

1) OBJECTIVES—Not later than June 30 of each calendar year, the Ombudsman shall report to the Committee on the Judiciary of the House of Representatives and the Senate on the objectives of the Office of the Ombudsman for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and—

(A) Shall identify the recommendation the Office of the Ombudsman has made on improving services and responsiveness of the Bureau of Citizenship and Immigration Services;

(B) Shall contain a summary of the most pervasive and serious problems encountered by individuals and employers, including a description of the nature of such problems;

(C) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action has been taken and the result of such action;

(D) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action remains to be completed and the period during which each item has remained on such inventory;

(E) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and shall identify any official of the Bureau of Citizenship and Immigration Services who is responsible for such inaction;

(F) Shall contain recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers, including problems created by excessive backlogs in the adjudication and processing of immigration benefit petitions and applications; and

(G) Shall include such other information as the Ombudsman may deem advisable.

2) REPORT TO BE SUBMITTED DIRECTLY—Each report required under this subsection shall be provided directly to the committees described in paragraph (1) without any prior comment or amendment from the Secretary, Deputy Secretary, Director of the Bureau of Citizenship and Immigration Services, or any other officer or employee of the Department or the Office of Management and Budget.

(d) OTHER RESPONSIBILITIES—The Ombudsman—

1) Shall monitor the coverage and geographic allocation of local offices of the Ombudsman;

2) Shall develop guidance to be distributed to all officers and employees of the Bureau of Citizenship and Immigration Services outlining the criteria for referral of inquiries to local offices of the Ombudsman;

3) Shall ensure that the local telephone number for each local office of the Ombudsman is published and available to individuals and employers served by the office; and

4) Shall meet regularly with the Director of the Bureau of Citizenship and Immigration Services to identify serious service problems and to present recommendations for

such administrative action as may be appropriate to resolve problems encountered by individuals and employers.

(e) PERSONNEL ACTIONS—

1) IN GENERAL—The Ombudsman shall have the responsibility and authority—

(A) To appoint local ombudsmen and make available at least 1 such ombudsman for each State; and

(B) To evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of the Ombudsman.

2) CONSULTALTION—The Ombudsman may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services in carrying out the Ombudsman's responsibilities under this subsection.

(f) RESPONSIBILITIES OF BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES— The Director of the Bureau of Citizenship and Immigration Services shall establish procedures requiring a formal response to all recommendations submitted to such director by the Ombudsman within 3 months after submission to such director.

(g) OPERATION OF LOCAL OFFICES—

1) IN GENERAL—Each local ombudsman—

(A) Shall report to the Ombudsman or the delegate thereof;

(B) May consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(C) Shall, at the initial meeting with any individual or employer seeking the assistance of such local office, notify such individual or employer that the local offices of the Ombudsman operate independently of any other component of the Department and report directly to Congress through the Ombudsman; and

(D) At the local ombudsman's discretion, may determine not to disclose to the Bureau of Citizenship and Immigration Services contact with, or information provided by, such individual or employer.

(2) MAINTENANCE OF INDEPENDENT COMMUNICATIONS—Each local office of the Ombudsman shall maintain a phone, facsimile, and other means of electronic communication access, and a post office address, that is separate from those maintained by the Bureau of Citizenship and Immigration Services, or any component of the Bureau of Citizenship and Immigration Services.

Request for Case Assistance Process

Helping Individuals and Employers Resolve Problems with USCIS

Before asking the Ombudsman for help with an application or petition, try to resolve the issue with USCIS by:

- Obtaining information about the case at USCIS My Case Status at **www.uscis.gov.**
- Submitting an e-Request with USCIS online at **https://egov.uscis.gov/e-Request.**
- Contacting the USCIS National Customer Service Center (NCSC) for assistance at **1-800-375-5283**.
- Making an InfoPass appointment to speak directly with a USCIS Immigration Services Officer in a field office at **www.infopass.uscis.gov.**

Option 1

Submit an online request for case assistance available on the Ombudsman's website at **www.dhs.gov/cisombudsman.**

RECOMMENDED PROCESS

Option 2

Download a printable case assistance form (Form DHS-7001) from the Ombudsman's website **www.dhs.gov/cisombudsman.**

SUBMIT A SIGNED CASE ASSISTANCE FORM AND SUPPORTING DOCUMENTATION BY:

Email:
cisombudsman@hq.dhs.gov

Fax:
(202) 357-0042

Mail:
Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Attention: Case Assistance
Mail Stop 0180
Washington, DC 20528-0180

Individuals submitting a request from outside the United States cannot use the online request form and must submit a hard copy case assistance request form.

Request Assistance

If you are unable to resolve your issue with USCIS, you may request assistance from the Ombudsman. Certain types of requests involving refugees, asylees, victims of violence, trafficking, and other crimes must be submitted with a handwritten signature for consent purposes. This can be done using Option 1 to the left and uploading a signed Form DHS-7001 to the online request for case assistance.

AFTER RECEIVING A REQUEST FOR CASE ASSISTANCE, THE OMBUDSMAN:

STEP 1
Provides a case submission number to confirm receipt.

STEP 2
Reviews the request for completeness, including signatures and a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, if submitted by a legal representative.

STEP 3
Assesses the current status of the application or petition, reviews relevant laws and policies, and determines how the Ombudsman can help.

STEP 4
Contacts USCIS field offices, service centers, asylum offices, or other USCIS offices to help resolve difficulties the individual or employer is encountering.

STEP 5
Communicates to the customer the actions taken to help.

Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Mail Stop 0180
Washington, DC 20528
Telephone: (202) 357-8100
Toll-free: 1-855-882-8100

http://www.dhs.gov/cisombudsman

Send your comments to: **cisombudsman@hq.dhs.gov**