Annual Report 2014

Citizenship and Immigration Services
Ombudsman

June 27, 2014

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 27, 2014

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

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

The Honorable Chuck Grassley
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 2014 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

www.dhs.gov/cisombudsman

A Message from the Ombudsman

I am honored to submit the second Annual Report to Congress of my tenure as the Citizenship and Immigration Services Ombudsman. In this Report, we detail USCIS's accomplishments and challenges across the spectrum of family, humanitarian, and employment-based immigration.

Having spent my career in the immigration field, I recognize USCIS's achievements in turning the legacy Immigration and Naturalization Service into the more agile and customer-oriented agency it is today. In the past are years-long processing times for naturalization and green card applications. The addition of the USCIS Lockbox operations and the National Benefits Center have brought about more efficient and reliable intake and filing processes. The days when many immigrants feared approaching the agency for information have been replaced by a commitment to outreach with community relations officers who play a vital role in connecting USCIS to the communities it serves. Indeed, public engagement has become fundamental to the way USCIS conducts its work and is regularly part of developing new policy and initiatives.

USCIS service centers have also demonstrated that the agency can manage high volume, for example by successfully implementing the Deferred Action for Childhood Arrivals program. Their work requires constant adjustment to rising and shifting workloads, while addressing customer inquiries, vetting individuals, and screening for eligibility for immigration benefits.

This year, USCIS promptly and efficiently implemented the U.S. Supreme Court decision in *Windsor*,[1] holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Almost immediately following the June 26, 2013 decision, USCIS began adjudicating immigration benefits submissions filed on behalf of same-sex spouses. USCIS effectively tracked previously filed cases and reopened those that were denied solely because of DOMA. The agency response to *Windsor* shows its capacity to provide world-class service.

USCIS also issued guidance during this reporting period providing parole in place for spouses, children, and parents of active members of the U.S. Armed Forces and other military family members. This long-awaited policy ensures that our military personnel can focus on their readiness, rather than their families' immigration status.

Near the close of this reporting period, USCIS issued needed guidance pertaining to the Provisional Waiver program, an important tool to support family unity that should be expanded to include other immigrant categories in the future. In the same manner as the Windsor response, the agency is to be commended for proactively reopening and re-adjudicating provisional waiver cases impacted by the new policy.

USCIS's efforts to address gaps in policy and improve operations in the EB-5 Immigrant Investor program are noteworthy. Shortly before publication of our 2013 Annual Report, USCIS issued comprehensive new policy guidance. The agency also relocated its adjudications unit to Washington, D.C.; hired a new program office lead, adjudicators, and economists; and re-started stakeholder engagements. The result is a transparent and rejuvenated investment and job creation program, with a focus on customer service and integrity.

As we close another reporting period, however, challenges that USCIS customers currently face still mirror difficulties of decades past. Many of these challenges lie with the USCIS Service Center Operations Directorate, where over 50 percent of USCIS adjudications are performed. Service centers, as well as certain field offices, still struggle with ensuring quality and consistency in adjudications. Overly burdensome and unnecessary Requests for Evidence (RFEs) continue to erode trust in our immigration system, delay adjudications, and diminish confidence in adjudicators' understanding of law and policy. Erroneous template denials and the incorrect application of evidentiary standards cause hardship to individuals and employers.

[1] *United States v. Windsor*, 570 U.S. 12 (2013) (Docket No. 12-307).

Service centers continue to operate under inconsistent local rules that lead to disparities in adjudications. Shifts in production priorities still require more vigilant and strategic planning to avoid significant backlogs in other product lines, such as those that developed this past year in family-based petitions for immediate relatives. Meanwhile, many customers still receive inadequate and vague information about pending cases, and they are unable to rely on posted processing times due to the manner in which the agency calculates them.

In this year's Report, we address ongoing concerns regarding policy and field office adjudications of Special Immigrant Juvenile (SIJ) petitions, which offer immigration relief to children who are found by a state court to be abused, neglected, or abandoned. Many of these SIJ issues were the subject of Ombudsman recommendations in 2011. We also discuss persistent challenges in high skilled adjudications, including RFEs. Again, we include adjudications data (RFE and approval rates) for key nonimmigrant employment categories, and, for the first time, data pertaining to decisions by USCIS's Administrative Appeals Office.

I am hopeful that some of the longstanding issues discussed in this Report will be addressed through USCIS's new Quality Driven Workplace Initiative. The agency has converted employee performance standards from quantitative to qualitative measures, seeking to foster an environment in which quality decisions and customer service are front and center priorities. Over the past decade, USCIS has accomplished much, but the agency must continue to seize every opportunity to fully complete its transformation.

During this reporting period, my office received approximately 6,100 requests for case assistance – over one third more than we received in each of the two previous years. While I welcome the stakeholder recognition of our effectiveness at performing our statutory mission, I also believe this 35 percent increase in our casework underscores the need for USCIS to improve the quality of adjudications and service delivery across all product lines.

In August 2013, I became Chair of the Department of Homeland Security's Blue Campaign, the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental, and private organizations, the Campaign strives to protect the basic right of freedom. I am very proud of the work of my colleagues in the Department and across the entire U.S. government to combat the heinous crime of modern day slavery, and I thank the many Members of Congress who are working arduously to make our communities safe, especially our youth, from those who exploit humans as a commodity.

Today's immigrants, like those who came before them, dream that the future will be better in America for their children and their grandchildren. Whether they are fleeing persecution, throwing off the shackles of human trafficking, reuniting with family, or hoping to start a new business, immigration is essential to and enriches our country.

I want to thank Secretary of Homeland Security Jeh Johnson, Deputy Secretary Alejandro Mayorkas, and USCIS Acting Director Lori Scialabba for their support and continued collaboration. I am privileged to play a role in helping to make the U.S. immigration system more efficient, responsive, and just.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Executive Summary

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman) 2014 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 achievements during this reporting period; and
- A detailed discussion of pervasive and serious problems, recommendations, and best practices in the family, employment and humanitarian areas, as well as in customer service.

Ombudsman's Office Overview

The Ombudsman, established by the Homeland Security Act of 2002, assists individuals and employers in resolving problems with USCIS. Ombudsman policy and casework is carried out by fewer than 30 full-time professionals with wide-ranging skills and areas of subject matter expertise in immigration law.

From April 1, 2013 to March 31, 2014, the Ombudsman received 6,135 requests for case assistance, an increase of over 35 percent from the 2013 reporting period. Approximately 89 percent of requests during the reporting period were received through the Ombudsman's Online Case Assistance system. Overall, 34 percent of requests were for humanitarian-based matters; 27 percent for family-based matters; 23 percent for employment-based matters, and 16 percent for general-immigration matters (such as applications for naturalization). In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted USCIS's National Customer Service Center, and 28 percent appeared at InfoPass appointments at a USCIS local field office in an effort to resolve the matter directly with the agency. The Ombudsman is committed to reviewing all incoming requests for case assistance within 30 days and taking action to resolve 90 percent of requests within 90 days.

This year, the Ombudsman visited communities and stakeholders in regions across the United States. Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. The conference featured an update on immigration reform legislative developments from the White House Domestic Policy Council's Senior Policy Director for Immigration; a plenary panel on approaches and lessons learned from large-scale legal services responses; and panel discussions on challenges in high-skilled immigration, credible fear screenings, and waivers of inadmissibility, among other issues. Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of Fiscal Year (FY) 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete over 150 for the year. The Ombudsman also recently revised its website content to clarify the office's scope of case assistance and provide Frequently Asked Questions and tips to assist individuals and employers when filing requests for case assistance with the office.

On March 24, 2014, the Ombudsman issued recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman issued recommendations titled *Improving the Quality and Consistency in Notices to Appear*, which is the charging document that initiates removal proceedings. Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership:

- Special Immigrant Juvenile adjudications;
- USCIS processing times;
- Agency responses to service requests submitted through the Service Request Management Tool;
- USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; and
- Challenges in the process for payment of the Immigrant Visa Fee using USCIS's Electronic Immigration System (ELIS).

The Ombudsman worked to promote interagency liaison through interagency meetings including:

- Monthly meetings with the U.S Department of State (DOS) and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- Quarterly data quality working group meetings with USCIS, U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the Systematic Alien Verification for Entitlements (SAVE) program and other DHS systems used to verify immigration status and benefits eligibility.

Additionally, since August 2013, Ombudsman Odom has served as the Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate, and victim assistance. Since September 2013, Ombudsman Odom also has served as Acting Co-Chair of the DHS Council for Combating Violence Against Women.

Key Developments and Areas of Study

Families and Children

Provisional and Other Immigrant Waivers of Inadmissibility

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family immigration. In 2012, USCIS consolidated Form I-601, *Application for Waiver of Grounds of Inadmissibility* waiver adjudications in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a DOS consulate abroad. In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program. While this guidance addresses the most pressing stakeholder concerns, other aspects of the provisional waiver process remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record or without first affording the applicant the opportunity to respond. There is no appeal available for a denial of a provisional waiver.

Special Immigrant Juveniles

The Ombudsman is concerned with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary Requests for Evidence (RFEs) for information concerning underlying state court orders, and in some cases, unwarranted denials. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and inconsistent child appropriate interviewing techniques. The Ombudsman has brought these issues to USCIS's attention and in this Report presents initial recommendations calling for clarification of policy and centralized SIJ adjudications to improve consistency.

The Deferred Action for Childhood Arrivals Program

Nearly two years since the start of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved more than 560,000 applications for individuals who were brought to the United States as children. Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. Despite the successful program launch, DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending past USCIS's six-month processing goal due to background checks and issuance of RFEs. In other case assistance requests submitted to the Ombudsman, USCIS issued template denials that provide limited information as to the basis for denial; inconsistent with agency policy, some of these denials were issued without USCIS first issuing an RFE or Notice of Intent to Deny. As the renewal process for DACA benefits begins in summer 2014, the Ombudsman will continue to engage with stakeholders and USCIS to resolve long-pending cases and address any future issues.

Employment

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in agency policy. Stakeholders cite redundant and unduly burdensome RFEs, and data reveal an RFE rate of nearly 50 percent in one key high-skilled visa category. Employers continue to seek the Ombudsman's assistance to resolve case matters and systemic issues in high-skilled adjudications.

The H-2 Temporary Worker Programs

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 temporary worker programs. During this reporting period, the Ombudsman received an increase in requests for case assistance, most submitted by small and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more foreign nationals to fill their temporary labor needs. Stakeholders report receiving RFEs for petitions that were approved in prior years for the same employer with identical temporary need and in the same sector. In May 2014, the Ombudsman hosted an interagency meeting with the U.S. Department of Labor, DOS and DHS to review the entire H-2 process and begin to address these concerns.

The EB-5 Immigrant Investor Program

The Immigrant Investor program has presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. In April 2013, USCIS relocated adjudications to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudications unit and updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

Humanitarian

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. Starting in 2013, Ombudsman Odom became Chair of the Blue Campaign Steering Committee and Acting Co-Chair of the DHS Council on Combating Violence Against Women. Working alongside USCIS, other DHS components, law enforcement, and community partners, the Blue Campaign and the Council helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

USCIS continues to devote attention to improve services for victims eligible for immigration benefits. This year USCIS made improvements in processing times for VAWA self-petitioners, U status petitioners, and T status applicants. The DHS Deputy Secretary committed to continuing to address processing times for these benefit categories, and stakeholders have emphasized the importance of providing interim employment authorization where USCIS does not meet the 180-day processing time goal. Stakeholders also continue to raise concerns about RFEs in the adjudication of these humanitarian benefits. For example, VAWA self-petitioners and applicants for conditional residence waivers due to battery or extreme cruelty report receiving RFEs that seek the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). RFEs increase processing times and may require additional attention from legal service providers, diminishing their capacity to assist victims. As USCIS trains new officers in the Vermont Service Center VAWA Unit, the Ombudsman will continue to monitor the quality of RFEs.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from CBP and ICE. USCIS has shifted resources, made new hires, and updated agency guidance to address the rising number of credible and reasonable fear claims. Despite these efforts, the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – has resulted in lengthy delays for affirmative asylum processing and a significant increase in asylum case referrals to the Immigration Courts.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Humanitarian reinstatement is a regulatory process under which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under Immigration and Nationality Act (INA) section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Interagency, Process Integrity, and Customer Service

USCIS Processing Times and their Impact on Customer Service

Individuals and employers seeking immigration benefits set expectations based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests with USCIS local offices and service centers to check case status until cases are outside posted processing times. Similarly, in FY 2014, the Ombudsman instituted a new policy not to accept requests for case assistance, absent urgent circumstances, until cases have been pending 60 days past USCIS posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted. The Ombudsman urges USCIS to consider new approaches to calculating case processing times.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

USCIS generates "service requests" through the Service Request Management Tool based on inquiries from individuals and employers, which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration customers experience and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

Issues with USCIS Intake of Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*

USCIS is not issuing notice to attorneys or accredited representatives when it rejects Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative.* The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, RFEs, and denials. USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership.

Fee Waiver Processing Issues

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report, including improvements made by USCIS. The Report also summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing, including inconsistencies in guidance and the application of fee waiver standards. USCIS has rapidly sought to resolve individual cases the Ombudsman has brought to the agency's attention, but systemic issues remain and require a review of guidance and form instructions, as well as agency intake procedures.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated lengthy processing times once cases reach the AAO and revised its website content. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand. In this Report, the Ombudsman publishes AAO data, provided by USCIS, for select form types. The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types.

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Individuals report issues with the USCIS SAVE program verifying a foreign national's immigration status with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from DHS, DOS, the U.S. Department of Justice and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit. USCIS has taken steps to resolve certain quality issues and improve customer service but problems persist. In April 2013, the Ombudsman convened an interagency working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data sharing challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Problems with Payment of the Immigrant Visa Fee via ELIS

In May 2013, USCIS began requiring that immigrant visa recipients use USCIS's Electronic Immigration System (ELIS) to pay the $165 fee to cover the cost of producing their Permanent Resident Cards. Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English. USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient.

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Ombudsman's Office Overview

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman)[1] mission 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; the Ombudsman is not a part of USCIS. ***See Appendix 2:*** *U.S. Department of Homeland Security Organizational Chart.*
- **Impartial.** The Ombudsman works in a neutral, impartial manner to improve the delivery of immigration benefits and services.
- **Confidential.** Individuals, employers, and their legal representatives 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 assistance and requesting that 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's attention for resolution; and
- Facilitating interagency collaboration and conducting outreach to a wide range of public and private stakeholders.

As of the date of this Report, the Ombudsman has fewer than 30 full-time employees with diverse backgrounds and areas of subject matter expertise in immigration law and policy. These individuals include attorneys who previously worked for non-governmental organizations representing families and vulnerable populations; private sector business immigration experts; and former USCIS, U.S. Department of Labor, and U.S. Department of State (DOS) adjudicators and staff.

Since Fiscal Year (FY) 2011, the Ombudsman's budget has been reduced by more than $900,000[3]; at the same time requests for case assistance have significantly risen. The office has reached this lower funding level through attrition, as well as cuts to travel, training and contracts. The Ombudsman has benefited from the DHS Rotational Program with individuals coming to the office for temporary assignments to assist with casework, fielding general inquiries from the public, and redesigning the Ombudsman's website. The President's FY 2015 Budget request to Congress for DHS sought to return the office to its prior funding level. The Ombudsman is pleased that the FY 2015 budget request reaffirms its mission and work.

Requests for Case Assistance

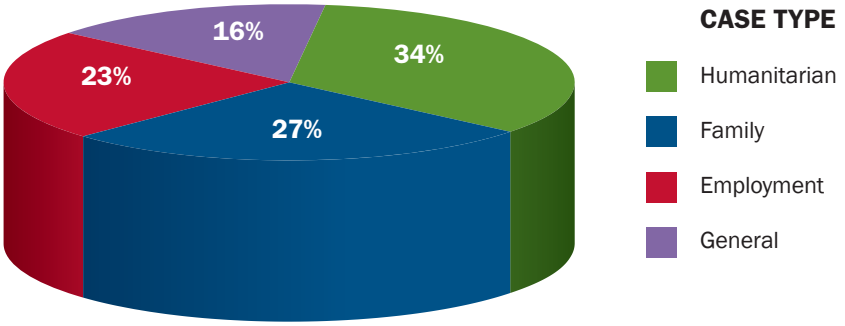
In the 2014 reporting period (April 1, 2013 - March 31, 2014), the Ombudsman received 6,135 case assistance requests, an increase of more than 35 percent from the 2013 reporting period total. Case assistance requests involved the following subject matter: Humanitarian, Family, Employment, and General. ***See Figure 1:*** *Case Submission by Category.* This year requests for case assistance related to the Deferred Action for Childhood Arrivals program contributed to a significant increase in humanitarian-related requests received by the Ombudsman, representing 15 percent of all such requests.

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

[2] Homeland Security Act of 2002 (HSA) § 452, Pub. L. No. 107-296. ***See Appendix 1:*** *Homeland Security Act - Section 452 - Citizenship and Immigration Services Ombudsman.*

[3] *See* Office of the Citizenship and Immigration Services Ombudsman Expenditure Plans for Fiscal Years 2012 to 2014.

FIGURE 1: CASE SUBMISSION BY CATEGORY



The Ombudsman's jurisdiction is limited by statute to case problems involving USCIS.[4] Individuals, employers, and their legal representatives may contact the Ombudsman after encountering problems with USCIS in the processing of their immigration-related applications and petitions. Approximately 47 percent of case assistance requests received during the reporting period were submitted directly by individuals and employers, and 53 percent were submitted by attorneys or accredited representatives. The top five states from which the Ombudsman received case assistance requests are: California, Texas, New York, Florida and Illinois. ***See Figure 2:*** *Top Five States for Case Submissions.*

The Ombudsman encourages individuals and employers to submit requests for assistance through the Ombudsman's Online Case Assistance, but they can also submit a request via mail, email and facsimile. Approximately 89 percent of case assistance requests during the reporting period were received by the Ombudsman through the online system. ***See Figure 3:*** *Case Submission Mode.*

FIGURE 2: TOP FIVE STATES FOR CASE SUBMISSIONS

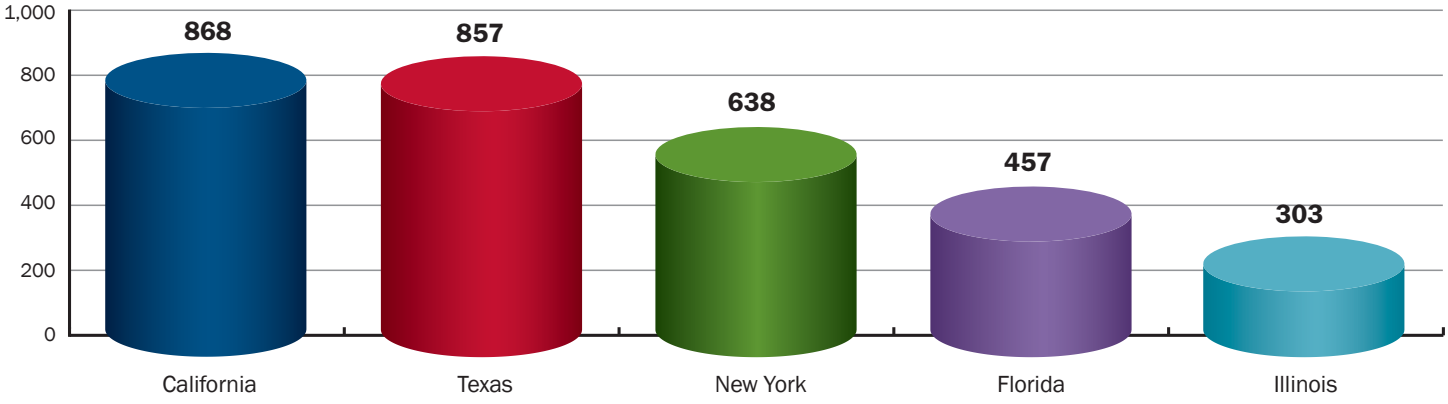
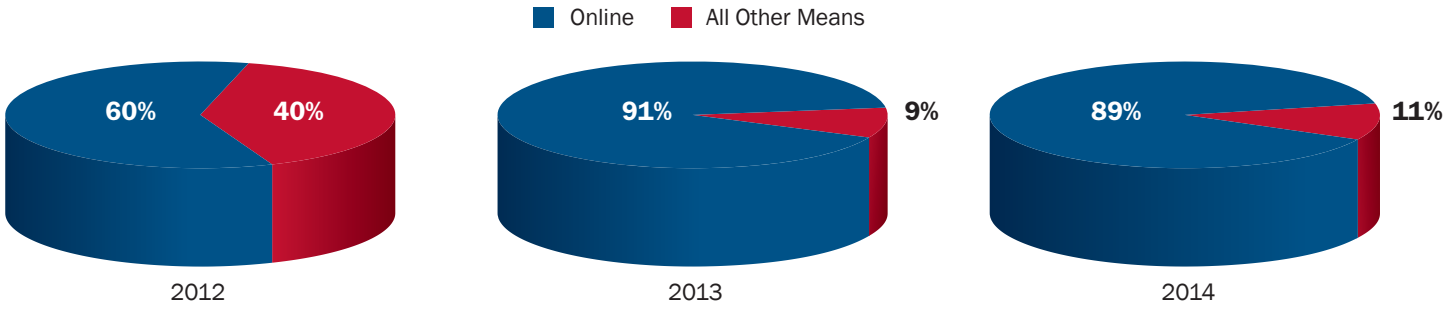


FIGURE 3: CASE SUBMISSION MODE

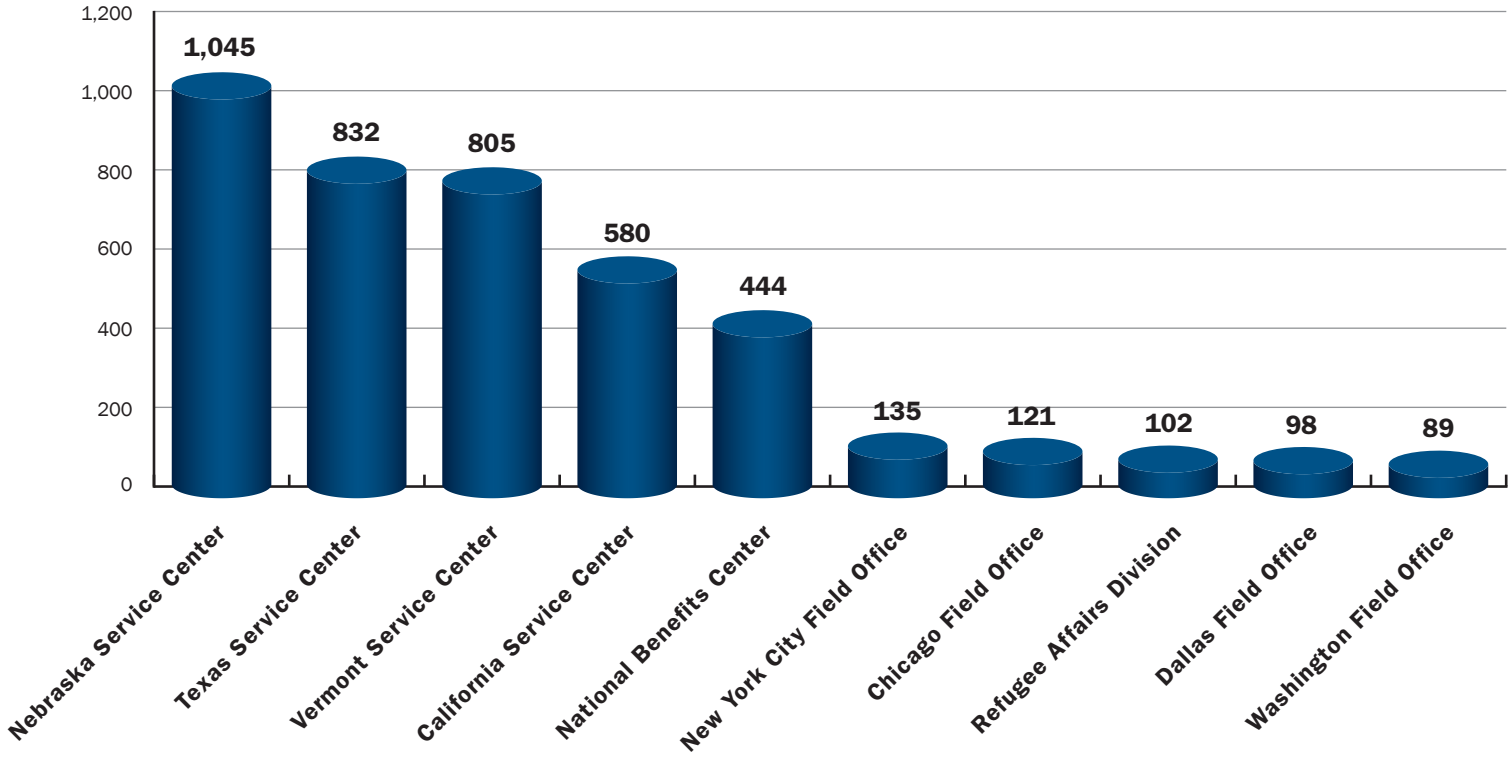


[4] HSA § 452(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice.

The Ombudsman evaluates each request for case assistance by examining facts, reviewing relevant DHS data systems and analyzing applicable laws, regulations, policies and procedures. After assessing the case assistance request, the Ombudsman may contact USCIS service centers, field offices, or other facilities to request they review the matter and take action as appropriate. ***See Figure 4:*** *Top Ten USCIS Facilities Contacted.*

In certain scenarios, the Ombudsman will expedite a request based on an emergency or hardship.[5] In deciding whether to expedite, the Ombudsman adheres to the same criteria as USCIS.[6] When a case assistance request falls outside of the Ombudsman's jurisdiction, the individual or employer is referred to the pertinent government agency. ***See Figure 5:*** *Ombudsman Case Assistance Request Process.*

FIGURE 4: TOP TEN USCIS FACILITIES CONTACTED



[5] Individuals or employers requesting expedited handling should clearly state so in Section 10 (Description) of Form DHS-7001, *Case Assistance Form* and 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.

[6] U.S. Department of Justice Memorandum, "Service Center Guidance for Expedite Requests on Petitions and Applications" (Nov. 30, 2001). *See also* USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Mar. 14, 2014). The criteria are: severe financial loss to company or individual; extreme emergent situation; humanitarian situation; nonprofit status of requesting organization in furtherance of the cultural and social interests of the United States; U.S. Department of Defense or National Interest Situation; USCIS error; and compelling interest of USCIS.

FIGURE 5: OMBUDSMAN CASE ASSISTANCE REQUEST 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**.

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 below and uploading a signed Form DHS-7001 to the online case assistance request.

OPTION 1

Submit an online request for case assistance available on the Ombudsman's website at www.dhs.gov/cisombudsman. This is the 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, D.C. 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.

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.

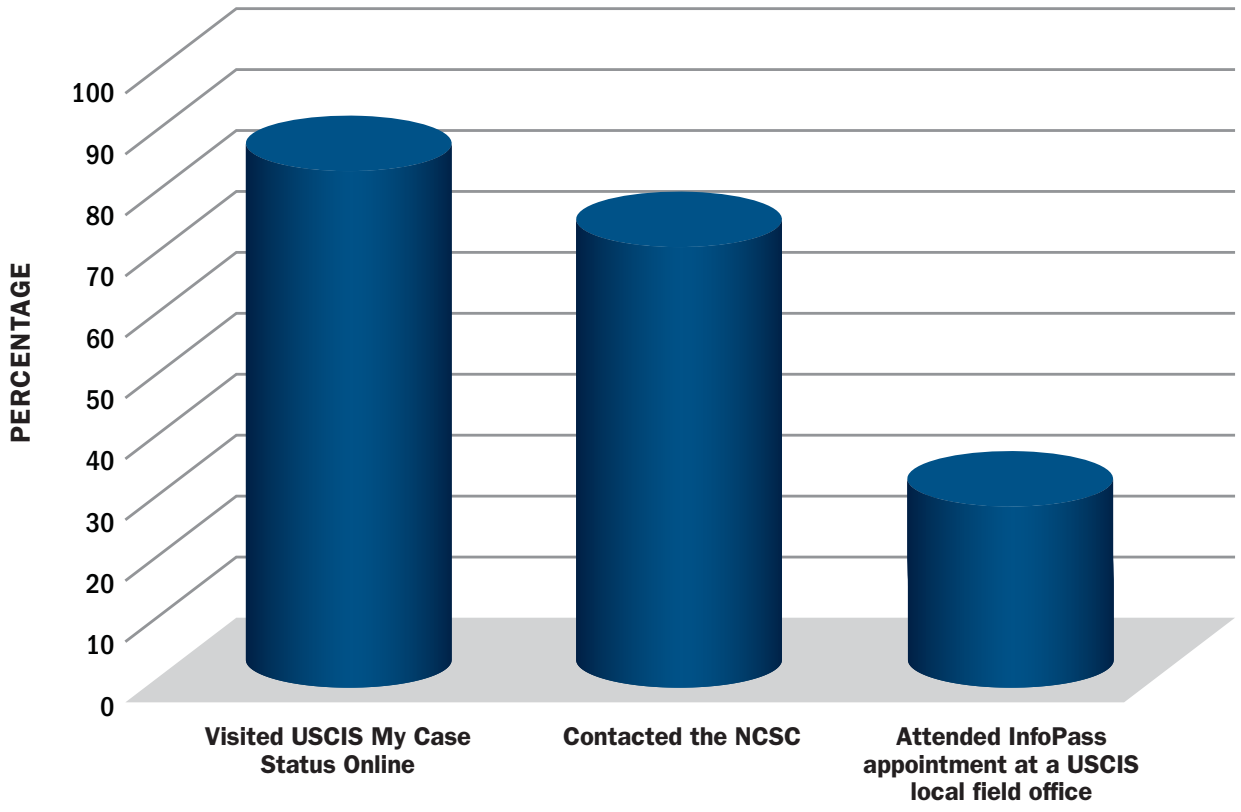
The Ombudsman is an office of last resort. Prior to contacting the Ombudsman, individuals and employers must attempt to resolve issues directly with USCIS through the agency's available customer service options. These include: My Case Status;[7] the National Customer Service Center (NCSC);[8] InfoPass;[9] and the e-Service Request tool.[10]

Individuals, employers, and their legal representatives are now required to indicate prior attempted actions when submitting case assistance requests to the Ombudsman. In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted the NCSC, while 28 percent appeared at InfoPass appointments at a USCIS local field office. ***See Figure 6:*** *Prior Actions Taken.*

The Ombudsman recognizes that individuals and employers seeking assistance often have waited long periods of time for resolution of their cases. For that reason, the Ombudsman recently revised its website content and stated its commitment to review all incoming requests for case assistance within 30 days and take action to resolve 90 percent of requests within 90 days of receipt. The revised content also makes clear the requirement that individuals and employers first avail themselves of the USCIS customer service options and wait 60 days past USCIS posted processing times before contacting the Ombudsman for assistance. Finally, it provides the scope of case review, Frequently Asked Questions, and tips to assist individuals and employers with filing case assistance requests.[11] ***See Appendix 3:*** *Ombudsman Scope of Case Assistance.*

When the Ombudsman is not able to resolve a request for case assistance using standard protocols, often due to pending background checks, the request is escalated to USCIS Headquarters. The Ombudsman then works directly with USCIS Headquarters officials and monitors the issue on a regular basis until it is resolved. The Ombudsman will continue to work with USCIS to improve the efficiency and effectiveness of this process.

FIGURE 6: PRIOR ACTIONS TAKEN



[7] *See* USCIS Webpage, "My Case Status;" https://egov.uscis.gov/cris/Dashboard/CaseStatus.do (accessed Apr. 3, 2014).

[8] The National Customer Service Center can be reached at 1-800-375-5283.

[9] InfoPass is a free online service that allows individuals to schedule an in-person appointment with a USCIS Immigration Services Officer. InfoPass appointments may be made by accessing the USCIS Webpage at http://infopass.uscis.gov/ (accessed Mar. 14, 2014).

[10] USCIS Webpage, "e-Request;" https://egov.uscis.gov/e-Request/Intro.do (accessed Mar. 14, 2014).

[11] *See* Ombudsman Webpage, "Ombudsman – Case Assistance, Help with a Pending Application or Petition;" http://www.dhs.gov/case-assistance (accessed Apr. 3, 2014).

Outreach

In-Person Engagements

During this reporting period, the Ombudsman visited communities and stakeholders in regions across the United States.[12] The Ombudsman conducted USCIS site visits and meetings with state and local officials, Congressional offices, employers and communities with emerging immigrant populations. The Ombudsman views in-person engagements as essential to its mission and continues to monitor the impact of budget limitations. The Ombudsman is committed to expanding the use of technology and alternative means to interact with the public and USCIS offices around the country by holding engagements via video conference and teleconference.

Teleconferences

To inform stakeholders of new initiatives and receive feedback on a variety of topics, the Ombudsman hosted the following teleconferences:

- *USCIS Customer Service* (March 20, 2014)
- *Provisional I-601A Waivers* (February 21, 2014)
- *Naturalization Disability Waivers and Access to Immigration Services* (January 23, 2014)
- *The Ombudsman's 2013 Annual Report* (July 17, 2013)
- *The Process after USCIS Approves a U Visa: A Conversation with Department of State Representatives* (June 12, 2013)
- *USCIS's Temporary Suspension of Certain H-2B Adjudications* (May 30, 2013)
- *Fee Waivers at USCIS: How Are They Working for You?* (April 30, 2013)

Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of FY 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete more than 150 this year.

The Ombudsman's Annual Conference

Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. Attendees included individuals from non-governmental organizations, the private sector and federal and state entities. The White House Domestic Policy Council Senior Policy Director for Immigration Felicia Escobar updated attendees on immigration reform legislative developments. The keynote panel featured a discussion of approaches and lessons learned from large-scale legal services responses. Other panel discussions addressed the following areas: challenges in high-skilled immigration; autonomy, transparency, and timeliness of decisions at the USCIS Administrative Appeals Office; credible fear screenings; DHS data systems; and waivers of inadmissibility (Provisional Unlawful Presence Waivers).[13]

Recommendations and Interagency Liaison

The Ombudsman is required to identify areas in which individuals and employers have problems in dealing with USCIS and, to the extent possible, propose changes in administrative practices to mitigate these problems.

Recommendations are developed based on:

- Trends in requests for case assistance;
- Feedback from individuals, employers, community-based organizations, trade and industry associations, faith communities and immigration professionals from across the country; and
- Information and data gathered from USCIS and other agencies.

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices* to Appear, which are the charging documents issued by USCIS to initiate removal proceedings.

[12] Northeast: Dewey Beach, DE; New York, NY; Jersey City, NJ; and Worcester and Boston, MA. Midwest: Chicago, IL and Kansas City, MO. Mid-Atlantic: Baltimore, MD; Washington, D.C.; and Falls Church, VA. Southeast: Macon, GA; Miami, FL; Memphis and Nashville, TN; and Greensboro, Raleigh and Charlotte, NC. Southwest: El Paso and Dallas, TX; and Phoenix, Tucson, and Nogales, AZ. West: San Francisco and Los Angeles, CA.

[13] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership. Discussed in detail in later sections of this Annual Report, these issues pertain to: Special Immigrant Juvenile adjudications; USCIS processing times; Agency responses to service requests submitted through the Service Request Management Tool; USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; and Challenges in the process for payment of the Immigrant Visa Fee.

Among other activities, the Ombudsman worked to promote interagency liaison through:

- Monthly meetings with DOS and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- Quarterly data quality working group meetings with USCIS, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the Systematic Alien Verification for Entitlements (SAVE) program[14] and other DHS systems used to verify immigration status and benefits eligibility.

On March 21, 2013, then-Secretary of Homeland Security Janet Napolitano announced the creation of the Council for Combating Violence Against Women. Ombudsman Odom has served as Acting Co-Chair of this council since September 2013.

On August 29, 2013, Ombudsman Odom was appointed the Department's Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement and government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate and victim assistance.

The Ombudsman's Annual Report

The Ombudsman submits an Annual Report to Congress by June 30 of each calendar year, pursuant to section 452(c) of the Homeland Security Act. At the time of publication, the Ombudsman has not yet received USCIS's response to the 2013 Annual Report.

[14] The Systematic Alien Verification for Entitlements program is a web-based service that helps federal, state and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants to ensure only those entitled to benefits receive them. *See* USCIS Webpage, "Systematic Alien Verification for Entitlements" (Nov. 20, 2013); http://www.uscis.gov/save (accessed Apr. 29, 2014). *See* section of this Report on "Data Quality and its Impact on those Seeking Immigration and Other Benefits."

Key Developments and Areas of Study

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.[15] The areas of study presented in this year's Report are organized as follows:

- **Families and Children;**
- **Employment;**
- **Humanitarian; and**
- **Interagency, Process Integrity, and Customer Service.**

[15] HSA § 452(c)(1)(B).

Families and Children

Family reunification has long been a pillar of U.S. immigration policy. The USCIS Provisional Unlawful Presence Waiver program advances family unity in a concrete and meaningful way, and recent guidance addresses some of the most pressing stakeholder concerns. The Ombudsman previously made recommendations and continues to bring to USCIS's attention issues with policy and practice in the processing of Special Immigrant Juvenile self-petitions. Pervasive and serious problems persist in this area. In the Deferred Action for Childhood Arrivals program, USCIS has provided discretionary relief to more than 560,000 individuals who were brought to the United States as children.

Provisional and Other Immigrant Waivers of Inadmissibility

Responsible USCIS Offices:[16]

Field Operations and Service Center Operations Directorates

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family reunification. In 2012, USCIS consolidated adjudication of Form I-601, *Application for Waiver of Grounds of Inadmissibility* in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a U.S. Department of State (DOS) consulate abroad.[17] In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program.

Background

In 1996, Congress enacted unlawful presence bars that have come to be called the "three-year" and "ten-year" bars.[18]

[16] Homeland Security Act of 2000 § 452(c)(1)(E) requires that the Ombudsman "identify any official of [USCIS] who is responsible" for inaction-related Ombudsman recommendations "for which no action has been taken" or USCIS "pervasive and serious problems encountered by individuals and employers." For the first time, in this Annual Report, the Ombudsman identifies the responsible USCIS component. Where more than one USCIS office is listed, coordination is needed among USCIS components.

[17] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. Immigration and Nationality Act (INA) § 212 (a)(9)(B)(i)(I) is known commonly as the three-year bar, referring to the time an individual is barred from returning to the United States. It is triggered by 180 days or more of unlawful presence and a departure from the United States, followed by a request for readmission. INA § 212(a)(9)(B)(i)(II) is commonly known as the ten-year bar, which is triggered by one year or more of unlawful presence and a departure from the United States, followed by a request for readmission.

An individual seeking a waiver of either the three-year or ten-year bar must demonstrate to the satisfaction of the Secretary of Homeland Security that refusal of admission would result in extreme hardship to a qualifying relative as a matter of law and in the exercise of discretion.[19] Until June 4, 2012, waivers of the three-year and ten-year bars could only be sought by applicants after leaving the United States in order to apply for an immigrant visa at a DOS consulate abroad.[20] This led to lengthy periods of family separation since waiver processing took months, if not a year or longer, to complete.[21]

Since the enactment of the unlawful presence bars, many foreign nationals with close family ties in the United States have been dissuaded from seeking Lawful Permanent Residence. After residing in the United States for many years, others traveled abroad for what they hoped would be a temporary period, only to encounter prolonged adjudication delays or denials of their waiver requests. Even individuals approved for such waivers abroad may have been forced to endure separation from relatives for months.[22] Under prior waiver procedures, these applicants had no choice but to travel overseas to complete their application for an immigrant visa.

Centralized I-601 Processing. On June 4, 2012, USCIS centralized Form I-601 processing at the Nebraska Service Center (NSC).[23] This was intended to improve consistency in decision-making and reduce the time applicants waited overseas for waiver decisions while they were completing the immigration visa process at a DOS consulate abroad.[24] USCIS announced a processing time target of three months for the newly centralized waiver process.[25] In February 2014, USCIS published a processing time of seven months for these waivers.[26]

While wait times for decisions have been longer than previously announced, the uniformity of filing and centralizing adjudication in one USCIS office is a welcome development.

Provisional Waivers. On January 9, 2012, USCIS announced its plan to establish a Provisional Waiver program.[27] Following the publication of proposed regulations, a comment period, and the issuance of final regulations, the plan took effect on March 4, 2013.[28] Now, immediate relatives of U.S. citizens, who wish to apply for an immigrant visa and who require a waiver of inadmissibility for unlawful presence only, are permitted to submit a waiver application from within the United States prior to departing for an immigrant visa interview at a U.S. embassy or consulate abroad.[29] Applicants submit Form I-601A, *Application for Provisional Unlawful Presence Waiver* along with the appropriate filing fee to a USCIS Lockbox facility in Chicago, Illinois.[30] Stakeholders welcomed this change and deemed it critical to preserving family unity.

Shortly after implementation, stakeholders raised concerns with USCIS's interpretation of the "reason to believe" standard applied when determining whether a provisional waiver applicant appears to be inadmissible on grounds other than unlawful presence.[31] National organizations representing immigrants cited denials by USCIS where applicants had minor criminal arrests or convictions for misdemeanor crimes, such as driving without a license or disorderly conduct, without any apparent analysis of supporting evidence demonstrating the underlying crime would not be a bar to admissibility. In a number of the aforementioned cases, USCIS issued summary denials without due consideration of whether an applicant's criminal offense fell within the "petty offense" or "youthful offender" exceptions,[32] or was not a crime of moral

[19] INA § 212(a)(9)(B)(v).

[20] INA § 245(a) and (c).

[21] *See* USCIS Webpage, "USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility in the United States" (May 31, 2012); http://www.uscis.gov/news/uscis-centralize-filing-and-adjudication-certain-waivers-inadmissibility-united-states (accessed May 20, 2013); *see also* Ombudsman Recommendation 45, "Processing of Waivers of Inadmissibility" (Jun. 10, 2010); http://www.dhs.gov/ombudsman-recommendation-processing-waivers-inadmissibility (accessed Apr. 29, 2014).

[22] *Id.* "Currently, applicants experience processing times from one month to more than a year depending on their filing location. This centralization will provide customers with faster and more efficient application processing and consistent adjudication."

[23] *Id.*

[24] *Id.*

[25] USCIS Webpage, "Form I-601 Centralized Lockbox Filing" (May 14, 2014); http://www.uscis.gov/outreach/notes-previous-engagements/form-i-601-centralized-lockbox-filing (accessed Jun. 23, 2014).

[26] USCIS Webpage, "USCIS Processing Time Information for the Nebraska Service Center" (Feb. 2014); https://egov.uscis.gov/cris/processingTimesDisplay.do (accessed May 9, 2014).

[27] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule," 77 Fed. Reg. 19901 (Jan. 9, 2012).

[28] 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[29] *Id.*

[30] USCIS Webpage, "I-601A, Application for Provisional Unlawful Presence Waiver" (Jun. 27, 2013); http://www.uscis.gov/i-601a (accessed Apr. 22, 2014).

[31] *Supra* note 28.

[32] INA § 212(a)(2)(A)(ii).

turpitude that would render the applicant inadmissible.[33] Due to these case examples, national organizations appealed to the USCIS Director to revise applicable standards.[34]

USCIS also denied a number of cases based on fraud or misrepresentation grounds of inadmissibility because of the applicant's prior history of encounters with immigration authorities.[35] These cases were denied without due consideration of documentation establishing the nature of these prior encounters. For example, the Ombudsman reviewed cases where applicants who had been refused entry at the border were alleged to have provided a false name or date of birth. In some of these cases, the applicant disputed that any false information was provided, and instead stated that there was a data entry error. Countervailing evidence was reportedly not considered, as these provisional waivers were summarily denied. In other cases, applicants wished to present evidence that the facts of the cases did not satisfy the legal definition of "willful misrepresentation of a material fact,"[36] and thus did not support a denial. These summary denials were made without the issuance of Requests for Evidence (RFE) or a full examination of the information on record.

The Ombudsman received a number of case assistance requests connected with these concerns. Applicants requested the Ombudsman's assistance in obtaining further review of summary denials since provisional waiver applicants are not permitted to file a motion to reopen/reconsider or an appeal of a denial.

In August 2013, USCIS suspended adjudication of 4,400 provisional waiver applications where the agency had determined there might be "reason to believe" the applicant was inadmissible on a ground other than unlawful presence.[37] On January 24, 2014, USCIS published a Policy Memorandum titled *Guidance Pertaining to Applicants for Provisional Unlawful Presence* instructing adjudicators to review all information in the record, taking into account the nature of a particular charge or conviction as well as the ultimate disposition, before making a final determination of whether there is "reason to believe" criminal inadmissibility grounds apply.[38]

On February 7, 2014, Ombudsman Odom sent a letter to the USCIS Acting Director noting the new "clear, consistent standard for adjudicators to apply to future provisional waiver cases" but also describing stakeholder concerns related to reopening cases previously denied and revisiting guidance on fraud and willful misrepresentation.[39] On March 18, 2014, USCIS announced that it would reopen under its own motion provisional waiver applications that had been denied prior to January 24, 2014, solely on the basis that a criminal offense might pose a "reason to believe" that the applicant was inadmissible.[40] Thereafter, USCIS moved the 4,400 "reason to believe" provisional waiver applications that had been placed on hold back into the normal flow of work for adjudication at the National Benefits Center.[41]

Ongoing Concerns

USCIS's new guidance addresses the most pressing stakeholder concerns, and the Ombudsman will closely monitor implementation. There are other aspects of the provisional waiver process that remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record.[42] The Ombudsman has urged USCIS to issue guidance specifying the nature and type of evidence required to support a finding of inadmissibility under the Immigration and Nationality Act section 212(a)(6)(C)(i), and to afford applicants an opportunity to present new evidence and

[33] INA § 212(a)(2)(A)(i)(I).

[34] Letter from the American Immigration Lawyers Association to USCIS Director Mayorkas (Aug. 6, 2013); Letter from the Catholic Legal Immigration Network to USCIS Director Mayorkas (Aug. 5, 2013).

[35] INA § 212(a)(6)(C)(i) provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the [INA] is inadmissible."

[36] INA § 212(a)(6)(C)(i).

[37] Information provided by USCIS (Sept. 19, 2013).

[38] USCIS Policy Memorandum, "Guidance Pertaining to Applicants for Provisional Unlawful Presence" (Jan. 24, 2014); http://www.uscis.gov/sites/default/files/files/nativedocuments/2014-0124_Reason_To_Believe_Field_Guidance_Pertaining_to_Applicants_for_Provisional_Unlawful_Presence_Waivers-final.pdf (accessed Apr. 21, 2014). The Policy Memorandum states, "USCIS officers should review all evidence in the record, including any evidence submitted by the applicant or the attorney of record. If, based on all evidence in the record, it appears that the applicant's criminal offense: (1) falls within the "petty offense" or "youthful offender" exception under INA section 212(a)(2)(A)(ii) at the time of the I-601A adjudication, or (2) is not a CIMT under INA section 212(a)(2)(A)(i)(I) that would render the applicant inadmissible, then USCIS officers should not find a reason to believe that the individual may be subject to inadmissibility under INA section 212(a)(2)(A)(i)(I) at the time of the immigrant visa interview solely on account of that criminal offense. The USCIS officer should continue with the adjudication to determine whether the applicant meets the other requirements for the provisional unlawful presence waiver, including whether the applicant warrants a favorable exercise of discretion."

[39] Letter from Ombudsman Odom to USCIS Acting Director Lori Scialabba (Feb. 7, 2014).

[40] USCIS Public Engagement Division, Message: Form I-601A, Provisional Unlawful Presence Waiver (Mar. 18, 2014).

[41] Information provided by USCIS (Apr. 28, 2014).

[42] *See* INA § 212(a)(6)(C)(i).

request reconsideration of cases previously denied for fraud or willful misrepresentation of a material fact.[43]

Special Immigrant Juveniles

Responsible USCIS Offices:

Field Operations Directorate, Office of Policy and Strategy, and Office of Chief Counsel

In this Annual Report section, the Ombudsman raises concerns with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary RFEs for information concerning underlying state court orders, and ultimately denials in some cases. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and ensuring child appropriate interviewing techniques. The Ombudsman brought these issues to USCIS's attention and presented initial recommendations calling for clarification of policy and for centralized SIJ adjudication to improve consistency.

Background

In 1990, Congress established the SIJ category to provide protection to children without legal immigration status.[44] For a child to be eligible for SIJ status, a juvenile court must declare the child to be dependent on the court or legally commit the child to the custody of a state agency or an individual appointed by a state or juvenile court. The court must also declare the child cannot be reunited with one or both of his or her parents due to abuse, neglect, or abandonment.[45] In addition, an administrative or judicial proceeding must have determined it would not be in the best interests of the child to be returned to the child's or parents' country of citizenship or last habitual residence.[46]

In 1997, Congress amended the SIJ definition to safeguard the process from fraud or abuse by including only those juveniles deemed eligible for long-term foster care.[47]

The amendment also required the "express consent" of the Attorney General (now the Secretary of Homeland Security) "to the dependency order serving as a precondition to the grant of [SIJ] status."[48] By making these amendments, Congress aimed "to limit the beneficiaries … to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining [immigration] status … rather than for the purpose of obtaining relief from abuse or neglect."[49] With these amendments, Congress also sought to address concerns for potential abuse in the SIJ program by restricting grantees from later petitioning for their parents.[50]

USCIS published final SIJ regulations in 1993, recognizing that it "would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations …"[51] USCIS then

[43] *Supra* note 39.

[44] Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J), 104 Stat 4978 (Nov. 29, 1990). Historically, U.S. government efforts to protect children resulted in a gap for immigrant children who were protected during their childhood but grew into adults with no legal immigration status. *See generally* "Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law," Angela Lloyd, 15 B.U. Pub. Int. L.J. 237, at 1.

[45] INA § 101(a)(27)(J).

[46] *Id.*

[47] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997); *see Gao v. Jenifer* 185 F.3d 548, at 552 (1999).

[48] *Id.*

[49] H.R. Conf. Rep. 105-405, at 130 (Nov. 13, 1997).

[50] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997); Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, 42847 (Aug. 12, 1993).

[51] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, Supplemental Information at 42847 (Aug. 12, 1993).

issued policy memoranda in 1998 and 1999, instructing adjudicators to request information necessary to make independent findings regarding abuse, abandonment, neglect and best interests.[52] In 2004, USCIS issued a third Policy Memorandum, instructing adjudicators to examine state court orders for independent assurance that courts acted in an "informed" way.[53] The memorandum also provided that adjudicators should not "second-guess" findings made by state courts because "express consent is limited to the purpose of determining [SIJ] status, and not for making determinations of dependency status."[54] However, in that memorandum, USCIS instructed adjudicators to give express consent only if the adjudicator was aware of the facts that formed the basis for the juvenile court's rulings.

The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) again amended the SIJ statute.[55] TVPRA clarified that the Secretary of Homeland Security must consent to the grant of SIJ status, and not to the dependency order serving as a precondition to a grant of SIJ status.[56] TVPRA thus recognized state court authority and "presumptive competence"[57] over determinations of dependency, abuse, neglect, abandonment, reunification, and best interests of children. In addition, TVPRA removed the need for a state court to determine eligibility for long-term foster care and replaced it with a requirement that the state court determine whether reunification with one or both parents is viable.[58]

In 2010 and 2011, stakeholders reported receiving RFEs from USCIS asking for detailed information regarding the underlying state court order. Stakeholders also reported age-inappropriate interviewing techniques by immigration officers, such as, use of language that is not suitable for children. They recounted problems with USCIS not meeting statutory processing times, a lack of procedures for requesting expedited review of SIJ petitions for those in jeopardy of aging-out of eligibility, and repeated denials of fee waiver requests in cases where applicants appeared to be *prima facie* eligible. These concerns prompted the Ombudsman to issue formal recommendations in April 2011.[59] Since the publication of these recommendations, the Ombudsman has continued providing USCIS with stakeholder feedback, examples of problem cases, and other information relevant to improving SIJ adjudication. In 2012, USCIS partnered with state courts to train judges on the SIJ process.[60]

On February 27, 2014, USCIS held a "train-the-trainer" session for regional selectees who then provided training to USCIS adjudicators in the field. All USCIS officers adjudicating SIJ petitions are now required to take this training. The new training module includes instruction on USCIS's consent requirement and directs adjudicators to accept court orders containing or supplemented by specific findings of fact. The training offers a sample court order that adequately represents the type of factual findings required in a juvenile state court order. The written training, however, states that adjudicators may issue an RFE "if the record does not reflect that there was a ***sufficient*** factual basis for the court's findings." *(emphasis added)*.[61] This instruction is inconsistent with the supplementary training materials, which present sample court orders that do not have exhaustive factual findings, but satisfy USCIS's limited role of verifying that a state court has made the requisite SIJ findings. As a result, stakeholders continue to receive problematic RFEs and denials reflecting adjudicators' overly expansive search for records supporting the factual findings

[52] Immigration and Naturalization Service Policy Memorandum, "Special Immigrant Juveniles - Memorandum #2: Clarification of Interim Field Guidance" (Jul. 9, 1999); http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_2_Special_Immigrant_Juvenile_Status/5_4_2_3_Published_Decisions_and_Memoranda/Cook_Thomas_SpecialImmigrantJuvenilesMemorandum.pdf (accessed Jun. 18, 2014).

[53] USCIS Interoffice Memorandum, "Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed Jun. 18, 2014).

[54] *Id.*

[55] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) §235(d)(1), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[56] TVPRA § 235(d)(1).

[57] *Gao v. Jenifer* 185 F.3d 548 (1999) at 556 *citing Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33. F.3d 561, 565 (6th Cir. 1994).

[58] TVPRA § 235(d)(1)(B).

[59] Ombudsman Recommendation 47, "Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices" (Apr. 15, 2011); http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf (accessed Mar. 19, 2014). The Ombudsman recommended that USCIS: (1) standardize its practices of: (a) providing specialized training for those officers adjudicating Special Immigrant Juvenile (SIJ) status; (b) establishing dedicated SIJ units or Points of Contact (POCs) at local offices; and (c) ensuring adjudications are completed within the statutory timeframe; (2) cease requesting the evidence underlying juvenile court determinations of foreign child dependency; and (3) issue guidance, including agency regulations, regarding adequate evidence for SIJ filings, including general criteria for what triggers an interview for the SIJ petition, and make this information available on the USCIS website.

[60] *Supra* note 41.

[61] USCIS SIJ Training (Feb. 27, 2014).

of state courts, including full court transcripts, and, in some cases, any and all evidence submitted in the underlying proceeding.[62]

Case Example
In May 2014, the Ombudsman received a request for case assistance involving an SIJ-based RFE issued subsequent to the release of USCIS's new field training. In this case, the state court order presented by the petitioner appeared to include requisite factual findings for SIJ eligibility. However, the adjudicator issued an RFE requesting the following: "a copy of the original application for guardianship, a complete transcript of ***any*** hearing held in front of ***any*** judge regarding your temporary or permanent guardianship, copies of ***any and all*** documents submitted to ***any*** judge during ***any*** hearing regarding your guardianship." *(emphasis added)*

Ongoing Concerns

USCIS Interpretation of Consent. The Ombudsman continues to receive reports and requests for case assistance from stakeholders where USCIS has called into question the validity of court orders and their content by:

- Requesting that petitioners provide information and/or documents that substantiate a state court order;
- Raising concerns of alleged fraud or misrepresentation in the state court process, particularly in cases dealing with reunification with one parent, as permitted by TVPRA;[63]
- Reinterpreting state law by deeming that a particular state court did not have jurisdiction to issue a dependency order; and
- Refusing to accord "full faith and credit" to a state court order issued in a state different from the petitioner's current state of residence.[64]

The Ombudsman received and continues to evaluate other emerging SIJ issues, including USCIS's adherence to its obligations under the 2005 *Perez-Olano* settlement agreement.[65] Under this settlement, the agency committed not to deny or revoke any new, pending, or reopened SIJ petition "on account of age or dependency status, if, at the time the class member files or filed a complete application for SIJ classification, he or she was under 21 years of age or was the subject of a valid dependency order that was subsequently terminated based on age." SIJ regulations have historically protected children under 21 years of age to "minimize confusion caused by dissimilar state laws" and to "allow students and other young persons who continue to be dependent upon the juvenile court after reaching the age of eighteen to qualify for SIJ status."[66]

The Ombudsman will continue to monitor and work to address SIJ issues with USCIS. In the coming year, the Ombudsman may issue additional recommendations calling for the agency to: 1) clarify its limited consent authority; and 2) centralize SIJ adjudication to improve quality and consistency of decisions.

The Deferred Action for Childhood Arrivals Program

Responsible USCIS Office:

Service Center Operations Directorate

Nearly two years since the inception of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved over 560,000 DACA applications for individuals who were brought to the United States as children.[67] Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending beyond USCIS's six-month processing goal due to background checks. In other cases, USCIS has issued template denials that provide limited information as to the basis for denial.

[62] Such Requests for Evidence (RFEs) raise privacy concerns. In many states, providing records of juvenile proceedings would be a violation of state confidentiality laws. *See* e.g., N.J.S.A. 9:2-1, 9:2-3 ("The records of such proceedings, including all papers filed with the court, shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parents, or their attorneys, and to no other person except by order of the court made for that purpose.") New Jersey Rule, R. 1:38-3(d)(13), excludes from public access: "Child custody evaluations, reports, and records pursuant to ... N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3." Additionally, juvenile court records often contain information not only about the SIJ applicant, but also about siblings and other persons who are not before USCIS. These RFEs also impose significant burdens on counsel who, in many cases, would have to seek special permission from the state court to disclose such documents.

[63] TVPRA § 235(d)(1)(A).

[64] U.S. Constitution, Art. IV, Sec. 1.

[65] *Perez-Olano, et al. v. Holder*, Case No. CV-05-3604 at 8 (C.D. Cal. 2005).

[66] 58 Fed. Reg. 42843-01, Supplemental Information at *42847 (Aug. 12, 1993); Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997).

[67] *See* USCIS Webpage, "Secretary Johnson Announces Process for DACA Renewal" (Jun. 5, 2014); http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (accessed Jun. 18, 2014).

Background

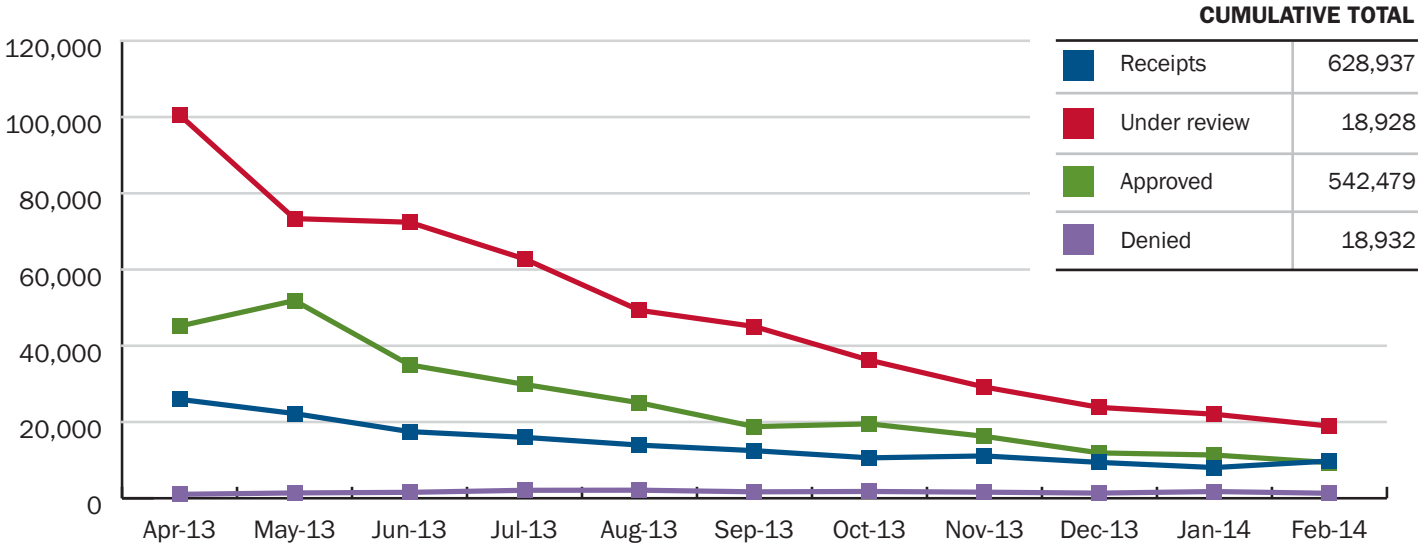
On June 15, 2012, the Secretary of Homeland Security announced that certain individuals who came to the United States as children and meet several requirements may request deferred action under the DACA program.[68] Within 60 days of the announcement and following robust public engagement, USCIS implemented a process for receiving, reviewing, and adjudicating DACA requests.[69]

As of March 10, 2014, individuals submitted 658,430 DACA applications and USCIS granted 542,479 of these requests. ***See Figure 7:*** *Deferred Action for Childhood Arrivals Adjudication Data.*

Ongoing Concerns

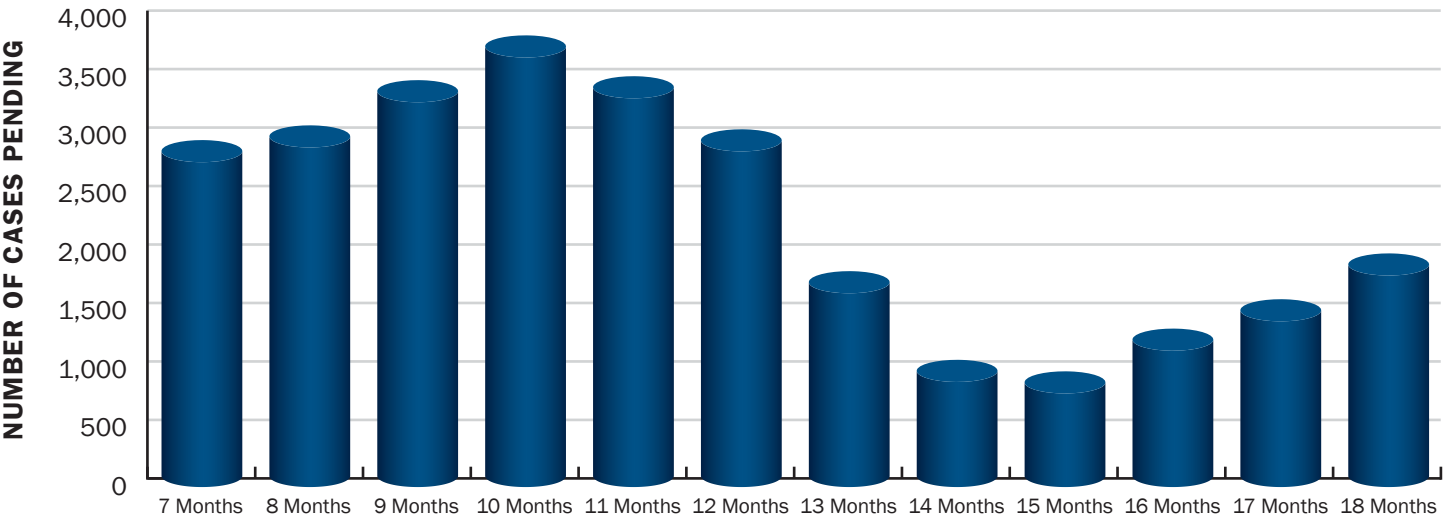
The Ombudsman has identified issues in DACA processing based on requests for case assistance, feedback from stakeholders, and information provided by USCIS.

FIGURE 7: DEFERRED ACTION FOR CHILDHOOD ARRIVALS ADJUDICATION DATA



Source: Information provided by USCIS (Apr. 28, 2014).

FIGURE 8: DEFERRED ACTION FOR CHILDHOOD ARRIVALS CASES PENDING PAST SIX MONTHS



Source: Information provided by USCIS (Apr. 28, 2014).
Includes data through March 7, 2014.

[68] DHS Press Release, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities" (Jun. 15, 2012); https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low (accessed Apr. 29, 2014).

[69] *See* USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process, (accessed May 12, 2014). *See* e.g., USCIS Public Engagement, "Deferred Action for Childhood Arrivals Stakeholder Conference Call" (Nov. 21, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/deferred-action-childhood-arrivals-stakeholder-conference-call (accessed Apr. 3, 2013).

Processing Times. Approximately seven months after the official start of the DACA program, USCIS announced a six-month processing time for all DACA applications.[70] While processing started at all four USCIS service centers, in February 2013, USCIS centralized most of the DACA workload at the NSC.[71] USCIS also shifted resources in response to declining DACA receipts and to address a growing backlog of Forms I-130, *Petition for Alien Relative* filed for immediate relatives. As of January 6, 2014, there were 71,949 DACA cases pending with USCIS service centers for more than six months (with 66,470 of these cases pending at the NSC),[72] 31 percent pending background checks, and 25 percent pending due to issuance of Requests for Evidence.[73] ***See Figure 8:*** *Deferred Action for Childhood Arrivals Cases Pending Past Six Months.* USCIS provided data to the Ombudsman showing that as of May 16, 2014, there were 12,061 DACA cases pending past six months, with 17 percent pending background checks and 8 percent pending RFEs.

The majority of DACA-related requests for case assistance received by the Ombudsman pertain to cases outside published processing times, many of which have been pending for a year or more. A large number of cases are on hold due to pending policy guidance on issues such as education accreditation.[74] The NSC increased its staffing for the DACA unit to a total of 150 adjudicators by April 2014. USCIS acknowledged the additional adjudicators were needed to handle delays in processing background checks. The agency also allocated additional resources at the NSC to address individual DACA cases that were delayed due to background checks. It anticipated most backlogged cases would be resolved by the end of May 2014.[75] The Ombudsman will continue to monitor DACA processing times as the program enters its first renewal period.

Template Denials. USCIS issued many DACA denial notices using template letters wherein adjudicators select a box from a list identifying the general basis for denial. However, the narrative language accompanying the check boxes is often limited and vague, and does not provide applicants a reason for the denial of the DACA application. According to USCIS, adjudicators are to issue an RFE or Notice of Intent to Deny (NOID) before denying a DACA application. The largest categories for RFEs pertain to the following eligibility requirements: continuous residence, current enrollment in school, and physical presence in the United States on June 15, 2012.[76] The Ombudsman received case assistance requests for DACA applications where, inconsistent with agency policy, USCIS did not issue an RFE or NOID prior to the denial, which is concerning since there is no formal appeal process or option for a motion to reopen/reconsider for DACA denials. Individuals may request review of the denial decision through the Service Request Management Tool process if they can demonstrate that: 1) USCIS incorrectly denied the application based on abandonment, or 2) USCIS mailed the RFE to the wrong address.[77] USCIS has reopened 1,656 cases for these reasons.[78] Otherwise, the only other recourse for applicants is to file a new application and pay the $465 filing fee again.

Employment Authorization Documents and Mailing Issues. Stakeholders have raised concerns about Employment Authorization Documents (EADs) issued following the approval of a DACA application. While the U.S. Postal Service shows the document as "delivered," some applicants report they never received their EADs. In most cases, USCIS requires the applicant to pay an additional $85 for the biometrics fee in order to obtain a replacement card. Currently, USCIS has no plans to begin mailing EADs via certified mail. The Ombudsman will be reviewing USCIS EAD mailing issues in the coming year.

DACA Renewals. Applicants began applying for DACA, with two-year grants of deferred action and EADs, on August 15, 2012. The renewal process begins in summer 2014. Most DACA renewals will be adjudicated at the NSC.

[70] USCIS Webpage, "USCIS Processing Time Information" (May 6, 2014); https://egov.uscis.gov/cris/processTimesDisplay.do (accessed May 8, 2014).

[71] USCIS shifted resources to address growing backlogs of immediate relative Forms I-130, *Petition for Alien Relative*. *Supra* note 41.

[72] Information provided by USCIS (Jan. 30, 2014).

[73] *Id.*

[74] Information provided by USCIS (Mar. 23, 2014, Apr. 9, 2014 and Apr. 28, 2014).

[75] Information provided by USCIS (Apr. 9, 2014 and Apr. 28, 2014). USCIS noted that more complex background check cases may take longer than six months to process.

[76] *Id.*

[77] USCIS Webpage, "Frequently Asked Questions" (Dec. 6, 2013); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed May 9, 2014). There are no other bases to reopen denied Deferred Action for Childhood Arrivals applications.

[78] *Supra* note 41.

On December 18, 2013, USCIS published a notice of proposed revisions to Form I-821D, *Consideration of Deferred Action for Childhood Arrivals (DACA)* and instructions in the Federal Register.[79] Multiple stakeholders provided feedback on the proposed revisions, requesting that USCIS: 1) simplify parts of the form, 2) make explicit the evidentiary requirements for DACA renewal, and 3) adjust the instruction to file a renewal application four months prior to the expiration of the applicant's DACA period to account for the current six-month processing time.[80]

Following this comment period, USCIS published a second revised DACA form on April 4, 2014, which was available for comment until May 5, 2014.[81] The revised form addresses the aforementioned concerns such as the narrow renewal period; USCIS extended it from 120 days to 150 days.[82] Additionally, USCIS updated its DACA website page to include preliminary information regarding the renewal process.[83]

USCIS Community Outreach. USCIS recognizes there may be individuals eligible to request DACA benefits who have not yet come forward. The agency plans to expand the reach of the DACA program through the development of educational materials in multiple languages and the use of social media and digital engagement to reach individuals in remote locations.[84] USCIS will also collaborate with teachers, parent associations, employers, and other nontraditional stakeholders who can serve as liaisons to hard-to-reach immigrant communities.

Conclusion

USCIS's improvements in the Provisional Unlawful Presence Waiver program serve to advance consistency and minimize delays for thousands of individuals and their families. The Ombudsman urges USCIS to study issues presented in this Annual Report related to SIJs and USCIS's limited "consent" authority. USCIS has demonstrated through DACA that the agency can successfully operationalize discretionary decision-making, by establishing formal filing procedures and processing protocols, including posted processing times. The Ombudsman encourages USCIS to do the same to address long-standing issues in the processing of non-DACA deferred action requests. The Ombudsman continues to engage with the DACA community and legal service providers, and to work to resolve long pending cases, as the renewal process begins.

[79] "Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection," 78 Fed. Reg. 76636 (Dec. 18, 2013).

[80] Letter from the American Immigration Council to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection, OMB Control Number 1615-0124, 78 Fed. Reg. 76636 (Dec. 18, 2013)" (Feb. 18, 2014); Letter from the Catholic Legal Immigration Network to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection" (Feb. 14, 2014).

[81] 79 Fed. Reg. 18925 (Apr. 4, 2014).

[82] *Id.* USCIS plans to send notice in a postcard to applicants reminding them of the renewal period, but the exact time notice will be sent is unclear.

[83] USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (accessed May 16, 2014). Both the draft Form I-821D and the information on the USCIS Webpage are subject to change until the form and renewal process are finalized.

[84] *Supra* note 41.

Employment

U.S. employment-based immigration programs are designed to foster economic growth, respond to labor market needs and improve U.S. global competitiveness. The Ombudsman is pleased to report on progress in the EB-5 Immigrant Investor program. However, as discussed in prior Ombudsman Annual Reports, there are longstanding issues with USCIS policy and practice in the high-skilled categories, as well as emerging issues in the seasonal and agricultural programs.

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

Responsible USCIS Offices:

Service Center Operations Directorate and Office of Policy and Strategy

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in policy. Stakeholders cite redundant and unduly burdensome Requests for Evidence (RFEs), and data reveal an RFE rate of nearly 50 percent for L-1B petitions and nearly 43 percent for L-1A petitions in the first half of Fiscal Year (FY) 2014.[85] Employers continue to seek the Ombudsman's assistance to resolve individual case matters and systemic issues in high-skilled adjudications.

Background

Start-up firms, U.S. and international companies, and academic institutions use high-skilled visa programs to hire or transfer foreign employees to work in U.S. offices. Most employers seeking to employ a foreign national in a high-skilled occupation use one of the following visa programs: the H-1B (Specialty Occupation), L-1A (Intracompany Transferee Manager or Executive) and L-1B (Specialized Knowledge). In the past four years, USCIS issued policy guidance for the H-1B program,[86] and drafted much needed guidance for the L-1B program that remains pending.

[85] Information provided by USCIS (Apr. 28, 2014 and May 29, 2014).

[86] USCIS Policy Memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8. 2010); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf (accessed May 16, 2014). USCIS Policy Memorandum, "H-1B Anti-Fraud Initiatives—Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment" (Oct. 31, 2008).

Requests for Evidence. USCIS RFE rates have continued to rise in recent years. ***See Figure 9:*** *H-1B, L-1A and L-1B RFE Rates.* Issuance of unnecessary RFEs is inefficient for USCIS because they interrupt normal processing and require adjudicators to review cases more than once. The agency also incurs administrative costs for storing, retrieving, and matching files with RFE responses after they are submitted. For petitioners, RFEs can disrupt business operations and planning, and result in delays for product development or client services. For beneficiaries and their families who depend on timely adjudication, RFEs can negatively impact arrangements to move to or within the United States, the transition to their children's schools, and the significant life choices and commitments foreign nationals make when accepting employment in the United States. Additionally, the issuance of unduly burdensome RFEs erodes stakeholder confidence in the agency's adjudications and increases the legal costs associated with these filings.

The following is an example of such an RFE, which was issued to more than one petitioner by both the California Service Center (CSC) and Vermont Service Center (VSC) for L-1A extensions.

> *USCIS acknowledges that you filed this petition to extend the [stay of a] beneficiary admitted to the United States under an L blanket petition. Thus, the beneficiary's qualifications and duties in the managerial capacity have not been examined by USCIS, and the record is insufficient to establish that the position qualifies for the classification … Your submitted written statement was not corroborated by evidence in the record. You may still submit evidence to satisfy this requirement, [including] but not limited to:*
>
> - *A letter from an authorized representative in the U.S. entity describing the beneficiary's expected managerial decisions. The letter should describe the beneficiary's typical managerial duties, and the percentage of time to be spent on each. In addition, the letter should address:*
> - *How the beneficiary will manage the organization … or component of the organization;*
> - *How the beneficiary will supervise and control the work of other supervisory, professional or managerial employees or manage an essential function …*
> - *Whether the beneficiary will have authority to hire and fire, or recommend similar personnel actions … if other employees will be directly supervised …*
> - *How the beneficiary will make decisions on daily operation of the activity or function under his or her authority. If the beneficiary will be a first-line supervisor, submit evidence showing the supervised employees will be professionals.*
> - *An organizational chart or diagram showing the U.S. entity's organizational structure and staffing levels. The chart or diagram should list all employees in the beneficiary's immediate division, department or team by name, job title, and summary of duties, educational level, and salary …*
> - *Copies of the U.S. entity's payroll summary, and Forms W-2, W-8 and 1099-Misc showing wages paid to all employees under the beneficiary's direction.*
> - *Copies of all employment agreements entered into by newly hired employees who will be managed by the beneficiary.*

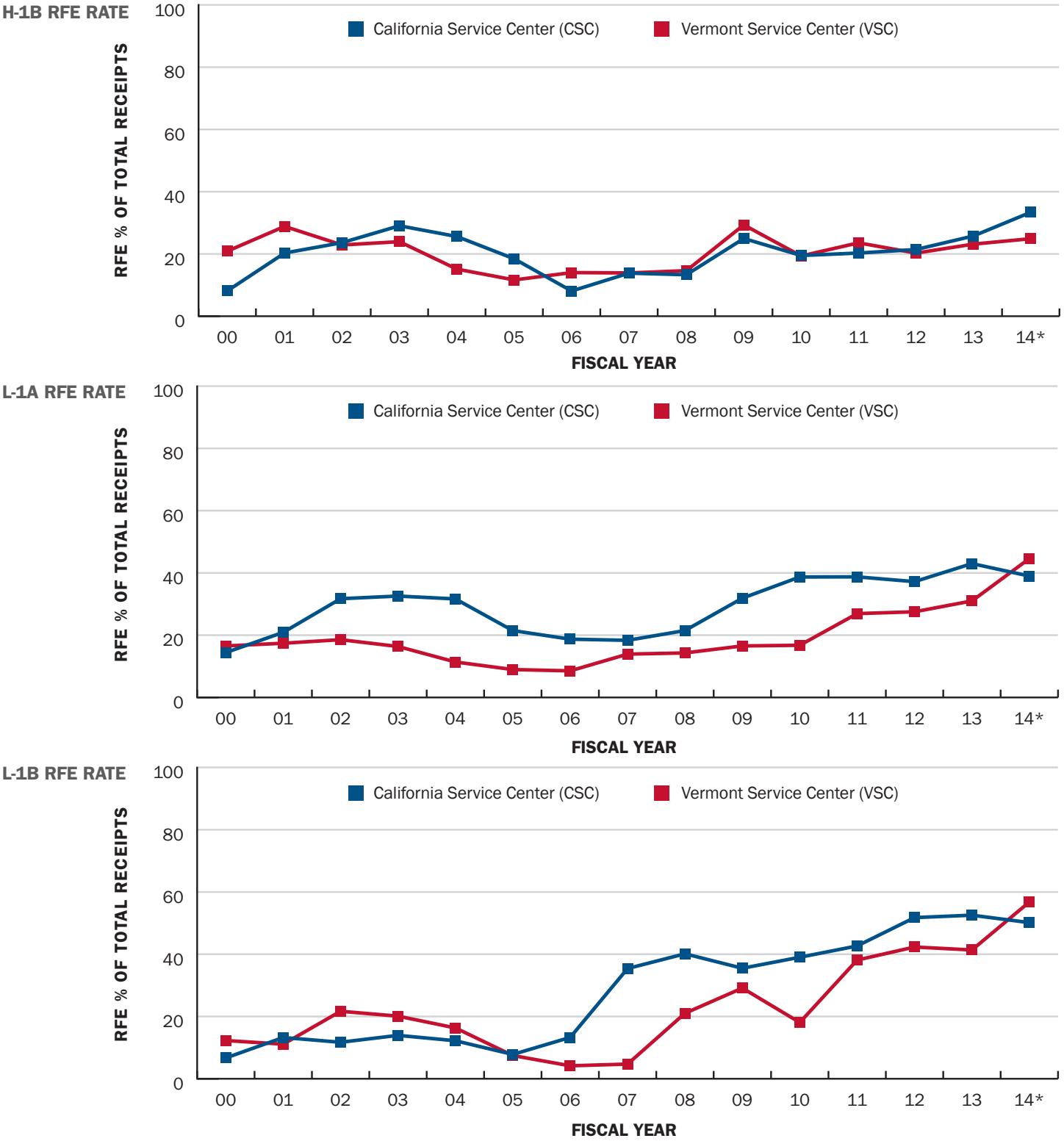
In one case, the petitioner responded to this RFE but excluded the list of all employees, their payroll summaries and employment agreements, noting that it considered this information confidential and proprietary. The petitioner did provide alternative evidence to establish the *bona fides* of the petition, describing the beneficiary's duties in the U.S. position, organizational charts showing the positions and educational degrees held by employees, and copies of the evaluations the beneficiary issued to direct reports. USCIS's denial decision stated:

> *According to the chart provided, it appears that the beneficiary's position … may oversee fourteen employees with professional degrees. However, USCIS notes that, although specifically requested, employee names and quarterly reports were intentionally omitted by the petitioner, citing company policy. Without the requested information or similar documentary evidence, USCIS cannot determine whether the subordinates managed by the beneficiary exist. For the forgoing reasons … [t]he burden of proof … has not been met.*

This RFE is unduly burdensome and demands confidential, propriety information. The petitioner in this case is a large well-established firm, and the beneficiary had already worked for the petitioner for three years as a manager in the United States at the time the extension was submitted. When the Ombudsman inquired about this RFE, USCIS responded that the RFE was appropriate, but after repeated discussions agreed to review the denial, reopened the matter, and issued an approval.

On June 3, 2013, USCIS issued a Policy Memorandum titled *Requests for Evidence and Notices of Intent to Deny.*[87] USCIS instructed adjudicators to issue an RFE only if "the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof."[88] Otherwise, the adjudicator should approve or deny the petition.[89]

FIGURE 9: H-1B, L-1A, AND L-1B RFE RATES



Source: Information provided by USCIS (Nov. 23, 2009; Jan. 26, 2011; May 18, 2011; Apr. 4, 2013; May 29, 2014).

** FY 2014 includes data through March 23, 2014.*

[87] USCIS Policy Memorandum, "Requests for Evidence and Notices of Intent to Deny" (Jun. 3, 2013); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf (accessed Jun. 2, 2014). The USCIS Policy Memorandum was issued in response the U.S. Department of Homeland Security Office of Inspector General (OIG) Report, "The Effect of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers" (Jan. 5, 2012); http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan12.pdf (accessed Jun. 2, 2014).

[88] *Id.*, p. 2.

Despite issuance of clarifying guidance nearly a year ago, RFE rates in high-skilled visa programs have remained high through the first half of FY 2014. The Ombudsman continues to review case assistance requests with RFEs such as the following:

> *The evidence you submitted is insufficient to show that the U.S. entity is currently doing business. You submitted a print out from the website of the Secretary of the Commonwealth of Massachusetts that the U.S. entity was organized on July 12, 2012. In the petition, there is a 2012 Form Schedule C for the U.S. entity. You submitted a sublease agreement for the U.S. entity's premise, but the space is "residency type." The evidence is also insufficient to show that [redacted] has authority to sublicense [sic] the space to the U.S entity. You include articles about the U.S. entity and the beneficiary. The most recent contract between a third party and the U.S. entity is November 22, 2013. The evidence includes two 2013 Miscellaneous Income Form 1099s addressed to the beneficiary and the U.S. entity. The most recent invoice is dated December 18, 2013.*
>
> *You may still submit evidence to satisfy this requirement. Evidence may include:*
>
> - *The most recent annual report, which describes the state of the U.S. entity's finances.*
> - *Securities and Exchange Commission Form 10-K.*
> - *Federal or state income tax returns.*
> - *Audited financial statements, including balance sheets and statements of income and expenses describing the U.S. entities business operations.*
> - *Major sales invoices identifying gross sale amounts reported on the income and expenses statement or on corporate income tax returns.*
> - *Shipper's exports declarations for in-transit goods, if applicable.*
> - *The U.S. entity's U.S. Customs and Border Protection forms, Entry Summary and Customs Bond that show business activity.*
> - *Business bank statement that show business activity.*
> - *Vendor, supplier, or customer contracts.*
> - *Third party license agreements.*
> - *Loan and credit agreements.*

A review of this excerpt reveals that the petitioner advanced both probative and credible evidence in support of its requirement to demonstrate that the L-1A petitioner is conducting business in the United States. Absent derogatory information, the evidence submitted appears to establish that it is "more likely than not" – the preponderance of the evidence standard – that the petitioner is conducting business in the United States.

Despite high RFE rates in 2013, USCIS approved more than 94 percent of H-1Bs filed, 83 percent in the L-1A classification, and 67 percent in the L-1B classification.[90] High RFE rates coupled with high approval rates indicate USCIS needs to better articulate evidentiary requirements.

USCIS's issuance of such unduly burdensome RFEs consumes both USCIS and employer resources as well as delays final action on otherwise approvable filings. RFEs such as those described above demonstrate that additional training and quality assurance is needed to ensure USCIS adjudicators are aware of and adhering to current USCIS guidance and policy.

Entrepreneurs in Residence. In May 2013, USCIS completed its Entrepreneurs in Residence (EIR) initiative, which brought together USCIS and private-sector experts in an effort to provide immigrant entrepreneurs with pathways that are clear, consistent, and aligned with business realities.[91] This initiative was widely publicized by the agency,[92] and many were optimistic that if given sufficient resources, time and latitude, EIR could positively influence and modernize agency policies and practices. As part of the initiative, EIR representatives visited USCIS service centers to train adjudicators, and helped develop an "Entrepreneur Pathways" website dedicated to providing information about U.S. immigration avenues available to foreign entrepreneurs.[93] From the EIR initiative, USCIS developed *Startup 101* training that has been incorporated in the Basic Immigration Officer Training Course (Basic).[94] USCIS has not quantified the initiative's impact, such as changes in approval or RFE rates for start-up companies. On May 8,

[89] *Id. See also* 8 C.F.R. § 103.2(b)(8)(i).

[90] *Supra* note 85.

[91] USCIS Webpage, "USCIS Announces 'Entrepreneurs in Residence' Initiative" (Oct. 11, 2011); http://www.uscis.gov/news/public-releases-topic/business-immigration/uscis-announces-entrepreneurs-residence-initiative (accessed Apr. 9, 2014).

[92] *See generally* USCIS Webpage, "Entrepreneur in Residence;" http://search.uscis.gov/search/docs?utf8=%E2%9C%93&sc=0&query=%22entrepreneur+in+residence%22+&m=&affiliate=uscis_gov&commit=Search h (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Entrepreneurs in Residence Information Summit" (Feb. 24, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/entrepreneurs-residence-information-summit (accessed Jun. 12, 2014).

[93] USCIS Webpage, "Entrepreneur Pathways;" http://www.uscis.gov/eir (accessed Apr. 9, 2014).

[94] Information provided by USCIS (Apr. 28, 2014).

2013, USCIS announced the next phase of the initiative, now called Executives in Residence, would focus on the areas of performing arts, healthcare and information technology.[95]

Ombudsman's Past Recommendations. The Ombudsman issued recommendations to USCIS in the Ombudsman's 2010 Annual Report to address pervasive and serious issues in the high-skilled programs. The Ombudsman recommended that USCIS expand training of its adjudicators on the legal standard of proof, preponderance of the evidence, which is the standard for most petitions and applications for immigration benefits.[96] USCIS concurred with this recommendation, and its Offices of Human Capital and Training and Chief Counsel developed training that provided specific examples for several immigrant and nonimmigrant classifications.[97] USCIS piloted this training at Basic in February 2012, and finalized the material after revisions were made in the third quarter of 2012.[98]

This 2012 training module is allocated four hours of classroom time during the six and a half week Basic curriculum, which covers a wide range of subjects including ethics, decision writing, interviewing techniques, and immigration law basics. While there may not be time for in-depth discussion of the legal standard at Basic, there is no mandatory refresher course for USCIS adjudicators pertaining to the preponderance of the evidence legal standard.

The Ombudsman also previously recommended that USCIS conduct supervisory review of all RFEs at one or more of its service centers and in one or more product lines as a quality control pilot measure.[99] The agency declined to adopt this recommendation, noting that it routinely conducts quality reviews.[100] It deemed 100 percent supervisor RFE review to be too time-consuming and resource-intensive, despite the enormous costs for the agency in preparing RFEs and reviewing responses in tens of thousands of cases.[101]

The Ombudsman supports USCIS's efforts to clarify the L-1B standard.[102] In 2010, the Ombudsman recommended that USCIS re-write L-1B regulations using the Administrative Procedure Act notice and comment process.[103] Several years prior, USCIS issued multiple policy memoranda attempting to better define "specialized knowledge."[104] These memoranda focused on Congressional intent, and a 1970 Congressional Report noted, "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade."[105] Despite these efforts, employers struggle to decipher USCIS policy and practice in the high-skilled visa programs.

[95] USCIS Webpage, "USCIS to Expand Entrepreneurs in Residence Initiative"; http://www.uscis.gov/news/uscis-expand-entrepreneurs-residence-initiative (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Executives in Residence" (Apr. 4, 2014); http://www.uscis.gov/about-us/uscis-residence-programs/executives-residence (accessed Apr. 23, 2014).

[96] Ombudsman Annual Report 2010 (Jun. 30, 2010), p. 47; http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf (accessed May 16, 2014).

[97] *See* USCIS Webpage "USCIS and American Immigration Lawyers Association (AILA) Meeting" (May 29, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/notes-previous-engagements-topic/policy-and-guidance/uscis-and-american-immigration-lawyers-association-aila-meeting (accessed Jun. 23, 2014).

[98] USCIS response to Ombudsman Annual Report 2010 (Nov. 9, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf (accessed Jun. 23, 2014).

[99] *Supra* note 96, p. 48.

[100] *Supra* note 98, p. 9.

[101] *Id.* USCIS, at times, has conducted 100 percent supervisory review of RFEs upon the issuance of new policy.

[102] *See generally* USCIS Teleconference Recap, "L-1B Specialized Knowledge" (Jun. 14, 2011).

[103] *Supra* note 96, p. 36. *See also* Ombudsman Annual Report 2011 (Jun. 2011), p. 26; http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf (accessed May 16, 2014) and Ombudsman Annual Report 2013 (Jun. 2013), p. 30; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014). *See* Administrative Procedure Act, Pub. L. No. 79-404; 5 U.S.C. § 551 (1946).

[104] Immigration and Naturalization Service (INS) Policy Memorandum, "Interpretation of Specialized Knowledge," (Mar. 9, 1994); INS Policy Memorandum, "Interpretation of Specialized Knowledge," HQSCOPS 70/6.1 (Dec. 20, 2002); USCIS Policy Memorandum, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks," (Sept. 9, 2004).

[105] *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.).

Ongoing Concerns

Below is an overview of challenges – many of them longstanding – in agency policy and adjudication of petitions for high-skilled workers.

The Legal Standard for Adjudications: Preponderance of the Evidence. USCIS's adjudicator training lacks a concentrated exploration of the preponderance of the evidence standard. Basic curriculum does not include hypothetical examples of employment cases that can be used to train adjudicators on how to apply the "more likely than not" preponderance test. Exploring how various factual scenarios could turn the case from an approval to a denial, or warrant the issuance of an RFE, would be highly instructive. The Ombudsman previously recommended this approach, but the training module covers this important subject matter only in the abstract. The Ombudsman urges USCIS to reinforce this training for all USCIS adjudicators by developing and requiring refresher courses on a regular basis.

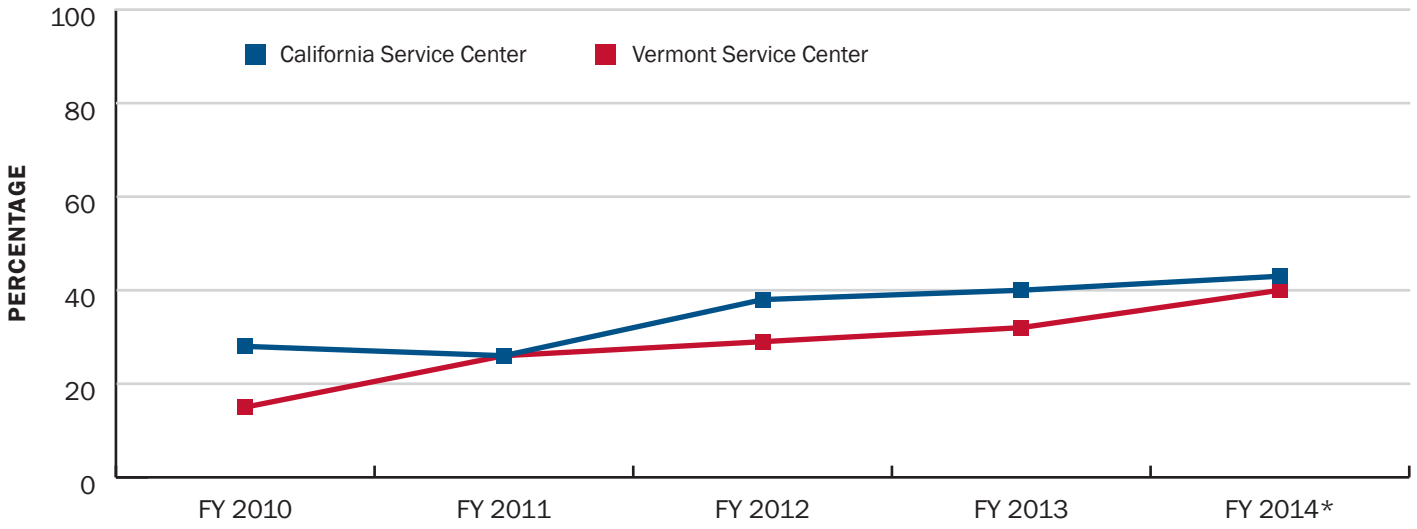
Gaps in L-1B Policy and Requests for Evidence. New L-1B guidance or regulations are needed to clarify the definition of "specialized knowledge."[106] The Immigration and Nationality Act (INA) does not precisely define "specialized knowledge," and RFE rates for L-1Bs show that this legal standard is not well understood by employers or USCIS adjudicators. Stakeholders report receiving RFEs that request information already provided with the initial filing, business information not directly relevant to adjudication, or otherwise confidential or proprietary corporate information.

The Ombudsman continues to monitor high RFE rates in the high-skilled worker visa programs. In 2004, CSC and VSC issued RFEs in 16 and 12 percent of L-1B petitions, respectively. In 2013, the CSC L-1B RFE rate was 51.5 percent, and 41.4 percent at the VSC.[107] In the first two quarters of FY 2014, the CSC RFE rate was at 50 percent, and at 56.7 percent at the VSC.[108]

L-1B Denial Rates. USCIS L-1B denial rates have also increased in recent years.[109] Five years ago, there was a 20 percent denial rate overall for the L-1B category. Today, denial rates are at 40 and 32 percent for FY 2013 for the CSC and VSC, respectively.[110] Data from FY 2014 reflects a similar denial rate at both service centers. ***See Figure 10:*** *L-1B Denial Rates.*

It is difficult to identify the root cause of the high RFE and denial rates. The Ombudsman recognizes that USCIS cannot prevent the receipt of improperly prepared L-1B submissions. However, the sustained high rate of RFEs and denials in this visa classification indicates several possibilities: USCIS adjudicators are not receiving the right information from petitioners, adjudicators do not fully understand the legal standards for establishing L-1B specialized knowledge, or petitioners do not understand what USCIS adjudicators are looking for in an L-1B filing.

FIGURE 10: L-1B DENIAL RATES



Source: Information provided by USCIS (Apr. 28. 2014).

**FY 2014 includes data through March 24, 2014.*

[106] *See* Immigration and Nationality Act (INA) § 101(a)(15)(L).

[107] *Supra* note 94.

[108] *Id.*

[109] *Id.* USCIS collects data by fiscal year, which means some cases are receipted in one fiscal year and issued a decision in the subsequent fiscal year.

[110] *Id.*

The H-2 Temporary Worker Programs

Responsible USCIS Office:

Service Center Operations Directorate

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 programs. During this reporting period, the Ombudsman received a sharp increase in the number of requests for case assistance, most submitted by small- and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more workers to fill their temporary labor needs. Stakeholders raise concerns with issuance of RFEs where similar petitions were approved in prior years for the same employer with identical temporary need in the same sector and for the same or similar workers. The Ombudsman also received requests for case assistance from Members of Congress whose constituents are negatively impacted by delays in H-2 adjudications.

Background

Under the H-2 programs, U.S. employers may petition to hire foreign workers when they anticipate a temporary shortage of domestic labor.[111] H-2 status is for workers who perform certain agricultural (H-2A) or nonagricultural jobs (H-2B) on a temporary basis due to seasonal, peak load, intermittent or one-time occurrence needs.[112] Industries that rely on the timely processing of H-2 petitions include agriculture, landscaping, hospitality, horse racing, ski resorts, mobile entertainment (circuses), and crabbing, among others.

There is a statutory limit on the number of H-2B non-agricultural workers that may be admitted each fiscal year. Visas are allocated in two allotments, with 33,000 available from October 1 to March 31, and the remaining 33,000 available in the second half of the fiscal year, from April 1 to September 30.[113] In FY 2013, the U.S. Department of State (DOS) reported that 57,600 H-2B workers were admitted to the United States.[114] There is no corollary limit on the number of agricultural workers who may be admitted, and DOS reported that 74,192 H-2A visas were issued in 2013.[115] Generally, periods of admission may not exceed one year.[116]

The H-2 programs are highly regulated, and in all cases require substantive review by three distinct agencies: the U.S. Department of Labor (DOL), USCIS, and DOS. The employer first files Employment and Training Administration (ETA) Form 9142, *Application for Temporary Labor Certification* with DOL demonstrating there are insufficient workers in the local labor pool who are willing, able, qualified, and readily available to fill the temporary need. This involves conducting a local recruitment campaign and coordination with the appropriate State Workforce Agency. Additionally, the employer must prove that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employer petitioners and others involved in the H-2 process are prohibited from collecting a "job placement fee" or other compensation (either direct or indirect) at any time from workers as a pre-condition to their recruitment or employment.[117]

Once DOL issues the Temporary Labor Certification, the employer submits to USCIS Form I-129, *Petition for Nonimmigrant Worker*. USCIS reviews the Temporary Labor Certification issued by DOL, and examines whether the need and the job are both temporary in nature (i.e., one time, seasonal, peak load or intermittent). USCIS prioritizes H-2A agricultural worker filings and typically completes these adjudications within a matter of days.[118] Non-agricultural H-2B filings are not prioritized, but petitioners may request premium processing to obtain a decision within 15 calendar days.[119]

The prospective foreign worker beneficiary then applies for a H-2 nonimmigrant visa at a DOS consulate abroad and is interviewed to determine admissibility, as well as if the applicant is aware of the work that will be performed, including the location and the applicable wage rate. DOS also probes whether or not the beneficiary paid a prohibited "job placement fee" at any time during the process.[120] Following visa issuance, the beneficiary presents himself or herself for admission to the United States at a U.S. Customs and Border Protection port of entry.

[111] *See* INA § 101(a)(15)(H)(ii)(a)-(b).

[112] 8 C.F.R. § 214.2(h)(6)(ii).

[113] INA §§ 214(g)(1)(B) and 214(g)(10).

[114] U.S. Department of State Webpage, "Table XVI(B) Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2009-2013;" http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf (accessed May 14, 2014).

[115] *Id.*

[116] 8 C.F.R. § 214.2(h)(5)(iv)(A).

[117] 20 C.F.R. § 655 Subpart A and B.

[118] Adjudicator's Field Manual Ch. 31.4(c).

[119] USCIS Webpage "How Do I Use the Premium Processing Service?" (Jun. 6, 2013); http://www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 16, 2014).

[120] 9 FAM 41.53 N2.2(c).

Delays at any point in this process can have severe economic consequences for U.S. employers, including spoilage of harvestable fruits and vegetables, loss of valuable livestock, or disruptions of scheduled events or delivery of services. Employers may not begin the H-2B filing process more than 90 calendar days and no less than 75 calendar days before the employer's date of need, and for H-2A filings an application cannot be filed 45 calendar days before the employer's date of need.[121] Processing delays with any entity involved in the life-cycle of these temporary worker filings, whether at DOL, USCIS, or DOS, heightens the need for the next agency in line to act swiftly on such filings.

Ongoing Concerns

Stakeholder concerns have focused on the increased issuance of RFEs by the VSC. One stakeholder representing multiple employers filing H-2B petitions at both the VSC and CSC provided the Ombudsman data indicating that the VSC is placing higher scrutiny on the "temporariness" or "seasonality" of occupations, resulting in a high issuance of RFEs. Between January 1 and March 30, 2014, one of the stakeholder's employer members received 146 RFEs out of 300 petitions pending with the VSC for landscapers, a traditionally recognized seasonal and temporary job. H-2 stakeholders are questioning why USCIS is issuing RFEs for seasonality for occupations that have long been recognized and approved by DOL and USCIS in prior years. FY 2014 data shows that the VSC RFE issuance rate is 35 percent whereas the CSC rate over the same time frame is at 7 percent. ***See Figure 11:*** *H-2B (Temporary Nonagricultural Worker) Adjudication Data.*

Another common complaint is repetitive RFEs to verify business information year after year. For example, one ranch employer brought an H-2 case to the Ombudsman where USCIS issued RFEs for three consecutive years seeking the same business information for the petitioner.

In May 2014, the Ombudsman convened an interagency meeting between DOL, DOS and DHS to review aspects of the H-2 process. The Ombudsman expects to discuss further H-2 processing issues at the office's 2014 Annual Conference.

The EB-5 Immigrant Investor Program

Responsible USCIS Office:

Immigrant Investor Program Office

The Immigrant Investor program has historically presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. During this reporting period, USCIS relocated adjudication to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudication unit and the updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

FIGURE 11: H-2B (TEMPORARY NONAGRICULTURAL WORKER) ADJUDICATION DATA

FISCAL YEAR	SERVICE CENTER	RECEIPTS	APPROVALS	DENIALS	REQUESTS FOR EVIDENCE
2012		4,287	4,143	272	1,276
	California Service Center	1,381	1,355	74	334
	Vermont Service Center	2,906	2,788	198	942
2013		4,720	4,490	168	1,427
	California Service Center	1,547	1,466	31	338
	Vermont Service Center	3,173	3,024	137	1,089
2014*		3,653	3,319	61	918
	California Service Center	1,250	1,182	16	85
	Vermont Service Center	2,403	2,137	45	833

Source: Information provided by USCIS (May 13, 2014).

**FY 2014 includes data through March 31, 2014.*

[121] 20 C.F.R. §§ 655.15(b) and 655.130(b).

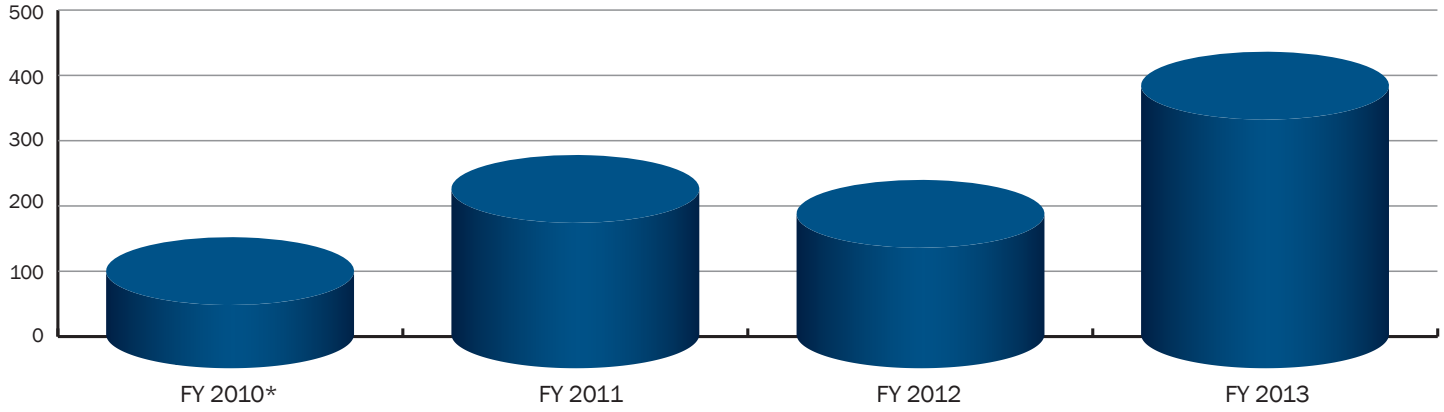
Background

In 1990, Congress established the fifth employment-based preference category (EB-5), which offers Legal Permanent Residence to immigrants who make significant investments in commercial enterprises that create U.S. jobs.[122] Congress allocated 10,000 visas annually under this category for qualified foreign entrepreneurs, their spouses, and children.[123] To be eligible for EB-5 status, a foreign entrepreneur must invest a minimum of $500,000 in an enterprise that will "directly create" 10 full-time positions for U.S. workers over a two-year period.[124]

In 1992, shortly after launching the EB-5 preference category, Congress authorized the "Regional Center" Pilot program to encourage the concentration of EB-5 investor capital in projects likely to have greater regional and national impacts.[125] Today, the vast majority of EB-5 investments flow through the Regional Center Pilot program.

The EB-5 program has become an increasingly attractive pathway for individuals with investment capital to immigrate to the United States. Individual immigrant investor filings, submitted on Form I-526, *Immigrant Petition by Alien Entrepreneur* increased 504 percent between FY 2008 and 2013.[126] Project developers and financiers across the United States are now working with EB-5 Regional Centers, as well as with state and municipal governments, to use EB-5 funds as one part of financing for large-scale commercial and public development projects. Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program* filings have also increased over the same period. ***See Figure 12:*** *Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program.*

FIGURE 12: FORM I-924, APPLICATION FOR REGIONAL CENTER UNDER THE IMMIGRANT INVESTOR PILOT PROGRAM



Source: Information provided by USCIS (May 16, 2014).

**Form I-924 came into use on November 23, 2010.*

[122] Immigration Act of 1990 § 121(b)(5), Pub. L. No. 101–649; 8 U.S.C. § 1153(b)(5).

[123] INA § 203(b)(5)(A).

[124] INA § 203(b)(5)(B)(ii). Most foreign entrepreneurs invest in a "targeted employment area," defined as a rural or urban area that has experienced high unemployment (of at least 150 percent of the national average rate). Under 8 C.F.R. section 204.6(f), the amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is $500,000.

[125] The Judiciary Appropriations Act of 1993 § 610, Pub. L. No. 102-395 (Oct. 6, 1992).

[126] Information provided by USCIS (Jan. 24, 2014).

Notwithstanding the increase in EB-5 program filings, USCIS has, from time-to-time, placed adjudication holds on Forms I-526, I-829, *Petition by Entrepreneur to Remove Conditions,* and I-924, as it worked to address novel legal issues.

On December 3, 2012, the USCIS Director announced that EB-5 adjudications would be transitioned from the CSC to a newly-established EB-5 adjudication unit in Washington, D.C. With this transition, USCIS organizationally realigned the EB-5 product line under the Field Operations Directorate, and designated this new unit as the Immigrant Investor Program Office (IPO). The IPO became operational on April 29, 2013. On May 30, 2013, USCIS issued a comprehensive EB-5 Policy Memorandum that addresses several longstanding stakeholder concerns, including when deference is afforded to prior adjudications.[127]

On December 12, 2013, the DHS Office of the Inspector General (OIG) issued a report titled *United States Citizenship and Immigration Services Employment Based Fifth Preference (EB-5) Regional Center Program.*[128] The OIG called on USCIS to:

- Update and clarify the EB-5 federal regulations to ensure program integrity, including increased oversight of regional centers;
- Establish formal memoranda of understandings with the Departments of Commerce and Labor and the Securities and Exchange Commission to provide expertise and assistance in the EB-5 program management and adjudications; and
- Conduct a comprehensive assessment of how EB-5 funds have effectively stimulated job growth.

In a response letter attached to the OIG report,[129] USCIS concurred with these recommendations, with the exception of the OIG's call on the agency to "quantify the impact of the EB-5 program on the U.S. economy." In rejecting this recommendation, USCIS stated that it is "not charged with conducting a broader assessment of the program's impact." Furthermore, USCIS "defended its policy of deferring to prior agency decisions involving the same investment project … [indicating] that an important element of consistency is that the agency must not upend settled and responsible business expectations by issuing contradictory decisions relating to the same investment projects," and that doing so "undermines program integrity, and is fundamentally unfair to … developers and investors [who] act in reliance on the approval." The Ombudsman concurs – deference is essential to consistency in EB-5 and other USCIS adjudications. It should be noted that the two recommendations in the December 2013 OIG report with which USCIS concurred were previously made by the Ombudsman in March 2009. USCIS indicated in its response to the OIG report that it intends to soon initiate formal rulemaking to replace the current framework of outdated and ambiguous EB-5 regulations.

[127] *See* USCIS Policy Memorandum, "EB-5 Adjudications Policy (PM-602-0083)" (May 30, 2014); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf (accessed May 13, 2014).

[128] *See* OIG Report, "United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program" (Dec. 12, 2013); http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf (accessed Mar. 31, 2014).

[129] *Id.,* pp. 21-33.

Ongoing Concerns

In January 2014, the Ombudsman held separate meetings with EB-5 stakeholders and USCIS IPO leadership. Stakeholders reported lengthy processing times in EB-5 product lines, and raised concerns regarding lack of information sharing and engagement between the agency and stakeholders. Stakeholders stated that USCIS adjudicators appeared to be implementing new guidance from the May 2013 EB-5 Policy Memorandum, including deference to prior adjudications involving the same regional center project. Ombudsman Odom communicated this feedback directly to responsible EB-5 program officials, including the new IPO Director.

Shortly after these meetings, on January 26, 2014, the IPO held a national teleconference. USCIS updated stakeholders on the transition of EB-5 adjudications from the CSC to the Washington, D.C.-based IPO, and noted that, due to the transition, processing times will likely temporarily increase throughout the remainder of FY 2014, as the IPO on-boards and trains approximately 100 new adjudicators, economists, and other staff. Adjudication of Form I-829 will remain in California for the remainder of 2014. Program leaders expressed determination that when the IPO is fully operational, USCIS will reduce processing times, and improve the predictability and consistency of EB-5 adjudications. Additionally, USCIS announced that it will redouble efforts to simultaneously enhance program integrity as it seeks to improve program efficiency.

Conclusion

The Ombudsman will continue to review RFEs in the high-skilled and H-2 programs and assess USCIS initiatives designed to improve the quality and consistency of adjudications. The Ombudsman anticipates continued USCIS and stakeholder engagements following the recent transition of the EB-5 unit from the CSC to Washington, D.C.

Humanitarian

USCIS humanitarian programs provide relief for immigrant victims of persecution, abuse, crime and trafficking. This Annual Report section discusses progress and challenges in USCIS processing of humanitarian immigration benefits, including lengthy processing times and unnecessary and unduly burdensome Requests for Evidence for certain victims. This section also includes a discussion of the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – resulting in lengthy affirmative asylum processing times.

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. During this reporting period, Ombudsman Odom became Chair of the Blue Campaign Steering Committee (Blue Campaign), DHS's interagency anti-trafficking initiative, and Acting Co-Chair of the DHS Council on Combating Violence Against Women. These leadership roles – working alongside USCIS, other DHS components, law enforcement, and community partners – helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

Background

Enacted in 1994, the Violence Against Women Act (VAWA) provides important immigration protections for victims of trafficking and other violent crimes.[130] VAWA immigration benefits include: 1) a self-petition process for victims of domestic violence to independently request Lawful Permanent Residence on their own behalf and eliminate the need for victims to rely on abusers in order to obtain Permanent Residence; 2) T nonimmigrant status for victims of human trafficking; and 3) U nonimmigrant status for victims of certain specified crimes.[131] DHS components, including USCIS, have implemented these provisions.

[130] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322; *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, and Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

[131] *Id.*

On March 7, 2013, the President signed into law the Violence Against Women Reauthorization Act of 2013.[132] This legislation includes reauthorization of the William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008,[133] which reasserts the U.S. Government's leadership role in the fight against modern-day slavery.[134]

DHS Blue Campaign. The Blue Campaign, launched in 2010 and formally chartered in August 2013, is the unified voice for DHS's nationwide efforts to combat human trafficking. Through interagency coordination, the Blue Campaign collaborates with law enforcement, first responders, prosecutors, government, non-governmental, faith-based, and private organizations to conduct training and outreach that expands awareness of human trafficking and helps to identify and protect victims and prosecute traffickers. Since its inception, the Ombudsman has contributed to the Blue Campaign by providing subject matter expertise and hosting stakeholder engagements. As Chair of the Blue Campaign, Ombudsman Odom works with DHS components across their various missions to prevent human trafficking, protect trafficking victims, investigate and assist in the prosecution of traffickers, and provide publicly available resources to the anti-trafficking community.

Under Ombudsman Odom's leadership, DHS completed with U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) the development and release in January 2014 of the *Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States*, which coordinates the anti-human trafficking efforts of 19 federal agencies.[135] This five-year plan outlines four goals, eight objectives and more than 250 action items across agencies for services. The plan provides a roadmap for aligning federal efforts to aid victims, increase understanding among federal and non-federal entities who work to support victims, expand victims' access to services, and improve outcomes for survivors of human trafficking. The Blue Campaign has continued under Ombudsman Odom's leadership to establish partnerships outside the federal government, such as reaching an agreement with Western Union at the end of 2013 that provides training to hundreds of Western Union employees on human trafficking and how to report it. This agreement also extends the reach of Blue Campaign public awareness materials to Western Union facilities nationwide.

The Ombudsman provides case assistance to individuals seeking to resolve problems with applications and petitions for immigration relief, including immigrant victims of trafficking. The Ombudsman also 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.

As a part of the Blue Campaign, USCIS participated in training sessions for law enforcement agencies on protections for immigrant victims. USCIS also collaborated with U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations Victim Assistance program and Law Enforcement Parole Unit to train state and local police, and non-governmental and community-based organizations on indicators of human trafficking and

[132] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4; *see also* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (Jan. 5, 2006); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000); Violence Against Women Act of 2000; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994).

[133] William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457 (Dec. 9, 2008).

[134] *Id.* at § 235(d)(8).

[135] The President's Interagency Taskforce to Monitor and Combat Trafficking in Persons, "Coordination, Collaboration, Capacity, Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013-2017" (Jan. 2014); http://www.ovc.gov/pubs/FederalHumanTrafficking-StrategicPlan.pdf (accessed Apr. 28, 2014).

protections for immigrant victims.[136] In addition, through its Vermont Service Center (VSC) VAWA Unit, USCIS hosted quarterly public outreach events.

DHS Council on Combating Violence Against Women. In 2010, DHS created a working group to examine ways in which the Department could support the work of the Immigration Subcommittee of the White House Council on Women and Girls.[137] This working group met on a quarterly basis from fall 2010 to spring 2012, to coordinate and develop projects to support protections for immigrant women and children. Through the coordinated efforts of the working group, DHS provided training to personnel on protections for immigrant victims and section 1367 of VAWA (VAWA Confidentiality). The group organized regular public outreach to state and local immigration professionals and legal and domestic violence service providers to receive feedback about DHS-related issues impacting victims, and it published the *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement.*[138] The group also established working relationships with HHS, DOJ, the U.S. Department of State, and various state, local, and tribal government agencies.

In an effort to formalize its work, DHS created the Council on Combating Violence Against Women (Council) in March 2013. The Council provides a forum to bring together experts from across DHS to identify and build consensus around the best approaches for combaing violence against women. The Council also identified initiatives that support combating violence against women already implemented across the Department for inclusion in a public resource guide.

Ombudsman Odom, who has been Acting Co-Chair of the Council since September 2013, plays a key role in coordinating stakeholder engagements and identifying areas for improvement of DHS's services and protections for victims. Additionally, the Council coordinates quarterly public webinars and teleconferences for DHS stakeholders including law enforcement, first responders, legal service providers, victim advocates, and others. On December 19, 2013 and January 28, 2014, the Council and ICE co-hosted a webinar on ICE's efforts to aid vulnerable populations. These efforts include the use of prosecutorial discretion on detention determinations through its Risk Classification Assessment Tool, stays of removal orders for U nonimmigrant status petitioners, and the agency's sexual abuse and assault prevention intervention efforts to reduce sexual assault of detained immigrants, among other initiatives.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

Responsible USCIS Office:

Service Center Operations Directorate

USCIS continues to devote significant resources to outreach, training, and adjudication for immigration benefits for victims. The agency recognizes the need to meet processing time goals. As USCIS trains new adjudicators in the VAWA Unit, the Ombudsman will continue to monitor the quality of Requests for Evidence (RFEs) and overall processing of humanitarian programs.

Background

In 2000, USCIS established the VAWA Unit at the VSC to promote consistency in adjudications.[139] In May 2013, processing times were five months for T nonimmigrant status applications; 15 months for U nonimmigrant status petitions; and up to 19 months for VAWA self-petitions.[140] To address these lengthy processing times, USCIS added 30 staff to its VAWA Unit. In March 2014, processing times had reduced to about eight months for U nonimmigrant status petitions (or pre-approvals when the U visa cap has been reached) and five months for VAWA self-petitions, but were slightly longer for T nonimmigrant status applications, at six months.[141] At a December 6, 2013 stakeholder

[136] Information provided by USCIS (Apr. 28, 2014).

[137] Immigration Subcommittee of the White House Council on Women and Girls Webpage, "Council on Women and Girls;" http://www.whitehouse.gov/administration/eop/cwg (accessed Apr. 9, 2014).

[138] DHS "U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement;" http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (accessed May 9, 2014). This guide provides law enforcement agencies with information on the process to certify that a U nonimmigrant status petitioner has been the victim of a crime. It contains instructions on how to complete required forms and provides answers to frequently asked questions.

[139] "Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center, Report to Congress" (Oct. 22, 2010), P. 3; http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf (accessed Apr. 29, 2014).

[140] *See* Ombudsman Annual Report 2013 (Jun. 2013), p. 11; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014).

[141] *Id.*

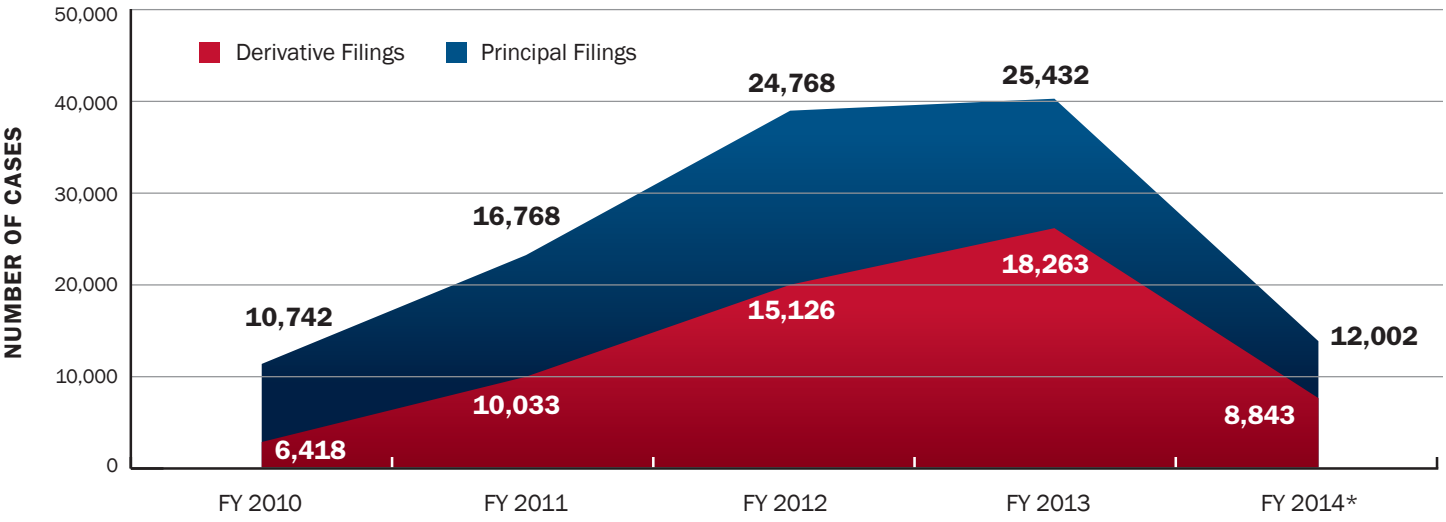
meeting, then-USCIS Director Alejandro Mayorkas stated his commitment to 180-day processing times at the VAWA Unit and not diverting resources to other immigration benefits. In a February 10, 2014 speech at a Blue Campaign stakeholder event, DHS Deputy Secretary Mayorkas committed to continuing to address processing times for these benefit categories.[142]

Each year, 10,000 U visas are available for victims of certain specified crimes, including domestic violence, sexual assault, and human trafficking, who aid law enforcement in the investigation and/or prosecution of those crimes.[143] In Fiscal Year (FY) 2014, for the fifth straight year, USCIS approved the statutory allotment of 10,000 petitions for U nonimmigrant status. ***See Figure 13:*** *U Petition Filings.* USCIS reached the limit earlier than in previous years, on December 11, 2013.[144] USCIS will continue to process U nonimmigrant status petitions for the remainder of the fiscal year, placing approvable cases on a waiting list, and providing petitioners interim employment benefits and deferred status until FY 2015 numbers become available on October 1, 2014.[145]

Over the past year USCIS has continued its extensive efforts to engage with the public, particularly emphasizing training for federal, state, and local law enforcement, to increase awareness of and access to the T and U visa programs. Between April 1, 2013 and March 31, 2014, USCIS conducted 24 outreach engagements regarding VAWA, U, and T nonimmigrant status petitions/applications.[146] Engagements ranged from in-person and webinar trainings to panel participation during conferences.[147]

USCIS training included VAWA Confidentiality, which provides protections to prevent abusive partners from using government resources to further perpetuate abuse. In particular, VAWA Confidentiality provides protections against governmental disclosure of certain information regarding a victim; prohibits the government from relying on information provided by the abuser, perpetrator, or the abuser's family members in a case against or for the benefit of the victim; and prohibits enforcement actions at protected locations (e.g., shelters, courthouses, rape crisis centers). Breaches of VAWA Confidentiality can lead to disciplinary action and/or a personal fine against a federal employee who discloses protected information. With the support of the Ombudsman, DHS created and launched in 2012 an online training program on immigration remedies for battered immigrants and VAWA Confidentiality requirements, and in 2013 released new policy guidance to ensure compliance with section 1367 of VAWA.

FIGURE 13: U PETITION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through April 14, 2014.*

[142] Ombudsman notes from Blue Campaign Stakeholder event (Feb. 10, 2014).

[143] Victims of Trafficking and Violence Protection Act of 2000 § 1513(c)(2)(A), P.L. 106-386. *See also* 8 C.F.R. § 214.14(d)(1).

[144] USCIS Webpage, "USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year" (Dec. 11, 2013); http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year (accessed Apr. 21, 2014).

[145] 8 C.F.R. § 214.14(d)(2).

[146] *Supra* note 136.

[147] *Id.*

Ongoing Concerns

Processing Times. This year USCIS made improvements in processing times for VAWA self-petitioners and T nonimmigrant status applicants. Both are now being adjudicated within six months. Considerable progress also has been made on processing times for U nonimmigrant status applications. Currently, they are being adjudicated within eight months. The VAWA Unit will need to be adequately resourced to ensure that USCIS meets its processing time goal of six months. In addition, stakeholders have expressed confusion regarding how processing times are reported publicly for U nonimmigrant status petitions. On the USCIS website it states that petitions filed on or before February 11, 2013 are being processed. However, it is the Ombudsman's understanding that the date on the website reflects the date of the last petition approved under the FY 2014 U visa cap and does not accurately reflect the processing time for conditional U status grants, which is currently approximately eight months.

Requests for Evidence. Stakeholders continue to raise concerns about RFEs in the adjudication of U nonimmigrant status petitions, VAWA self-petitions, and conditional residence waivers due to battery or extreme cruelty. Specifically for these types of petitions, USCIS must consider "any credible evidence" submitted.[148] This evidentiary requirement recognizes that abusers often deny victims access to important documents in a deliberate attempt to stop victims from seeking assistance. To ensure victims are afforded full protection under the law, USCIS adjudicators are directed to "give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent."[149]

VAWA self-petitioners and their legal representatives report receiving RFEs requesting the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). Such RFEs seek evidence of a nature and type that is *not* required under the relevant regulations – thereby holding VAWA self-petitioners to a higher standard of proof than is actually required by applicable law and guidance. These RFEs, which can affect the quality of adjudication, add additional processing time to already delayed adjudications and may require additional attention from legal service providers, diminishing their capacity to assist victims.

For U nonimmigrant status petitions, stakeholders report an increase in RFEs that appear burdensome and unnecessary and other adjudication issues. For example, the Ombudsman recently assisted an individual whose petition was denied because, according to USCIS, the petitioner did not show the certifying official was the appropriate certifier. The individual had provided USCIS with evidence in the initial petition regarding the authority of the certifying official, who previously had signed certifications in other U nonimmigrant status petition cases that had been approved. Upon review of the Ombudsman's request, USCIS reopened and approved the case. In other RFEs, there were issues caused by the difference between the crime prosecuted and the qualifying crime listed on the U nonimmigrant status petition. For example, victims of trafficking may possess a signed law enforcement certification from the U.S. Department of Labor for involuntary servitude or peonage, which are qualifying U visa crimes,[150] but the alleged trafficker is prosecuted for another crime. RFEs and denials have been based on a misunderstanding or misapplication of this distinction.

It is time-consuming for petitioners and their representatives, often nonprofit agencies with limited resources, to respond to unnecessary RFEs. The Ombudsman has raised these concerns with USCIS, and understands that the VSC provides extensive training to its adjudicators on the requirements of the benefit types, as well as the dynamics of domestic violence and victimization.

VAWA Adjustment of Status. During the past year, there were delays in the scheduling of adjustment of status interviews for VAWA self-petitioners, specifically between the time the VAWA Unit approved the self-petition and the time it took to transfer the case to the National Benefits Center (NBC) for processing and scheduling of an interview at a USCIS local office. The VSC is currently transferring approved Forms I-360, *Petition for Amerasian, Widow(er), or Special Immigrant* with accompanying Forms I-485, *Application to Register Permanent Residence or Adjust Status* to the NBC within seven days of the final VSC adjudication action.[151] The delay in scheduling for some VAWA self-petitioners has been six months or more. The NBC is working to eliminate delays in its process, with a processing goal of ten days.[152]

[148] Victims of Trafficking and Violence Protection Act of 2000 §§ 1504(a)(2)(D), 1505(b)(7)(B), and 1513(o)(4), P.L. 106-386. *See also* Violent Crime Control and Law Enforcement Act of 1994 § 40701(a)(3)(H), P.L. 103-322.

[149] Immigration and Naturalization Service Policy Memorandum, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents" (Apr. 16, 1996).

[150] 8 C.F.R. § 214.14(b)(1).

[151] *Supra* note 136.

[152] *Id.*

VAWA Employment Authorization for Nonimmigrants Victims. Section 106 of the Immigration and Nationality Act (INA), enacted on January 5, 2006 in the Violence Against Women and Department of Justice Reauthorization Act of 2005,[153] provides employment authorization for battered spouses of certain nonimmigrants.[154] USCIS has not implemented this provision. On December 12, 2012, USCIS published a draft Policy Memorandum titled *Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants*, which provides guidance on employment authorization eligibility for battered spouses of certain A, E, G, and H nonimmigrants. However, this draft policy has not been finalized. The Ombudsman continues to receive case assistance requests from potentially eligible applicants who are victims of abuse. In one recent request submitted to the Ombudsman, an abused spouse of an H-1B visa holder attempted to seek work authorization. USCIS denied her application and informed her that the agency is not currently approving such applications. Eligible victims of domestic violence may not be able to escape abuse because of the delay in implementation of INA section 106.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Responsible USCIS Office:

Refugee, Asylum, and International Operations Directorate

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from U.S. Customs and Border Protection (CBP) and ICE. USCIS shifted resources, made new hires, and updated agency training to address the rising number of credible and reasonable fear claims. Despite these efforts, delays have developed for affirmative asylum processing.

Background

Credible Fear. Expedited removal is the legal process under which a non-U.S. citizen is denied entry to and removed from the United States after seeking admission at a port of entry. Enacted in 1996, expedited removal applies to individuals at ports of entry ("arriving aliens") who have been found inadmissible to the United States by a CBP officer for any of the following reasons: 1) fraud or misrepresentation; 2) falsely claiming U.S. citizenship; 3) not possessing a valid, unexpired immigrant visa or other suitable entry document; 4) not possessing a passport valid for a minimum of six months from the date of expiration of the initial period of stay; or 5) not possessing a valid nonimmigrant visa or border crossing card at the time of application for admission.[155] The expedited removal process is also used to remove individuals unlawfully arriving in the United States by sea or those apprehended within 100 miles of a U.S. land border, who have not been admitted or paroled, and are unable to establish continuous physical presence in the United States for the two-year period immediately prior to the date of apprehension.[156]

A foreign national subject to expedited removal may be removed from the United States without a hearing before an immigration judge, unless that individual indicates an intention to apply for asylum or a fear of persecution, (i.e., a "credible fear").[157] If the individual expresses fear of persecution to either a CBP or ICE officer, the officer must make a referral for a credible fear interview by a USCIS Asylum Officer.[158]

Once a referral has been made, a USCIS Asylum Officer will conduct a credible fear interview, while the individual is detained,[159] to determine whether there is a "significant possibility … that the alien could establish eligibility for asylum."[160] If the foreign national is found to have a credible

[153] Violence Against Women and Department of Justice Reauthorization Act of 2005 § 844, Pub. Law No. 109-162. *See also* Immigration and Nationality Act (INA) § 106.

[154] USCIS Draft Policy Memorandum, "Eligibility for Employment Authorization upon approval of a Violence Against Women Act (VAWA) Self-Petition; and Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants" (Dec. 12, 2012); http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Draft+Memo+-+Eligibility+for+Employment+Authorization+upon+Approval+of+a+VAWA+Self-Petition-December%202012.pdf (accessed May 14, 2014).

[155] Illegal Immigration Reform & Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101, Pub. Law No. 104 – 208, 110 Stat. 3009 (1996)–546, codified at 8 U.S.C. § 1101. INA § 235(b)(1)(A) and 8 C.F.R. § 235.3.

[156] INA § 235(b)(1)(A)(iii).

[157] INA § 235(b)(1)(A)(ii). CBP may choose to use normal removal proceedings under INA § 240 even when expedited removal procedures could otherwise be used. *See Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011).

[158] 8 C.F.R. §§ 208.30 (a) and 208.30 (c).

[159] INA § 235(b)(1)(B)(iii)(IV).

[160] INA § 235(b)(1)(B)(v); *see also* USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

fear of return to the home country, the individual will be referred to the Executive Office for Immigration Review (EOIR) for a hearing before an immigration judge.[161] USCIS referred 30,393 individuals to EOIR in FY 2013 and 16,467 individuals in the first half of FY 2014.[162] If the USCIS Asylum Officer issues a negative decision in a credible fear interview, the decision can be appealed to an immigration judge.[163] If the individual does not appeal the credible fear determination, he or she will be removed from the United States using the expedited removal procedure.[164]

Reasonable Fear. USCIS Asylum Officers are required to make reasonable fear determinations in two categories of cases referred by other DHS officers after a final order of removal has been issued or reinstated. In these cases, the individual is ordinarily removed without being placed in removal proceedings before an immigration judge.[165] The first category involves individuals who illegally re-entered the United States after having been ordered removed or individuals who voluntarily departed the United States while under an order of exclusion, deportation, or removal.[166] The second category involves foreign nationals who do not hold Legal Permanent Residence, were convicted of one or more aggravated felonies and are subject to administrative removal from the United States.[167]

Individuals in both categories are prohibited from challenging removability before an immigration judge or from seeking any form of relief from removal.[168] However, a person may not be removed from the United States if the individual is "more likely than not" to be persecuted or tortured in the country to which the individual would be returned upon the execution of a removal order.[169] Accordingly, if a foreign national subject to administrative removal is able to establish a "reasonable possibility" of future persecution, the person will be granted an opportunity to appear before an immigration judge and request withholding of removal or deferral of removal.[170]

In order to assess whether an individual facing administrative removal from the United States has a reasonable fear of persecution or torture, USCIS conducts a reasonable fear interview. Although USCIS states on its website that this interview will be conducted 10 days after ICE refers the case to the Asylum Office, due to the high volume of requests, USCIS currently strives to complete the reasonable fear process within 90 days of receiving a referral from ICE.[171] As of April 6, 2014, the average time to complete an interview at a USCIS Asylum Office is 4.2 days for a credible fear interview and 45.5 days for a reasonable fear interview.[172] When a USCIS Asylum Officer determines that a foreign national has a reasonable fear of persecution or torture, the officer refers the foreign national to Immigration Court for a withholding/deferral of removal hearing.[173] If the USCIS Asylum Officer determines that the foreign national does not have a reasonable fear of persecution or torture, the individual can request that an immigration judge review the negative reasonable fear finding.[174] If the individual does not appeal the USCIS Asylum Officer's negative reasonable fear finding, ICE will remove him or her from the United States.[175]

Increase in Credible and Reasonable Fear Claims. Between 2000 and 2009, USCIS received approximately 5,000 credible fear interview requests each year.[176] In 2009, the number of credible fear interview requests increased to 8,000.[177] In 2012, the number rose to 13,000, and in 2013, it tripled to 36,000.[178] Similarly, requests for reasonable fear interviews have also increased.[179] For many years USCIS received only a few hundred reasonable

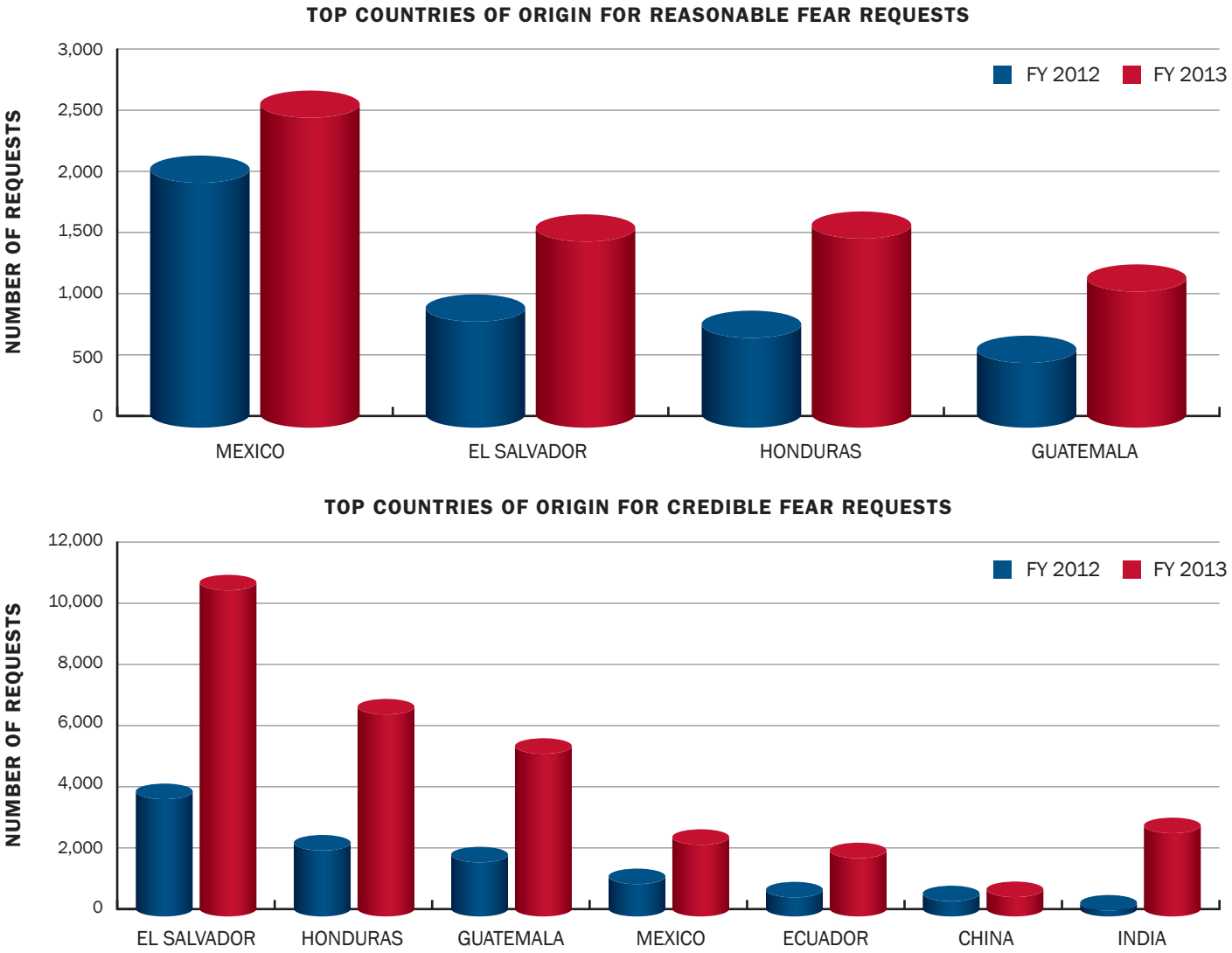
[161] INA § 235(b)(1)(B)(ii).
[162] *Supra* note 136.
[163] INA § 235(b)(1)(B)(iii)(III).
[164] INA § 235(b)(1)(B)(iii)(I).
[165] 8 C.F.R. § 208.31.
[166] INA § 241(a)(5).
[167] INA § 237(a)(2)(A)(iii).
[168] INA §§ 238(b) and (c), and 242(a)(2)(C) and 8 C.F.R. § 238.
[169] 8 C.F.R. § 208.16(c)(3).
[170] 8 C.F.R. §§ 208.31(e) and 208.16.
[171] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014). *See supra* note 135.
[172] Information provided by USCIS (Apr. 28, 2014).
[173] 8 C.F.R. §§ 208.31(e) and 208.16; *see* USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[174] 8 C.F.R. § 208.31(g).
[175] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[176] Information provided by USCIS (Oct. 24, 2013).
[177] *Id.*

fear interview requests each year. In 2013, USCIS received 7,000 reasonable fear interview requests from ICE.[180] A total of 4,156 reasonable fear cases were referred to USCIS in the first five months of FY 2014.[181] ***See Figure 14:*** *Top Countries of Origin for Credible and Reasonable Fear Interview Requests.*

USCIS has prioritized credible and reasonable fear interviews over affirmative asylum hearings because applicants for the former are detained. In addition, USCIS prioritizes credible fear interviews over reasonable fear interviews. Due to limited resources and the recent rise in the number of requests for credible fear interviews, USCIS is now conducting reasonable fear interviews within 90 days and on average 45 days.[182] Nonetheless, stakeholders have reported that some individuals waited up to three months to be interviewed by a USCIS Asylum Officer and then waited an additional three months, all while detained, to receive a reasonable fear determination.[183]

USCIS endeavors to conduct credible fear interviews within 14 days of receiving a referral from CBP or ICE and reduced the credible fear interview timeframe in 2013.[184] At the beginning of FY 2013, 85 percent of individuals requesting

FIGURE 14: TOP COUNTRIES OF ORIGIN FOR CREDIBLE AND REASONABLE FEAR INTERVIEW REQUESTS



Source: Information provided by USCIS (Apr. 28, 2014).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *See* USCIS Asylum Division Quarterly Stakeholder Meeting Notes (Jul. 31, 2013), p.5; *see also* 8 C.F.R. § 208.7(a).

[182] *Supra* note 136.

[183] *Supra* note 176.

credible fear interviews were processed within 14 days of referral from ICE or CBP. A year later, by October 2013, USCIS was processing credible fear interviews within eight days.[185] To further streamline the credible fear interviews, USCIS began conducting telephonic credible fear interviews.[186] In FY 2013, 60 percent of credible fear interviews were conducted telephonically, and more than 68 percent of cases were conducted telephonically through the second quarter of FY 2014.[187]

USCIS revised its credible fear training, which was released to USCIS Asylum Officers in February 2014. The revised training emphasizes the requirement that the applicant demonstrate a "significant possibility"[188] of eligibility for asylum, withholding or removal, or deferral of removal rather than a "mere possibility."[189]

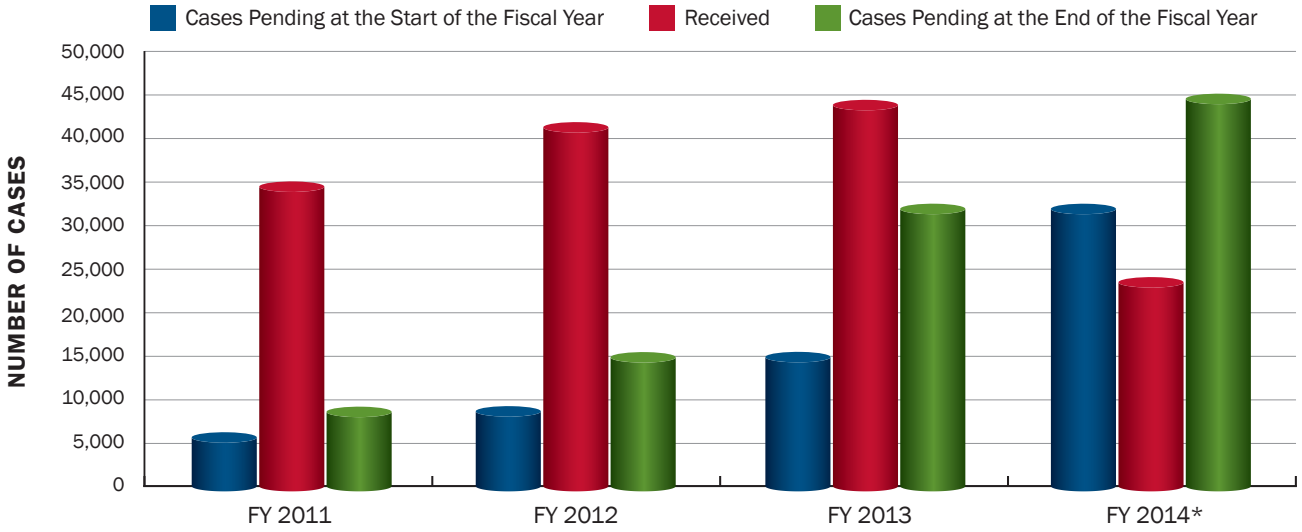
Ongoing Concerns

The Ombudsman continues to monitor steps taken by USCIS to streamline its credible and reasonable fear interview process and reduce backlogs while maintaining the integrity and protections afforded by U.S. asylum laws. The Ombudsman supports USCIS in its effort to increase staffing and eliminate backlogs.

Delays in Credible and Reasonable Fear Interviews. Many stakeholders have expressed concern regarding the delays in credible and reasonable fear interviews and communications between USCIS, CBP and ICE. USCIS's goal is to conduct reasonable fear interviews within 90 days of referral from ICE or CBP, and credible fear interviews within 14 days.[190] An individual may be detained by ICE for a significant period of time before and after making a request for a reasonable fear interview. Even with the increase in applications and lag in corresponding agency staffing levels, USCIS has stated its commitment to meet its policy and regulatory requirements.[191] The USCIS Refugee Asylum and International Operations Directorate is working to address these challenges through better coordination with ICE, for example, by accommodating credible fear interviews of detainees at certain USCIS Asylum Offices, rather than at DHS detention facilities.

Use of Telephonic Interviews. Since instituting telephonic interview processing in January 2013, remote USCIS Asylum Officers conducted more than 13,000 credible fear interviews.[192] Stakeholders stated concerns that the increased use of telephonic interviews limits the USCIS Asylum Officer's ability to evaluate credibility and appreciate

FIGURE 15: ASYLUM APPLICATION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through March 31, 2014.*

[184] *See supra* note 181; *see also* 8 C.F.R. § 208.7(a).

[185] *Supra* note 176.

[186] USCIS Asylum Division Quarterly Stakeholder Meeting (Mar. 19, 2013).

[187] *Supra* note 136.

[188] INA § 235(b)(1)(B)(v).

[189] USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

[190] Information provided by USCIS (May 8, 2014).

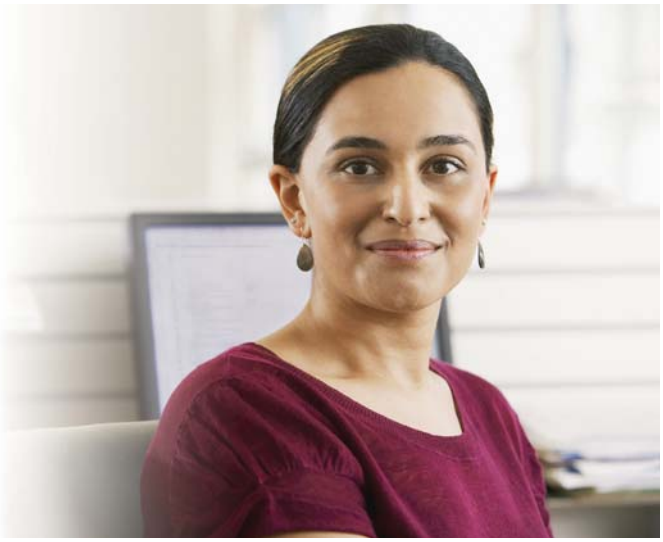
[191] *Supra* note 176.

[192] *Supra* note 136.

nuances in the foreign national's statements.[193] Specifically, they are concerned that, where an individual is referred for proceedings before an immigration judge, the Court will give undue weight to the summary of facts prepared by the USCIS Asylum Officer during the credible fear interview process, and fail to pay proper attention to the full statement made by the foreign national in applications for relief from removal.[194]

Impact on Affirmative Asylum. While USCIS continues to see an increase in requests for credible and reasonable fear interviews, the agency also faces an increase in receipts of affirmative asylum applications.[195] USCIS has prioritized requests by detainees and allocated its resources to those areas. Remaining resources are used to address affirmative asylum and Nicaraguan Adjustment and Central American Relief Act applications.[196] However, the result is that affirmative asylum application backlogs have arisen. As of April 23, 2014, USCIS faced a backlog of 45,193 cases.[197] The largest affirmative asylum application backlog is at the Los Angeles Asylum Office.[198] ***See Figure 15:*** *Asylum Application Filings.*

As the delay in affirmative asylum application adjudication grows, many asylum applicants are faced with difficulties in the United States such as employment and resettlement, while their families abroad continues to face adversity.



Applicants for asylum are not permitted to apply to bring their family to the United States unless and until their own asylum applications are approved and they are granted asylee status.[199] In the past year, the Ombudsman experienced a rise in the number of case assistance requests regarding delayed asylum application interviews and adjudication.

Case Example

An asylum applicant moved while he was waiting for his interview to be scheduled. His change of address request to USCIS and the interview notice crossed paths in the mail, causing him to miss his interview. The change of address was confirmed and his file was transferred to the new location. Having waited more than 180 days, he believed he was eligible for employment authorization, but was informed after applying that since he missed his interview, the asylum clock had stopped and he was considered ineligible. Rather than placing his file in queue for a rescheduled affirmative asylum interview, his file was placed in the new asylum office's backlog of new cases. For over a year he was unable to obtain work authorization. In response to the Ombudsman's inquiry, the USCIS Headquarters Refugee, Asylum, and International Operations Directorate agreed to expeditiously reschedule the interview.

New Funding and Hires. To meet the growing number of requests for credible and reasonable fear interviews, as well as affirmative asylum applications, USCIS requested additional funding, which Congress approved in August of 2013.[200] The USCIS Asylum Division received permission to increase its number of officers by 100, from 273 to 373 positions.[201] As of April 16, 2014, USCIS had 322 Asylum Officers on board, 15 additional candidates scheduled to enter on duty into USCIS Asylum Officer positions between April and July, and approximately 25 candidates selected to fill vacant Asylum Officer positions who are undergoing security screening prior to entering on duty.[202] In addition, USCIS has detailed 35 officers from other branches of USCIS to various Asylum Offices to conduct interviews.[203] The Ombudsman notes that additional adjudicative resources may be necessary to address the affirmative asylum backlog.

[193] *Id.*

[194] *Id.*

[195] *Supra* note 186.

[196] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (Nov. 19, 1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997).

[197] USCIS Asylum Division Quarterly Stakeholder Meeting (Apr. 23, 2014).

[198] *Supra* note 136.

[199] 8 C.F.R. § 208.21(d).

[200] *Supra* note 197.

[201] *Supra* note 136.

[202] *Id.*

[203] *Supra* note 197.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Responsible USCIS Office:

Service Center Operations Directorate

Humanitarian reinstatement is a regulatory process under 8 C.F.R. section 205.1(a)(3)(i)(C) in which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under INA section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death.[204] The 204(l) reinstatement applicant need not establish the multiple humanitarian factors required in traditional humanitarian reinstatement. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Background

Humanitarian Reinstatement under the Regulations. USCIS regulations provide that certain family-based petitions are revoked automatically upon the death of a petitioner, and surviving beneficiaries may request that the petition be reinstated on humanitarian grounds.[205] This process, referred to as "humanitarian reinstatement," is a form of discretionary relief available to the principal beneficiary of a Form I-130, *Petition for Alien Relative* that was approved prior to the death of the petitioner.[206]

The requirements for discretionary requests for humanitarian reinstatement are outlined in regulations and administrative guidance.[207] Reinstatement is the only possible relief for surviving beneficiaries who cannot meet the requirements of INA section 204(l) or who are not widow/widowers of U.S. citizens. An affidavit of support from a substitute sponsor must accompany the request.[208]

The USCIS Adjudicator's Field Manual (AFM) lists the criteria considered in assessing whether discretion should be exercised favorably in response to a humanitarian reinstatement request: 1) the impact of revocations on the family unit in the United States, especially on U.S. citizen or Legal Permanent Resident relatives or other relatives living lawfully in the United States; 2) the beneficiary's advanced age or poor health; 3) the beneficiary having resided in the United States lawfully for a lengthy period; 4) the beneficiary's ties to his or her home country; and 5) significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the government rather than the individual.[209] The AFM also states, "[A]lthough family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated."[210] The AFM further provides that decisions on humanitarian reinstatement should be communicated in writing to the beneficiary, that there is no appeal, and that humanitarian reinstatement "may be appropriate when revocation is not consistent with the furtherance of justice, especially in light of the goal of family unity that is the underlying premise of our nation's immigration system."[211]

Before INA section 204(l), only widows and widowers of U.S. citizens could seek Legal Permanent Resident status after the death of a qualifying relative. Other eligible survivors were required to seek humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).

Reinstatement under INA Section 204(l). INA section 204(l) protects:

- Beneficiaries of a pending or approved immediate relative visa petition;
- Beneficiaries of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
- Any derivative beneficiary of a pending or approved employment-based visa petition;
- Beneficiaries of a pending or approved refugee/asylee relative petition;

[204] *See* Ombudsman Recommendation, "Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act" (Nov. 26, 2012); http://www.dhs.gov/publication/improving-adjudication-under-ina-section-204l (accessed Apr. 23, 2014).

[205] 8 C.F.R. § 205.1(a)(3)(i)(C).

[206] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 1, 2014).

[207] 8 C.F.R. § 205.1(a)(3)(i)(C) and USCIS Adjudicator's Field Manual (AFM) Ch. 21.2(h)(1)(C).

[208] INA §§ 213(f)(5)(B), 212(a)(4)(C) and 8 C.F.R. § 213a.2(a)(2)(ii).

[209] AFM Ch. 21.2(h)(1) (C) (2013) and USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 13, 2014).

[210] *Id.*

[211] *Id.*

- Individuals admitted as derivative "T" or "U" nonimmigrants; and
- Derivative asylees.

In December 2012, USCIS issued guidance for reinstatement for those persons with approved petitions at the time of the qualifying relative's death seeking relief under INA section 204(l).[212] Survivors seeking coverage under INA section 204(l) are subject to a discretionary evaluation, but a showing of the factors needed for traditional humanitarian reinstatement is not required. Instead, the request will be approved if it is consistent with "the furtherance of justice."[213]

Data for Humanitarian Reinstatement and INA Section 204(l) Reinstatement. As reported in the Ombudsman's 2013 Annual Report, USCIS maintained no national data on humanitarian and INA section 204(l) reinstatement until November 2012, when the agency added an action code to its data system to account for reinstatement requests. The code, however, does not distinguish between a reinstatement request made under INA section 204(l) versus a humanitarian reinstatement request made under 8 C.F.R. section 205.1(a)(3)(i)(C).

After starting to collect data in November 2012, USCIS reports that in FY 2013 it received 3,257 requests for humanitarian and INA section 204(l) reinstatement, denied 632 requests and granted 262. In FY 2014, USCIS received 1,704 requests for humanitarian and INA section 204(l) reinstatement, denied 652 requests and approved 372. To date, there are 3,043 humanitarian and INA section 204(l) reinstatement requests pending with USCIS.[214] ***See Figure 16:*** *Humanitarian and INA Section 204(l) Reinstatement Requests.*

FIGURE 16: HUMANITARIAN AND INA SECTION 204(l) REINSTATEMENT REQUESTS

FISCAL YEAR		REQUESTS RECEIVED	REQUESTS GRANTED	REQUESTS DENIED
2013	**Service Center**	**3,257**	**262**	**632**
	California Service Center	2796	132	562
	National Benefits Center	2	1	1
	Vermont Service Center	459	129	69
2014	**Service Center**	**1,704**	**372**	**652**
	California Service Center	1,314	72	502
	National Benefits Center	92	20	0
	Vermont Service Center	291	280	150
	Texas Service Center	7	0	0

Source: Information provided by USCIS (May 29, 2014).

**As of April 28, 2014, there are 3,043 humanitarian reinstatement requests pending with USCIS.*

[212] USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Apr. 29, 2014).

[213] *Id.*, p. 6.

[214] Information provided by USCIS (May 29, 2014).

[215] *Supra* note 140, p. 18.

Ongoing Concerns

As noted in the Ombudsman's 2013 Annual Report, stakeholders continue to report, among other issues, variances and delays in the handling of humanitarian and INA section 204(l) reinstatement requests.[215] These and other concerns continue in 2014, as evidenced by the requests for case assistance received by the Ombudsman from humanitarian and INA section 204(l) reinstatement requestors.

Lack of Standardized Procedures. USCIS lacks a standardized process for receiving and processing humanitarian and INA section 204(l) reinstatement requests. Procedures for submitting such requests vary by USCIS office. Also, USCIS does not post processing times for reinstatement requests, nor does it issue receipt notices acknowledging the request.

Generally, for immigration benefits, there is a required form and accompanying instructions that specify where the application is to be filed.[216] This requirement helps USCIS issue receipt numbers and properly track cases. There is no standard USCIS form for making a humanitarian or INA section 204(l) reinstatement request. The USCIS website instructs individuals to send written requests for humanitarian reinstatement to the USCIS office that originally approved the petition.[217] With only an informal letter process, stakeholders have experienced slow and irregular handling of reinstatement requests by USCIS. The imprecise process of filing individualized letters in each case without a specific form poses challenges to uniformity in processing for a large agency responsible for hundreds of thousands of varied requests.

Stakeholders note that although basic humanitarian and INA section 204(l) reinstatement eligibility and instructions can be found on the USCIS website,[218] the information is unclear and difficult to find, particularly for pro se individuals. People report not knowing where to file the reinstatement request. Although the instructions on the USCIS website indicate that the humanitarian reinstatement request should be submitted to the office where the petition was approved,[219] in many cases the petition was filed years prior to the humanitarian reinstatement request by a petitioner who can no longer provide this information to the beneficiary. USCIS jurisdiction for the request also may have changed after the original filing for reasons unknown to the beneficiary, such as reallocation of resources or agency restructuring.[220]

[216] USCIS Webpage, "Forms"; http://www.uscis.gov/forms (accessed Apr. 15, 2014).

[217] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 9, 2014); *see also* USCIS Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Apr. 29, 2014); *see also* USCIS Webpage, "Basic Eligibility for Section 204(l) Relief for Surviving Relatives" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/basic-eligibility-section-204l-relief-surviving-relatives (accessed May 9, 2014); *see also* AFM Ch. 21.2(h)(1)(C).

[218] USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 15, 2014).

[219] *Id.*

[220] Information provided by USCIS (Apr. 9, 2014). For example, the Nebraska Service Center forwards reinstatement requests to the Vermont Service Center for decisions.

Processing Inconsistencies and Delays. Stakeholders continue to report that USCIS has difficulty determining which USCIS office has jurisdiction over the request, that USCIS uses uninformative and often incorrect template denials, and that it fails to provide meaningful information to *pro se* applicants, causing lengthy processing delays and confusion to the public.

Case Example

In July 1993, USCIS approved Form I-130 on behalf of a child. In 2004, the petitioning father died. At that time, the beneficiary was still waiting for his immigrant visa appointment overseas. The beneficiary who was unrepresented did not apply for reinstatement, but did notify DOS that the petitioner had died. DOS notified USCIS, and in March 2011, the USCIS California Service Center (CSC) issued a denial of the reinstatement, stating that the evidence on record did not establish a favorable exercise of discretion. This was a surprise to the beneficiary, since he had not yet submitted a humanitarian reinstatement request. He retained counsel who wrote to USCIS and clarified that no request for reinstatement had been submitted, but that the beneficiary would like to present one. USCIS issued a second denial in May 2011, in which the CSC referenced the first denial and incorrectly concluded that the petitioner died prior to the approval of the family-based petition, thus no reinstatement could be considered. USCIS itself had confirmed in its first denial that the petition was approved in July 1993. The petitioner died almost ten years later in 2004. The beneficiary and counsel submitted a request for reinstatement with documentation, and pointed out the factual errors made by USCIS. The CSC reopened and adjudicated the case.

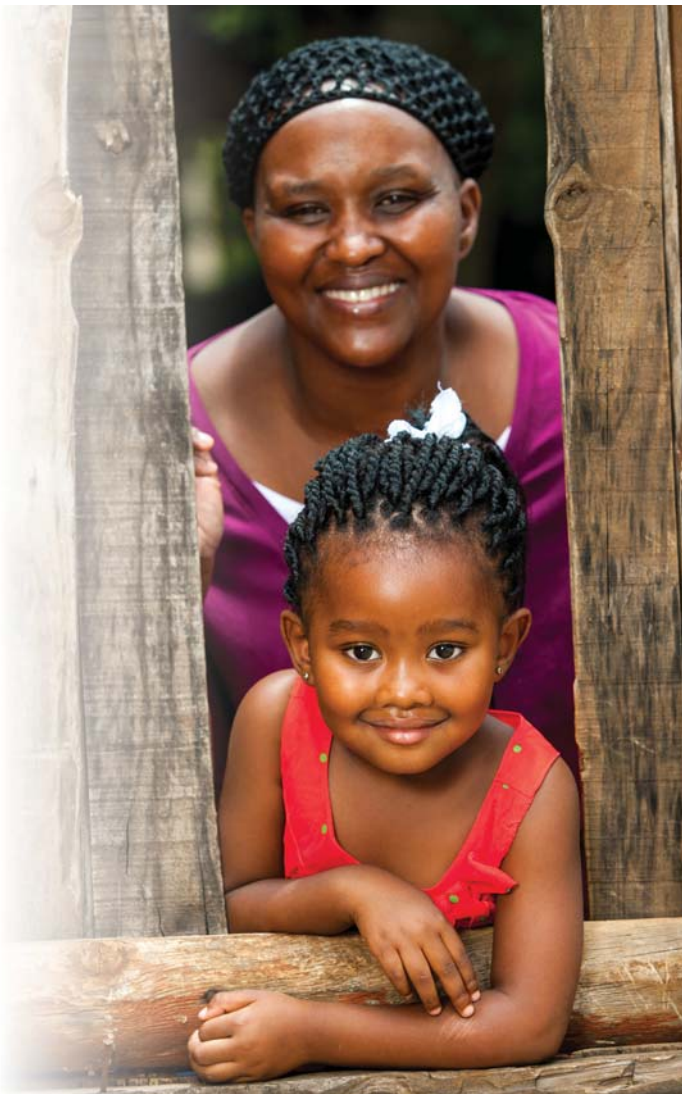
Stakeholders report that once the initial request for humanitarian reinstatement is denied, the CSC will not permit subsequent requests without the filing of Form I-290B, *Notice of Appeal or Motion* with a fee of $630, submitted within 30 days from USCIS's final decision.[221] This practice is problematic since it can take months to compile and submit additional evidence of humanitarian factors, or retain legal representation. Since humanitarian reinstatement has no appeal under the USCIS guidance in the AFM, resubmission of a request with additional evidence is the only possible avenue for further consideration of a case.[222] The Ombudsman raised this concern with USCIS Service Center Operations Directorate, which confirmed, "[t]here is no regulation or USCIS policy to limit the number of [reinstatement] requests that can be made following the death of the petitioner on an approved I-130."[223] However, it remains unclear whether this CSC local practice is standard agency policy.

[221] Information provided through requests for case assistance.

[222] AFM Ch. 21.1(h)(1)(C).

[223] Information provided by USCIS (Feb. 27, 2014).

Confusion between Humanitarian Reinstatement and INA section 204(l) Reinstatement. As described above, humanitarian and INA section 204(l) reinstatement have different legal authorities and eligibility standards. They also apply to different groups of people in the immigration process. However, perhaps because both requests concern survivors, and both lack a form, fee and normal receipting process at USCIS, stakeholders report that USCIS sometimes treats such cases interchangeably and requires persons requesting INA section 204(l) reinstatement to supply humanitarian and hardship documentation that should only be required for humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(i)(C). Many survivors often do not understand the distinct requirements for these requests for relief.



Conclusion

During this reporting period, USCIS, in partnership with other DHS components, continued to work to increase public awareness of trafficking and domestic violence, and the immigration relief available to victims. Unnecessary RFEs need USCIS's attention because they contribute to these delays and impact the quality of adjudications. The dramatic increase in credible and reasonable fear interview referrals has required USCIS and other DHS components to shift resources. Nearly a quarter of affirmative asylum cases are now pending over one year. Additionally, improvements in the handling of requests for reinstatement for surviving family members are long overdue and merit agency attention.

Interagency, Process Integrity, and Customer Service

USCIS provides customer service through a wide variety of programs and initiatives. Between April 1, 2013, and March 31, 2014, USCIS hosted or participated in more than 3,200 stakeholder events, including eight national multilingual engagements and 557 local outreach events in languages other than English.[224] USCIS revised forms pertaining to fee waivers and appeals/motions, in an effort to be more clear, concise, and user-friendly. However, improvements are needed in USCIS's calculation of processing times, responses to service requests, and fee waiver processing.

[224] Information provided by USCIS (Apr. 28, 2014).

USCIS Processing Times and their Impact on Customer Service

Responsible USCIS Offices:

Office of Performance and Quality and the Customer Service and Public Engagement Directorate

Expectations for individuals and employers seeking immigration benefits are set based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests to check case status with USCIS local offices and service centers until cases are outside posted processing times.[225] Similarly, in Fiscal Year (FY) 2014, the Ombudsman instituted a new policy not to accept requests for case assistance until cases have been pending 60 days past posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted.

Background

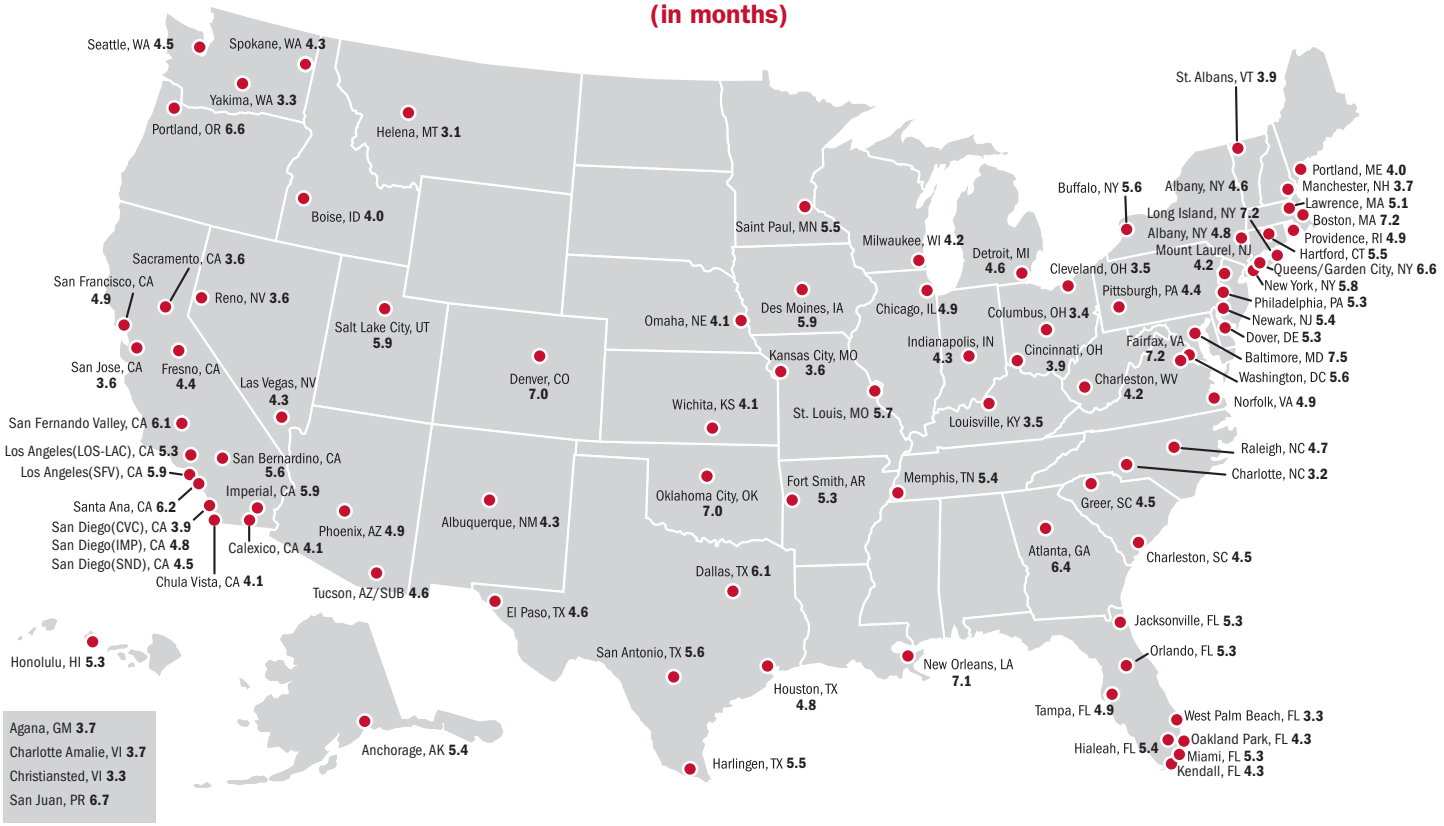
USCIS posts processing times for immigration petitions and applications on its website.[226] ***See Figure 17:*** *Average Processing Times for Forms N-400, Application for Naturalization, and I-485, Application to Register Permanent Residence or Adjust Status.*

Stakeholders rely on posted processing times when applying for immigration benefits. Individuals and employers seek accurate processing time information in order to make decisions about major life events such as immigration, travel, associated costs and timely filing of renewal applications.

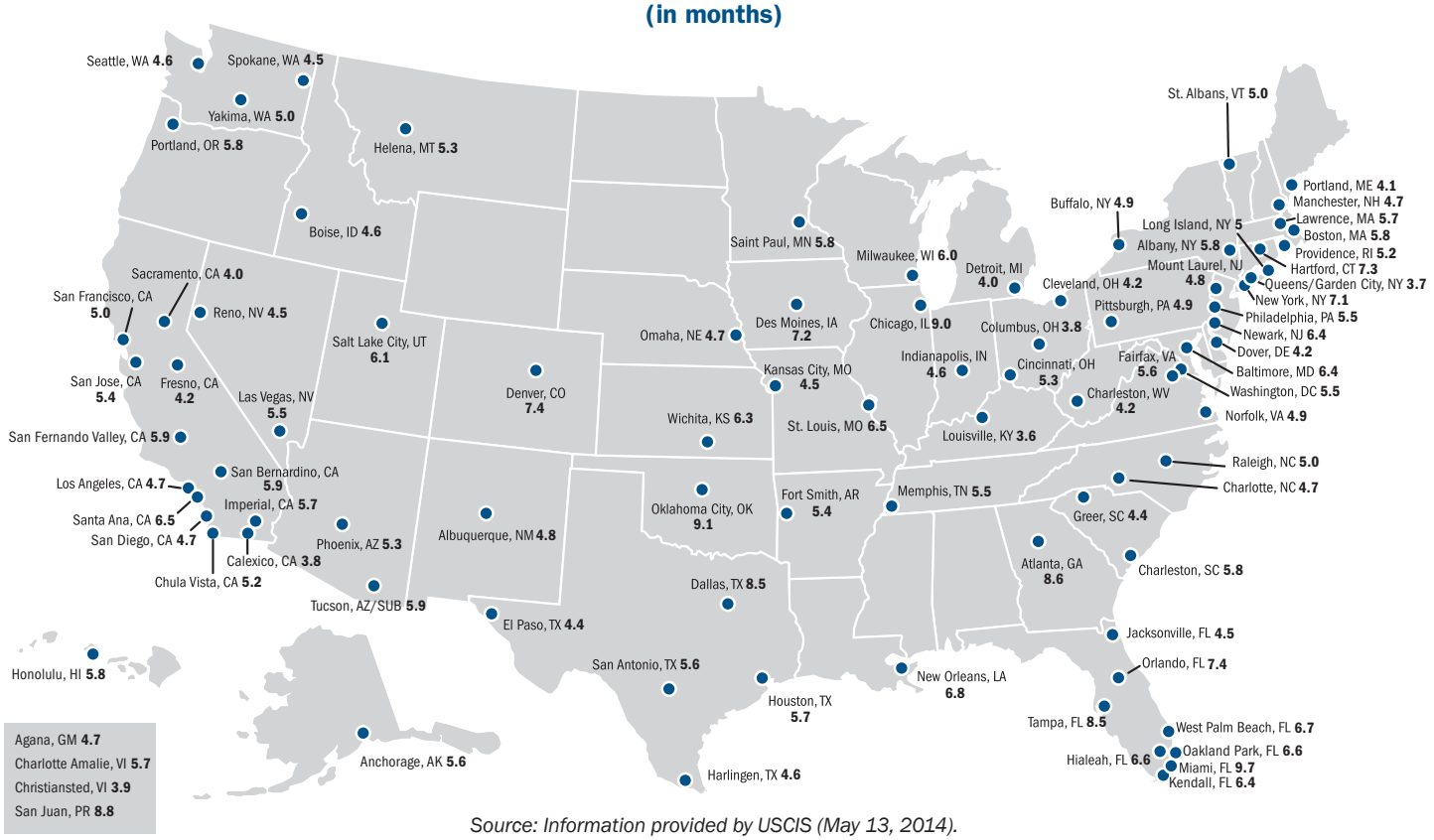
[225] *See* USCIS Webpage "e-Request;" https://egov.uscis.gov/e-Request/Intro.do?locale=en_US (accessed Jan. 2, 2014).
[226] USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplay.do (accessed Jan. 2, 2014).

FIGURE 17: AVERAGE PROCESSING TIMES FOR FORMS N-400 AND I-485

Application for Naturalization (N-400) Average Processing Time (in months)



Application to Register Permanent Residence or Adjust Status (I-485) Average Processing Time (in months)



Source: Information provided by USCIS (May 13, 2014).

For USCIS, processing times are important to measure agency performance in adjudication, identify operational challenges such as delays in resolving background checks, plan and implement new initiatives, and understand agency capacity in various offices.

Upon publication of the 2007 fee rule, USCIS established new processing time goals.[227] The USCIS Processing Time Information website states:

> USCIS usually processes cases in the order they are received. For each type of application or petition we have specific workload processing goals. For example, we try to process naturalization cases within five months of the date we receive them and immediate relative petitions (for the spouse, parent or minor child of a U.S. citizen) within six months of the receipt date. Sometimes the volume of cases we receive is so large that it prevents us from achieving our goals, but we never stop trying.[228]

USCIS calculates processing times for a particular application or petition type by subtracting the number of cases received each month from the total number of "active" pending cases (see below). For example, if the number of active pending cases was 200, and in each of the past four months USCIS received 50 cases, the processing time would be calculated as four months. This approach takes approvals and denials into account only insofar as the number of pending cases decreases when cases are completed.

Active pending cases are those cases that are available for processing, as opposed to cases that are waiting for visa availability or for applicants or petitioners to accomplish a step in the process, such as re-taking the naturalization test or responding to a Request for Evidence (RFE). Cases subject to delays due to background checks are included within the active pending cases for purposes of calculating processing times. The Ombudsman notes that USCIS customers may be unaware of what actions by USCIS or the applicant or petitioner may lead to tolling of processing times.

If USCIS is processing a particular type of application/petition in less time than the agency processing goal, the processing time will be the goal published in months (e.g., "Six Months").[229] For case types that are taking longer than the processing goal, USCIS lists the filing date (e.g., "December 26, 2013") of the cases it is currently processing.[230] Processing times are posted monthly, 30 days after the prior month's close. For example, April's processing times will be posted by May 30th.

Cases where USCIS has encountered difficulty in resolving background checks or has issued an RFE often take longer than posted processing times, with limited information available on how long USCIS will take to complete adjudication. Posted processing times also fail to take into account accelerations or delays that may be anticipated by USCIS based on workload shifts or changes in filing patterns. As such, processing times can increase significantly, without prior notice to the public.

Some applicants or petitioners have the option of upgrading certain types of filings to "premium processing."[231] Employers use premium processing to fill positions rapidly, but it is not available for all types of immigration filings. There is also a discretionary process for expediting applications or petitions for individuals or employers, but that process is limited to individuals who are confronted with specific compelling circumstances.[232]

Ongoing Concerns

Stakeholders are unable to accurately determine how long a case might take to be completed based on the methodology USCIS uses to calculate its posted adjudication timelines. These processing times are not an average processing time for all cases in a particular queue. Nor do they represent the time it may take for most cases to be completed.

When cases are outside processing times, individuals, employers, and their representatives schedule InfoPass appointments and initiate service requests online or by contacting the USCIS National Customer Service Center (NCSC).[233] They also request assistance from Congressional offices and the Ombudsman. USCIS, in turn, devotes significant resources to customer service inquiries that could otherwise be directed to adjudicating applications and petitions.

[227] "U.S. Citizenship and Immigration Services Fee Schedule; Final Rule," 75 Fed. Reg. 58961 (Sept. 24, 2010) (codified at 8 C.F.R. §§ 103, 204, 244 and 274).

[228] *Supra* note 226.

[229] *Id.*

[230] *Id.*

[231] Immigration and Nationality Act § 286(u). Premium processing is available for a fee of $1,225 for specific form types. *See* Instructions for Form I-907, *Request for Premium Processing Service*, OMB No. 1615-0048, Expires 10/31/2014; http://www.uscis.gov/sites/default/files/files/form/i-907instr.pdf (accessed May 14, 2014).

[232] USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Feb. 24, 2014).

[233] USCIS has informed the Ombudsman that call center contractors in Tier 1 and Immigration Service Officers in Tier 2 have access to the exact same posted processing time information as the public.

The Ombudsman urges USCIS to consider new approaches to calculating case processing times. USCIS could provide stakeholders more transparency in processing time information by stating the time, perhaps as a range, within which a certain percentage of cases are completed. For example, posted processing times could state that naturalization applications are adjudicated within six to eight months for 90 percent of cases. Processing times would also be improved if data were updated more timely.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

Responsible USCIS Offices:

Field Operations and Service Center Operations Directorates

USCIS generates "service requests," through the Service Request Management Tool (SRMT), which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, and/or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration experienced by customers and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

Background

Inquiries from individuals and employers are often channeled through SRMT, an electronic system to track and transfer service requests. Where USCIS call center staff cannot resolve a customer's inquiry, the agency uses SRMT to transfer requests to a USCIS local office or service center. An individual can also make an e-Request to generate an SRMT inquiry.[234] The Customer Service and Public Engagement Directorate in most cases does not provide substantive responses to service requests. Rather, the USCIS office of jurisdiction provides the response to the customer.

On March 5, 2012, the Ombudsman issued recommendations regarding service requests.[235] The Ombudsman recommended that USCIS: 1) implement national quality assurance review procedures for service requests and make quality a priority; 2) establish a follow-up mechanism in the SRMT system so that USCIS employees can provide customers with multiple responses (e.g., initial, follow-up, final) for the same service request; 3) expand self-generated e-Requests to all form types; 4) pilot mandatory supervisory review of certain SRMT responses; and 5) post SRMT reports on the USCIS website and standardize the use of SRMT reports to identify spikes, trends, or other customer service issues. USCIS responded on June 14, 2012, stating:

> Quality has been and will continue to be a priority for USCIS – not only in terms of responses to service requests, but with respect to all of our customer interactions and related work. In line with this priority, USCIS formed an operational working group to focus on issues related to the Service Request Management Tool (SRMT). The working group, which held its initial meeting on March 22, 2012, will consider this recommendation as part of its efforts … USCIS would like to reiterate that both the Field Operations Directorate and the Service Center Operations Directorate have established SRMT quality review programs that track and analyze relevant data to ensure quality and identify potential areas for improvement.[236]

The acceptance, review, and resolution of service requests is a major USCIS customer service undertaking. During this reporting period, USCIS received 1,136,262 service requests.[237] The target response time for service requests is 15 calendar days for most inquiries. USCIS aims to respond in five calendar days for an expedite request and 30 days for Deferred Action for Childhood Arrivals denial reopening requests.[238] Approximately 60 percent of SRMTs meet these goals. The most prevalent reasons for contacting NCSC have been non-delivery of documents, processing times, change of address, and typographical error.[239] ***See Figure 18:*** *Top Four Service Request Types.*

[234] *Supra* note 225.

[235] USCIS Webpage, "USCIS Service Requests: Recommendations to Improve the Quality of Responses to Inquiries From Individuals and Employers;" http://www.dhs.gov/uscis-service-requests-recommendations-improve-quality-responses-inquiries-individuals-and-employers (accessed May 7, 2014).

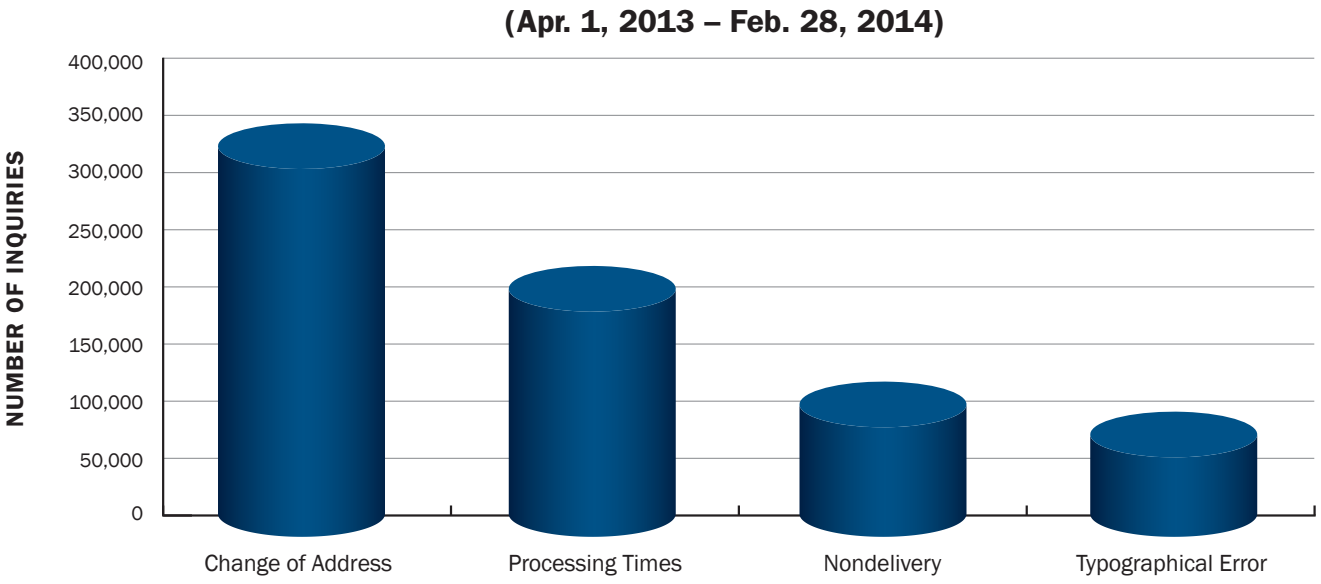
[236] USCIS Response to Recommendation 52 (Jun. 14, 2012); http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/USCIS%20Formal%20Response%20to%20Recommendation%2052.pdf (accessed Apr. 7, 2014).

[237] *Supra* note 224.

[238] *Id.*

[239] *Id.*

FIGURE 18: TOP FOUR SERVICE REQUEST TYPES



Source: Information provided by USCIS (Apr. 28, 2014).

USCIS has expanded e-Request capabilities, and individuals and employers now can generate SRMT inquiries online for cases beyond posted processing times, typographical errors, nondelivery of USCIS notices, and requests for special accommodations at a USCIS office. A total of 67,978 e-Requests were made during this reporting period. This self-generating service request capacity has been promoted through webinars, email messages, focus groups, a brochure distributed by USCIS community relations officers and through USCIS's crowd-sourcing site, Idea Community.

Since the Ombudsman issued its 2012 recommendations, USCIS formed a customer service working group. This working group met weekly between March 2012 and March 2013, and focused on SRMT reports and templates. The group continues to review the SRMT process.

With respect to a follow-up mechanism in SRMT, USCIS continues in various instances to provide an interim response (e.g., the file has been requested) and then close the request with no follow-up. Where the interim response does not answer the inquiry or resolve the problem, the individual or employer is left to initiate another service request or seek redress through other avenues. USCIS is no longer providing estimated case completion times in many responses to SRMTs.

Approximately 70 percent of all requests for assistance filed with the Ombudsman were submitted by individuals and employers who reported that they first attempted to resolve their problems by submitting a service request through the NCSC.[240] Despite these efforts, individuals and employers did not receive responses they considered to be satisfactory and sought assistance from the Ombudsman.

Ongoing Concerns

Responses to customer inquiries are valuable only where they include pertinent information, such as a projected timeline for adjudication or an explanation of processing delays that prompted the service request. Although some USCIS regions and service centers perform quality assurance reviews for service request responses – monitoring a sampling of responses to identify the response time, accuracy in spelling and grammar, and accuracy of the response – USCIS has not yet implemented a national quality assurance review to identify the accuracy or completeness of those responses.

In addition, customers are often told to wait a specified period of time before submitting another service request. In one case assistance request submitted to the Ombudsman, the petitioner stated,

> [A]ll we have received from the USCIS is a generic message stating "your case is under review and you should receive a notice of action in 30 days." Well we have [waited] many such 30 day periods without any action of notice or any clear message from USCIS. USCIS's lack of transparency is frustrating and overwhelming at times. We need help understanding why our case has been pending for an extended duration. Our concern is that USCIS has misplaced our case/paperwork …

[240] Information collected by the Ombudsman on Form DHS-7001, *Case Assistance Form.*

Ongoing delays and uninformative responses increase customer frustration and create additional work for USCIS, due to repeated customer inquiries.

With SRMT, USCIS has an effective process for receiving, tracking and transferring requests for assistance to USCIS field offices and service centers. However, individuals and employers continue to report agency responses are often uninformative and not timely. Ensuring meaningful responses to service requests is critical to successful customer service, and doing so would reduce the overall number of customer service interactions, thereby freeing resources that could be focused on adjudications and other agency needs.

Issues with USCIS Intake of Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*

Responsible USCIS Offices:

Office of Intake and Document Production and the Field Operations and Service Center Directorates

USCIS is not issuing notice to attorneys or accredited representatives when it rejects a deficient Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*. The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, requests for evidence, and denials.

Background

Under the regulations, applicants or petitioners appearing before USCIS may be represented, at no cost to the government, by an attorney or an accredited representative of a recognized organization.[241] Once an attorney or accredited representative has filed a properly completed Form G-28 on behalf of an applicant or petitioner, USCIS is required to serve documents and notices on the attorney or accredited representative.[242] In such instances, USCIS will send original notices and correspondence to the attorney or accredited representative noted on the Form G-28, with a copy to the applicant or petitioner.[243]

Failure to list an applicant or petitioner's attorney or accredited representative, without due cause, would constitute unwarranted interference by USCIS in the attorney or accredited representative client relationship. Failure to provide an attorney of record or accredited representative with notices and documents would greatly impede, if not extinguish, the attorney's or accredited representative's ability to zealously represent the client before USCIS. As such, it is critical that USCIS honor its obligation to serve documents and notices on the attorney of record or accredited representative, as specified in the regulations.[244]

Ongoing Concerns

Stakeholders have raised issues regarding USCIS acceptance of G-28 forms, and USCIS has confirmed that it is not notifying attorneys or accredited representatives where the form has been rejected.[245] When USCIS receives a technically deficient Form G-28, it marks the form invalid and places it upside down at the bottom of the non-record side of the administrative file without notifying the attorney or accredited representative that the Form G-28 was not properly filed. The attorney or accredited representative only becomes aware that he or she is not listed when the client begins to receive notices from USCIS, but the attorney or accredited representative does not. Failure to notify the customer or the attorney or accredited representative of a deficient Form G-28 denies the attorney or accredited representative the opportunity to correct the mistake and denies the customer the right to be represented.

[241] 8 C.F.R. §§ 103.2(a)(3) and 292.5(b). *See* definition of "Accredited Representative" at 8 C.F.R. § 292.1(a)(4).

[242] 8 C.F.R. § 292.5(a). A "properly completed Form G-28" is a notice of appearance containing sufficient information to determine that: 1) an attorney appears to be duly licensed; 2) an attorney-client relationship exists between the submitting attorney and the applicant or petitioner; and 3) there is a valid address to which notices and documents can be sent. A Form G-28 submitted without the required information in Item Numbers 1.-1.b.1 or 2.-2.b. will be rejected." *See* Instructions for Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, OMB No. 1615-01015, Expires 02/29/2016, http://www.uscis.gov/sites/default/files/files/form/g-28instr.pdf (accessed May 14, 2014).

[243] USCIS Policy Memorandum, "Representation and Appearances and Interview Techniques; Revisions to Adjudicator's Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42, PM-602-0055.1" (May 23, 2012); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2012/May/AFMs5-23-12.pdf (accessed Apr. 29, 2014).

[244] 8 C.F.R. § 292.5(a).

[245] *See* USCIS Meeting With the American Immigration Lawyers Association, Questions and Answers (Oct. 23, 2013). "When a G-28 is found to be defective (i.e., invalid) at the Lockbox, the standard procedure is not to recognize it and move the case on for processing. The Lockbox does not send any notice to the attorney when the G-28 is invalid. When a case is rejected and the G-28 is defective (i.e., invalid) only the applicant/petitioner will receive the rejected application/petition and notice, but we do not notify the applicant/petitioner that their G-28 is invalid."

Case Example

After filing Form I-589, *Application for Asylum and Withholding of Removal* on behalf of the client, the attorney did not receive any notices of action or other correspondence from USCIS. The client, however, did receive USCIS mailings. The Ombudsman submitted an inquiry to USCIS and was able to determine that the attorney had inadvertently submitted an outdated version of Form G-28. Due, in part, to the attorney not receiving notice, the applicant missed the asylum interview and was referred to Immigration Court. After the Ombudsman requested further review, USCIS decided that since the Form G-28 was originally filed (and subsequently refiled two weeks later) that it would seek to terminate proceedings and provide the applicant with an affirmative asylum interview.

To resolve issues with Form G-28 rejections, USCIS suggests that legal representatives contact the Lockbox support email (Lockboxsupport@uscis.dhs.gov). This is only helpful where the attorney or accredited representative is aware that the Form G-28 was rejected.[246]

USCIS policy and practice relating to rejected Form G-28s is problematic for a number of practical reasons. Many applicants and petitioners rely on their attorney or accredited representative to receive notices and other correspondence from USCIS because they do not have a secure place to receive mail, they have limited proficiency in English, or they lack knowledge of U.S. legal procedures and rely on their legal representative to ensure deadlines are met and applications are filed with the appropriate office.

USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership. To date, USCIS has not stated when these changes may be implemented, nor has it proposed any interim solutions.

Fee Waiver Processing Issues

Responsible USCIS Offices:

Office of Intake and Document Production and the Field Operations and Service Center Directorates

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report,[247] including improvements made by USCIS, and summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing.

Background

USCIS restructured and improved the fee waiver process in 2010, by publishing Form I-912, *Request for Fee Waiver*. When USCIS published the form, it stated:

> The proposed fee waiver form is the product of extensive collaboration with the public. In meetings with stakeholders, USCIS heard concerns that the absence of a standardized fee waiver form led to confusion about the criteria that had to be met as well as the adjudication standards … The new proposed fee waiver form is designed to verify that an applicant for an immigration benefit is unable to pay the fee for the benefit sought. The proposed form provides clear criteria and an efficient way to collect and process the information.[248]

USCIS also published guidance on fee waiver adjudication standards in a 2011 Policy Memorandum titled *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 AD11-2*.[249] This guidance supersedes and rescinds all prior memoranda regarding fee waivers.[250]

[246] American Immigration Lawyers Association, AILA FAQs: "Completing the New G-28 Form Answers Provided by USCIS Office of Intake and Document Production" (Oct. 11, 2013). *See also* Alan Lee, "G-28 Authorization of Representation Becomes a Trial for Attorneys/Other Representatives" ILW.com (Nov. 13, 2013); http://discuss.ilw.com/showthread.php?36220-Article-G-28-Authorization-Of-Representation-Becomes-A-Trial-For-Attorneys-Other-Representatives-by-Alan-Lee (accessed Jan. 17, 2014). Although USCIS has advised contacting the Lockbox Support e-mail for assistance with G-28 issues, the Lockbox filing tips clearly state, "If your client received a receipt notice, but you did not, it is likely that your G-28 was not properly filed. Do not send a follow-up Form G-28 to a Lockbox facility. Send follow-up Forms G-28 to the USCIS office where the case was assigned. Be sure to include the Receipt Number of the associated application/petition on Form G-28 in Part 3, Question 7." USCIS Webpage, "G-28 Notice of Entry of Appearance as Attorney or Accredited Representative: Tips for Lockbox Facility Filings" (Feb. 12, 2014); http://www.uscis.gov/forms/g-28-notice-entry-appearance-attorney-or-accredited-representative-tips-lockbox-facility-filings (accessed Jan. 17, 2014).

[247] Ombudsman Annual Report 2013 (Jun. 2013), pp. 47-49; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 29, 2014).

[248] USCIS Webpage, "USCIS Published First-Ever Proposed Fee Waiver Form" (Nov. 22, 2010); http://www.uscis.gov.edgesuite-staging.net/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0fb5ac6b49cd9210VgnVCM100000082ca60aRCRD&vgnextchannel=7546757a6e34b210VgnVCM100000082ca60aRCRDaRCRD (accessed Apr. 29, 2014).

[249] USCIS Policy Memorandum, "Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to the Adjudicator's Field manual (AFM) Chapter 10.9, AFM Update AD11-26" (Mar. 13, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf (accessed Apr. 29, 2014).

[250] *Id.*

USCIS revised Form I-912 and instructions in May 2013.[251] USCIS also published amended tips on fee waivers on its website.[252] The tips contain useful information and clarifications, including contact information for the receipting centers, referred to as Lockboxes (Lockboxsupport@uscis.dhs.gov), which can be used to inquire with USCIS about fee waiver denials.

Pursuant to established protocols, the Ombudsman does not accept fee waiver case assistance requests unless the applicant first attempts to resolve the problem through the Lockbox. The USCIS Lockbox support aims to respond to inquiries within five business days.

Ongoing Concerns

Calculating Household Size. The revised Form I-912 instructions changed the calculation of household size. The household total is critical, as it determines by reference to the Federal Poverty Guidelines whether the individual is income-eligible for a fee waiver.[253] It is unclear whether the applicant is included in counting the household size; some sections of Form I-912 and the instructions indicate the applicant should be counted, while others do not.[254]

In addition, the revised Form I-912 and instructions, for the first time, call for counting non-family members in household size, under certain circumstances. The 2011 Policy Memorandum does not call for non-family members to be counted in the household size calculation.[255] These inconsistencies cause confusion and can lead to unnecessary denials.

Fee Waiver Rejections. The Ombudsman's 2013 Annual Report recounted stakeholder concerns regarding multiple rejections of waiver applications by the USCIS Lockbox facilities, and inconsistent application of fee waiver standards. These concerns continued. The Ombudsman received reports that multiple, identical submissions were necessary before the request was favorably adjudicated, often based upon the same evidence included with the original submission. Stakeholders received rejections and denials even after submitting income documentation such as tax returns, or when USCIS disputes that a public benefit qualifies as a means-tested benefit, despite evidence presented to show that it is such a benefit. Stakeholders also recounted inconsistent decisions on fee waiver applications which, in all substantive respects, are identical. In a June 27, 2013 letter to USCIS, stakeholders stated:

> We are deeply concerned about the widespread pattern of denials of eligible applicants that our organizations and networks have been experiencing over the last few months … We are also concerned that USCIS's own systems for ensuring quality control have not identified this problem. While we appreciate USCIS's willingness to review individual case examples, we feel a case-by-case is not effective in this instance, and we are seeking a systemic resolution to what we see as a systemic problem.[256]

USCIS has rapidly sought to resolve individual cases brought to the agency's attention by the Ombudsman, but systemic issues remain and require a review of guidance and form instructions, as well as Lockbox intake procedures. The Ombudsman urges USCIS to host a public engagement on this program to hear stakeholder feedback.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

Responsible USCIS Office:

Administrative Appeals Office

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated

[251] USCIS Webpage, "Forms Update" (May 2013); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[252] USCIS Webpage, "Tips for Filing Form I-912, Request for Fee Waiver" (Jan. 15, 2014); http://www.uscis.gov/forms/tips-filing-form-i-912-request-fee-waiver (accessed Apr. 21, 2014).

[253] *See* Form I-912P, *HHS Poverty Income Guidelines for Fee Waiver Request* states how much income is the limit per household size for fee waiver eligibility. *See* USCIS Webpage; http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[254] Form I-912, *Request for Fee Waiver*, instructions at Section 5, line 9 asks, "other than you, how many others in your household depend on the stated income?" This directs that the applicant should not count himself. Section 5 does not have any other place to include the applicant. However, elsewhere on the Form I-912, at question 3 on page 4, it indicates that applicant should include him or herself in the household total. The Poverty Guidelines used for fee waivers are published as Form I-912P, *HHS Poverty Guidelines for Fee Waiver Request*; *see* USCIS Webpage, "I-912P, HHS Poverty Guidelines for Fee Waiver Request" (Jan. 28, 2014); http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[255] *Supra* note 249.

[256] Letter from the Catholic Legal Immigration Network, Hebrew Immigrant Aid Society, and World Relief (Jun. 27, 2013).

lengthy processing times once cases reach the AAO and revised its website. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand.

Background

With appellate jurisdiction over approximately 55 different immigration applications and petitions, the AAO is charged with reviewing certain decisions issued by USCIS service centers and district offices.[257] The authority to adjudicate appeals of these decisions is delegated to the AAO by the Secretary of Homeland Security, pursuant to the Homeland Security Act of 2002.[258]

In 2005, the Ombudsman published recommendations focusing on the transparency, quality and timeliness of the decisions issued by the AAO.[259] More than eight years later, USCIS has eliminated lengthy processing times for all case types once cases reach the AAO.[260] Additionally, the AAO has updated and revised its website content to provide AAO contact information and filing instructions. USCIS has also recently revised Form I-290B, *Notice of Appeal or Motion* and instructions; a new version was made available for use on February 12, 2014.[261]

Ongoing Concerns

Publication of an AAO Practice and Procedures Manual. Stakeholders regularly note that AAO procedures could be made more transparent through the publication of a practice manual providing procedural guidance.[262] The U.S. Department of Justice's (DOJ) Board of Immigration Appeals (BIA) and Executive Office for Immigration Review publish practice manuals as a public service to the parties who appear before them. These practice manuals are periodically updated and have been highly regarded by the public as being helpful guides and fostering greater uniformity in practice and decisions.[263] An AAO practice manual that provides substantive, procedural, and operational information in plain English and a user-friendly format would be similarly useful. Over the last year, the AAO has confirmed to the Ombudsman that it started drafting a practice manual similar in structure to that of the BIA; however, the AAO has not released a draft document or publicly stated a proposed publication date.[264]

Publication of Revised Regulations. Stakeholders have expressed concern regarding the AAO's autonomy, explaining that it is often thought of as an extension of USCIS service centers and field offices, and not an independent review panel.[265] Organizationally, the AAO is part of USCIS, but is independent of any specific USCIS district office or service center. Like other USCIS components, the AAO follows agency guidance and does not create new policy. The AAO consults with the USCIS Office of the Chief Counsel if an appeal involves novel or complex issues requiring legal interpretation and to develop uniform agency guidance. The AAO may also engage with USCIS adjudicating components on operational matters as well as on broad adjudication issues and trends.[266]

The lack of regulations governing the AAO's operations and role with respect to USCIS policies creates an impression among the public that the AAO merely "rubber-stamps" USCIS decisions. To avoid any appearance of bias, regulations could clearly articulate that the AAO is intended to function as an autonomous subcomponent of the agency, charged with providing appellants with a venue for administrative review of their immigration benefits claims.

[257] 8 CFR § 103.1(f)(3)(iii).

[258] Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective Mar. 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).

[259] Ombudsman Recommendation 20 (Dec. 6, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf (accessed Apr. 29, 2014).

[260] USCIS Webpage, "AAO Processing Times" (May 12, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times (accessed Apr. 6, 2014). The AAO currently lists all case types as being "current," which the AAO defines as "[w]ithin six months or less from the time when [the AAO received] the appeal."

[261] USCIS Webpage, "Forms Update" (Jan. 2014); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[262] Ombudsman Teleconference, "The USCIS Administrative Appeals Office (AAO)" (Dec. 19, 2012).

[263] *See* BIA Practice Manual; http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm, and Executive Office for Immigration Review's Immigration Court Practice Manual; http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (both accessed Apr. 6, 2014).

[264] Information provided by the AAO (Feb. 7, 2013 and Mar. 5, 2014).

[265] *Supra* note 262.

[266] Information provided by USCIS (Dec. 18, 2012).

Designating and Publishing Precedent Decisions. Pursuant to the regulations, AAO decisions may be designated as precedent by the Secretary of Homeland Security, with the Attorney General's approval.[267] The process for designating a precedent decision, described on the USCIS website, involves review by no fewer than seven entities within USCIS, as well as the Attorney General.[268] Due to this cumbersome process, precedent decisions are infrequently issued. The AAO did not issue a precedent decision in FY 2013; in FY 2012, the AAO published only one precedent decision;[269] no precedent decisions were issued in FY 2011;[270] and in FY 2010, the AAO published only two precedent decisions.[271]

More AAO precedent decisions would improve consistency in adjudications by offering USCIS adjudicators clearer paths to follow in assessing the legal and policy issues encountered in their assigned cases.[272] Since precedent decisions serve as binding legal authority for determining later cases involving similar facts or issues, the publication of more precedent decisions would also mean appellants and legal representatives would have additional information regarding legal and evidentiary requirements. While the AAO recognizes the need for precedent decisions, at the Ombudsman's 2013 Annual Conference, the AAO confirmed there is no current plan to allow it to independently make such designations.

Create a Searchable Index of Decisions. While AAO non-precedent decisions are generally made available on the USCIS website within weeks of issuance, they are not cataloged with a searchable index for quick review and retrieval. Creating a searchable index is not an AAO priority, given the availability of commercial legal research services. This, however, fails to take into account that *pro se* appellants and community-based organizations representing low-income immigrants may not be able to afford costly private research services. A searchable index of AAO decisions, similar to what other government agencies, such as the BIA, provide, would better serve USCIS customers.

Timely Forwarding of Appeals to the AAO. The AAO considers a case to be "current" as long as it is decided within six months from the date it is received by the AAO, and does not include the time the appeal was pending initially with the USCIS field office or service center of original jurisdiction. Appeals or motions are not filed directly with the AAO; instead they are filed with the USCIS field office, service center or Lockbox that made the decision.[273] Generally, upon submission of an appeal, the USCIS office that denied the application or petition is responsible for reviewing the appeal, and determining within 45 days of receipt whether to reverse the decision and reopen the case.[274] This is referred to as "initial field review." If the appeal is meritorious, the case will be reopened or reconsidered, whereas an unfavorable review results in the appeal being forwarded "promptly" to the AAO.[275] Stakeholders report that USCIS field offices and service centers are holding cases well beyond the 45-day period specified in regulations, prior to forwarding them to the AAO.[276] There are also delays in forwarding appeals remanded from the AAO back to USCIS field offices and service centers.

[267] 8 C.F.R. § 103.3(c).

[268] *See* USCIS webpage, "Administrative Appeals Office: Precedent Decisions;" http://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf (accessed Jan. 28, 2014).

[269] *Matter of Skirball Cultural Center,* 25 I&N Dec. 799 (AAO 2012); http://www.justice.gov/eoir/vll/intdec/vol25/3752.pdf (accessed Mar. 18, 2013).

[270] *Supra* note 266.

[271] *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf (accessed Mar. 18, 2013), and *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf (accessed Mar. 18, 2013).

[272] *Supra* note 262.

[273] *See* USCIS Webpage, "Direct Filing Address for Form I-290B, Notice of Appeal or Motion" (Apr. 3, 2014); http://www.uscis.gov/i-290b-addresses (accessed Apr. 10, 2014).

[274] 8 C.F.R. § 103.3(a)(2)(iii); *see also* USCIS webpage "The Administrative Appeals Office (AAO), Appeal Process" (Apr. 17, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao (accessed Apr. 29, 2014). Both indicate the appeal should be forwarded to the AAO within 45 days. However, the Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov.edgesuite-staging.net/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1482.html#0-0-0-286 (accessed Apr. 29, 2014) is silent on the number of days within which a decision must be made on the appeal and only states that if the arguments fail to overcome the basis for denial, "the appeal and related record must be promptly forwarded to the AAO."

[275] 8 C.F.R. § 103.3(a)(2)(iv); The Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov.edgesuite-staging.net/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1482.html#0-0-0-286 (accessed Apr. 29, 2014). The regulations and USCIS field guidance do not make clear what constitutes "promptly" for purposes of forwarding an appeal to the AAO.

[276] *Supra* note 262. Pursuant to 8 C.F.R. § 103.3(a)(2)(iii), "Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal."

The AAO and other USCIS components are aware of this issue, which has become more apparent with the AAO eliminating its own processing delays. The AAO noted that because USCIS field offices do not necessarily use the same electronic case management system, the AAO cannot determine electronically when an appeal is received by a field office, how long the appeal remains pending, or when the appeal has actually been forwarded to the AAO for review.[277] The AAO did state that recent revisions to the Form I-290B and instructions, including a drop-down list to select the USCIS office that issued the denial decision,[278] should facilitate easier tracking of appeals. Additionally, USCIS informed the Ombudsman that the agency established a working group last year to improve tracking of appeals through the initial review process at USCIS field offices. As a result of this effort, USCIS stated that it will issue in the third quarter of FY 2014 standard operating procedures on reporting requirements for the disposition of Forms I-290B and conduct in FY 2014 a full inventory of this form type.

AAO Decisional Data. In the 2005 recommendations, the Ombudsman noted that statistics on AAO decision-making are not published by USCIS.[279] In its response to those recommendations, USCIS indicated that the AAO maintains detailed data on the number of appeals received, the number of adjudicator decisions that are sustained (approved) and dismissed (denied), and the total number of decisions issued each year.[280] At that time, USCIS stated that once technical issues were resolved, the data would be added to the USCIS website. While it has yet to be published on the agency website, below is AAO data, provided by USCIS, for select form types. ***See Figure 19:*** *AAO Select Receipts, Sustains, and Dismissals.* For initial benefit adjudication data, ***See Appendix 5:*** *Initial Benefit Adjudication Data for Commonly Appealed Form Types.*

USCIS noted that this data provides the disposition of appeals that have been transferred to the AAO, and does not include favorable dispositions during initial field review. Also, this data does not include other AAO dispositions (e.g., rejections, withdrawals, and remands).

The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types. Publication of AAO decision statistics on a quarterly or annual basis would enhance transparency in administrative appeals.

FIGURE 19: AAO SELECT RECEIPTS, SUSTAINS, AND DISMISSALS

	2011			2012			2013		
	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed
I-129 H-1B, Specialty Occupation	723	15	585	523	19	985	578	12	858
I-129 L-1, Intracompany Transferee	257	4	83	254	26	317	269	37	508
I-140 EB-1, Extraordinary Ability	206	11	184	203	14	282	179	8	193
I-140 EB-3, Professionals	533	24	651	392	77	1803	423	93	1619
I-212, Request for Admission After Deportation or Removal	179	9	193	115	40	161	86	36	88
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	574	29	458	524	20	320	339	28	352
I-601, Waiver of Grounds of Inadmissibility	1347	435	1215	1167	490	1929	997	496	1737
I-918, U Nonimmigrant Status	216	12	190	221	4	183	166	0	119
N-600, Certificate for Citizenship	226	39	168	173	11	131	193	12	105

Source: Information provided by USCIS (Apr. 25, 2014).

[277] Information provided by USCIS (Feb. 7, 2013).

[278] *See* Form I-290B, *Notice of Appeal* or *Motion* and instructions on USCIS Webpage; http://www.uscis.gov/i-290b (accessed Apr. 10, 2014). Part 3, item 6 "USCIS Office Where Last Decision Issued" of Form I-290B asks the applicant to enter (if nonelectronic filing) or select from the drop-down (if electronic filing) the name of the office that denied or revoked the petition or application.

[279] *Supra* note 159.

[280] USCIS Response to Recommendation 20 (Dec. 19, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf (accessed Jan. 27, 2014).

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Responsible USCIS Office:

Enterprise Services Directorate

Stakeholders reported issues with the USCIS Systematic Alien Verification for Entitlements (SAVE) program verifying a foreign national's eligibility with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from the U.S. Department of State, DHS, DOJ, and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit, including drivers' licenses.[281] USCIS has taken steps to resolve certain quality issues but problems persist. In April 2013, the Ombudsman convened a working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data quality challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Background

USCIS Verification Information Systems (VIS) is the technical infrastructure that enables USCIS to operate SAVE and E-Verify.[282] It is a nationally accessible database of selected immigration status information containing in excess of 100 million records. In 2013, VIS responded to approximately 25 million E-Verify queries, and approximately 11 million SAVE queries.[283] The E-Verify and SAVE programs rely on multiple data systems to verify an individual's immigration status.

On September 19, 2012, the DHS Office of the Inspector General (OIG) issued a report on the SAVE program. The OIG recommended implementation of a process to compile and trace SAVE benefit-applicant requests and referrals, and a process for SAVE database owners to report to the USCIS Verification Division whether changes to SAVE benefit-applicant records were made.[284] USCIS concurred with the first recommendation. USCIS responded to the second recommendation by stating that the SAVE program was not the owner of the records it uses to determine immigration status, and that the SAVE program does not have the authority to require database owners to report corrections to applicants' records.[285] The OIG directed and USCIS is working to develop internal procedures to report to the SAVE program whether USCIS records have been changed.[286] Since the SAVE program uses non-USCIS data, the Ombudsman offered to help coordinate with other DHS components and federal offices to develop a reporting system as the OIG suggested.

In response to the OIG report, USCIS and DHS partners have worked to improve the quality of data used to verify immigration status with the SAVE program. Specifically, the SAVE program has automated certain processing steps for select user agencies that eliminate the need for manual processing requests. The SAVE program now interfaces with USCIS Electronic Information System (ELIS) and CLAIMS 3, the central USCIS case management system, as well as DOJ systems.[287]

Starting in April 2013, the Ombudsman began hosting the Data Quality Forum to address data sharing challenges between USCIS and other federal agencies. Participants include DOJ, SSA, and DHS. Topics have ranged from U.S. Customs and Border Protection's (CBP) main data system, to the automation of the Form I-94, *Arrival/Departure Record*, to data stewardship policies and service level agreements.

The Ombudsman's 2013 Annual Conference included a roundtable discussion on USCIS data quality enhancements, user challenges, and access concerns with panelists from the USCIS Enterprise Services Directorate, the DHS Office of Civil Rights and Civil Liberties, and a state Refugee and Asylee services office.[288] They shared information on recent USCIS systems enhancements and user frustrations and challenges.

[281] USCIS Webpage, "SAVE;" http://www.uscis.gov/save.

[282] DHS Privacy Impact Assessment, "Verification Information System Supporting Verification Programs" (Apr. 1, 2007); http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf (accessed Jun. 11, 2014).

[283] *Supra* note 224.

[284] U.S. Department of Homeland Security Office of Inspector General Report, "U.S. Citizenship and Immigration Services Systematic Alien Verification for Entitlements Program Issues" (Sept. 19, 2012); http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-125_Sep12.pdf.

[285] *Id.*, p.8.

[286] *Id.*

[287] *Supra* note 224.

[288] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Recently, in anticipation of new immigration legislation, USCIS Verification began system testing high volume use of the E-Verify and SAVE programs.[289] The SAVE program enhanced its monitoring and compliance to ensure agency participants use the program to verify the immigration status information of benefit applicants in a fair, appropriate and lawful manner.

Ongoing Concerns

In the last year, USCIS improved its data sharing capabilities and quality. VIS quality assurance efforts are also ongoing, but issues remain:

Correcting Data Errors. USCIS interfaces with multiple IT systems to compile information into the Central Index System (CIS). This system is a repository of electronic data that provides its users access to biographical, and current and historical status information. CIS has 15 interfaces with eight other IT systems. This is one of the many systems E-Verify and the SAVE program use to verify immigration status for benefits-granting agencies. E-Verify and the SAVE program depend on the responsible agency to make the correction or addition to the feeder system, but cannot force compliance and at times cannot verify corrections. An enforceable policy for follow-up and verification of corrections resulting from a system's error report is needed.

Interagency Coordination. Government agencies and employers rely on information from USCIS systems in order to administer benefits and entitlement programs, and to make hiring and other significant decisions. Careful coordination is needed in exchanges between record owners and USCIS to ensure the accuracy of data. This requires a commitment to invest time and resources to improve systems. To date, USCIS has taken steps toward improving data quality by, for example, developing internal working groups and sponsoring research projects to assess data quality. However, USCIS does not control all data it relies on to verify immigration status. Active measures are needed to ensure data quality practices remain effective and keep pace with the rapid development of new information systems technologies.

USCIS relies on accurate data to strengthen and effectively administer the immigration system. When data quality falls short, customers experience delays in benefits and inaccurate decisions. The Ombudsman values USCIS's contribution to the Data Quality Forum, and looks forward to continuing to host meetings to improve interagency coordination and data quality.

Problems with Payment of the Immigrant Visa Fee via ELIS

Responsible USCIS Office:

Office of Transformation Coordination

In May 2013, USCIS began requiring that immigrant visa recipients pay, via USCIS's ELIS system, the $165 fee to cover the cost of producing their Permanent Resident Cards.[290] Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English.

Background

During the 2014 reporting period, USCIS continued its "Transformation" efforts, the fundamental reengineering of USCIS's business processes from paper-based adjudications to an electronic case review and management environment.[291] On May 22, 2012, USCIS launched the foundational release of the new system, ELIS, which integrates with other DHS systems such as U.S. Immigration and Customs Enforcement's Student and Exchange Visitor Information System and CBP's Arrival-Departure Information system.[292] This release included online account-based filing of Forms I-526, *Immigrant Petition by Alien Entrepreneur,* and I-539, *Application to Extend/Change Nonimmigrant Status.*[293]

[289] *Supra* note 220.

[290] USCIS Webpage "USCIS Immigrant Fee" (Aug. 21, 2013); http://www.uscis.gov/forms/uscis-immigrant-fee (accessed Apr. 29, 2014). USCIS offered its email for feedback at usics-elis-feedback@uscis.dhs.gov.

[291] *See generally* USCIS Webpage, "USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 28, 2014).

[292] Information provided by USCIS (Apr. 28, 2014).

[293] *See* USCIS Webpage, "USCIS ELIS, Forms and Fees Available in USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 29, 2014). *See* section of this Report on "Problems with Payment of the Immigrant Visa Fee via ELIS."

In anticipation of its second release, USCIS held public engagements on the immigrant fee payment process via ELIS in May and August 2013.[294] Callers expressed concerns that some visa applicants have no computer access; and others, who can access a computer, do not have the computer-familiarity necessary to make an online payment. Callers also raised concerns about frequent error messages from ELIS; a non-intuitive registration process for the accounts; the barriers presented to certain visa applicants by the English-only interface; and the lack of technical support available to users. One attorney on the call described the new process as an "outrageous problem."

Since the USCIS immigrant fee payment process was added to ELIS, almost 500,000 ELIS accounts have been established by new immigrants.[295] According to USCIS, approximately 15 percent of new immigrants using ELIS pay after they enter the United States.[296]

The ELIS Customer Contact Center responded to 18,007 email inquiries from 42 countries since October 2013. Links are available on the ELIS landing page where customers create and log into accounts, and on the ELIS Help and Customer Support page.[297] The USCIS call center has 14 ELIS technical support agents to address technical inquiries. Despite not accepting overseas calls, many customers abroad are able to contact the ELIS technical support agents with the use of online communications for voice calling. Call center technical support agents have answered 65,871 telephonic inquiries since August 2013.[298]

Ongoing Concerns

Since June 2013, the Ombudsman has been receiving stakeholder reports that immigrant visa recipients are having difficulty using the new ELIS fee payment process. Of greatest concern are reports from organizations that represent low-income immigrant visa applicants who are not technologically proficient and do not typically have computer access. In addition to lacking access and know-how, these immigrants may not have bank accounts or credit/debit cards. Since ELIS does not permit attorneys or other representatives to pay the immigrant fee on behalf of their clients, these visa recipients face significant barriers to completing the immigration process. Stakeholders reported that individuals with valid immigrant visa packets were remaining overseas after consular interviews because they do not know how to use the ELIS system and feared coming to the United States without payment of the fee.

In August 2013, USCIS issued new instructions, *F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee*, indicating if an individual is unable to pay the fee while abroad, the individual may travel to the United States, without penalty, and make the payment following admission.[299] However, these instructions are embedded in a three-page brochure, and they provide little information on how that payment should be made, and no information specifying what a customer should do if the customer does not receive a Request for Payment from USCIS. The customer guide is available in Chinese (Mandarin), French, Hindi, Korean, Portuguese, Spanish, Tagalog, Urdu and Vietnamese, as well as English. USCIS acknowledged that the translations contain inaccurate language stating that the fee must be paid abroad, and there is no plan to revise this literature, which is distributed after the consular appointment.

[294] *See* USCIS Webpage, "USCIS Immigrant Fee Transition to USCIS ELIS (Electronic Immigration System)" (May 10, 2013); http://www.uscis.gov/outreach/notes-previous-engagements/uscis-immigrant-fee-transition-uscis-elis-electronic-immigration-system (accessed Apr. 28, 2014); USCIS Customer Service and Public Engagement Directorate, "Webinar on Paying the USCIS Immigrant Fee" (Aug. 16, 2013); http://www.uscis.gov.edgesuite-staging.net/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=039b3948918c7310VgnVCM100000082ca60aRCRD&vgnextchannel=039b3948918c7310VgnVCM100000082ca60aRCRD (accessed May 14, 2014).

[295] *Supra* note 136.

[296] Information provided by USCIS (May 12, 2014). Approximately 50,000 accounts have been created for individuals filing Form I-539.

[297] USCIS Webpage, "USCIS Electronic Immigration System (USCIS ELIS) Log In;" https://elis.uscis.dhs.gov/cislogin/CISControllerAction.do?TAM_OP=login&ERROR_CODE=0x00000000&URL=%2F&AUTHNLEVEL=&OLDSESSION (accessed May 9, 2014); "USCIS ELIS Help and Customer Support" (Jan. 27, 2014); http://www.uscis.gov/uscis-elis/uscis-elis-help-and-customer-support (accessed May 9, 2014).

[298] Information provided by USCIS (May 7, 2014).

[299] USCIS Webpage, "F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee" M-1113 (Aug. 2013); http://www.uscis.gov/sites/default/files/USCIS/Resources/How%20Do%20I%20Guides/F4en.pdf (accessed Apr. 28, 2014).

The Ombudsman suggested that USCIS take the following ameliorative actions:

- Change ELIS to allow an attorney or accredited representative with a Form G-28, on file to make the fee payment on the client's behalf. In a meeting with USCIS in April 2014, Transformation leaders stated USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient. USCIS likely will schedule a public engagement session when such changes are unveiled.
- Revise the foreign language instructions indicating that it is compulsory to pay the fee from abroad, and revise the instructions in English on the USCIS website to simply and clearly state that the applicant has the option of paying from overseas or in the United States, wherever the individual can access ELIS.
- Translate ELIS questions into Spanish and other languages.

Conclusion

USCIS continues to conduct robust public engagement. However, there are ongoing concerns with the AAO's authority and independence, the fee waiver process, and the methodology used to calculate processing times. The Ombudsman will continue to monitor USCIS's customer service efforts and looks forward to future developments.

Recommendations Updates

Employment Eligibility for Derivatives of Conrad State 30 Program Physicians

Responsible USCIS Offices:

Service Center Operations Directorate, Office of Policy and Strategy, and Office of the Chief Counsel

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians.*[300]

Background

USCIS interprets relevant statutory and regulatory provisions as permitting J-2 nonimmigrant dependents of a J-1 (Exchange Visitor) medical doctor accepted into the Conrad State 30 program,[301] which provides a waiver of the two-year home-country physical presence requirement, to change only to H-4 nonimmigrant status. USCIS will not allow change of status to another, employment-authorized nonimmigrant status, even where the dependent independently qualifies for such status.[302] This policy appears to be at odds with the legislative intent, may have a chilling effect on Conrad State 30 applications, and may place an undue financial burden on international medical graduates and their families.

Recommendations

Accordingly, the Ombudsman recommended that USCIS:

1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for Conrad State 30 program waivers to change to other employment-authorized nonimmigrant classifications; or
2) 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.

Improving the Quality and Consistency of Notices to Appear

Responsible USCIS Offices:

Field Operations and Service Center Operations Directorates, Office of Policy and Strategy, and Office of the Chief Counsel

On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices to Appear.*[303]

Background

Under the Immigration and Nationality Act, three agencies within DHS may initiate a removal proceeding by preparing and serving Form I-862, *Notice to Appear* (NTA) on a respondent and the Immigration Court.[304] These agencies include USCIS, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection.[305] While statutory and regulatory provisions outline the initiation, nature, and potential outcome of removal proceedings, agency policy memoranda makes clear enforcement priorities, procedures for drafting and reviewing NTAs, and

[300] Ombudsman Recommendation, "Employment Eligibility for Derivatives of Conrad State 30 Program Physicians" (Mar. 24, 2014); http://www.dhs.gov/publication/cisomb-recommendation-work-authorization-j2-physician-dependents (accessed Jun.17, 2014).

[301] Immigration and Nationality Act (INA) § 214(l). On September 28, 2012, through enactment of Pub. L. No. 112-176, the Conrad State 30 program was extended until September 30, 2015.

[302] Information provided by USCIS (Sept. 17, 2013). Prior to 2011, USCIS regularly approved requests for change of status for J-2s to employment-authorized nonimmigrant classifications, such as H-1B Specialty Occupation Worker, after the principal J-1 obtained a Conrad State 30 waiver. According to USCIS, subsequent to a revision of Form I-129, *Petition for a Nonimmigrant Worker*, in 2010, the agency began collecting information pertaining to J-2s in order to determine whether the principal was subject to the two-year home-residency requirement. It then began denying change of status applications filed by these dependents to change to classifications other than H-4. USCIS maintains that its policy has not changed in this area. Rather, the agency claims that denial of these applications for change of status is due to the collection of new information by USCIS via the revised Form I-129 (i.e., USCIS is now able to easily identify dependents who are subject to the two-year home-residency requirement).

[303] Ombudsman Recommendation, "Improving the Quality and Consistency in Notices to Appear (NTAs)" (Jun. 11, 2014); http://www.dhs.gov/publication/cisomb-nta-recommendation (accessed Jun.17, 2014).

[304] INA § 239(a); 8 U.S.C. § 1229(a) (2006); and 8 C.F.R. § 1003.14(a).

[305] This recommendation does not address the issuance of Notices to Appear (NTAs) by U.S. Customs and Border Protection (CBP) agents. It does discuss U.S. Immigration and Customs Enforcement's (ICE) priorities and legal review related to NTAs.

the proper exercise of prosecutorial discretion. In November 2011, USCIS released revised guidance on issuance of NTAs and referral of certain cases to ICE.[306] The guidance focused on DHS-established enforcement priorities and is an essential mechanism to streamline the NTA issuance process to promote efficiency while enhancing national security and public safety. Effective communication and collaboration to actualize DHS's priorities is a challenging but critical goal for NTA issuance.

In USCIS, a wide range of officials in asylum, field and service center locations may draft and issue NTAs.[307] There is no requirement that these NTAs be reviewed and approved by attorneys in the USCIS Office of the Chief Counsel (OCC) or in any other DHS legal program. OCC attorneys are not typically involved in designing or delivering training on NTA issuance.[308] Instead, USCIS offices and directorates have developed their own protocols and instructional materials, some of which have not been updated in years.[309] Stakeholder and case assistance feedback brought to the attention of the Ombudsman indicates the lack of attorney involvement in USCIS-generated NTAs has contributed to the issuance of unnecessary and inaccurate charging documents, creating additional work for ICE and hardship to individuals and families. The ensuing inefficiencies also undermine the intent of the 2011 policy guidance – increased efficiency and coordination.

USCIS does not track the number of NTAs that are returned as undeliverable, rejected by ICE, or terminated by the Executive Office for Immigration Review (EOIR), making it difficult to evaluate the agency's overall performance in this area.[310] However, the Ombudsman has identified a need for greater transparency and coordination within USCIS, and between USCIS, ICE and EOIR. The recommendations below seek to ensure that those placed into removal receive a full and fair hearing, including proper notice of all charges and a meaningful opportunity to respond.

Recommendations

To improve the quality and consistency of NTAs, and to ensure they are in compliance with DHS and USCIS policies, the Ombudsman recommends that USCIS:

1) Provide additional guidance for NTA issuance with input from ICE and EOIR;

2) Require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training; and

3) Create a working group with representation from ICE and EOIR to improve tracking, information-sharing, and coordination of NTA issuance.

[306] USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (Nov. 7, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf (accessed Apr. 29, 2014).

[307] Information provided by USCIS (Mar. 22, 2013).

[308] *Id.*

[309] *Id.* USCIS Office of the Chief Council does not have any separate guidance related to legal sufficiency review of NTAs by its headquarters or field attorneys.

[310] *Id.* USCIS informed the Ombudsman that the agency does not generally maintain a system to track the number of NTAs returned to USCIS by ICE, CBP or the Executive Office for Immigration Review due to erroneous information or faulty drafting. The agency also does not track how many of these returned NTAs were mailed again or delivered in person to the same respondent. According to USCIS, the agency "does not track the number of NTAs returned as undeliverable on a national level." Information provided by USCIS (Oct. 1, 2013).

Appendix 1: 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 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) CONSULTATION—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;

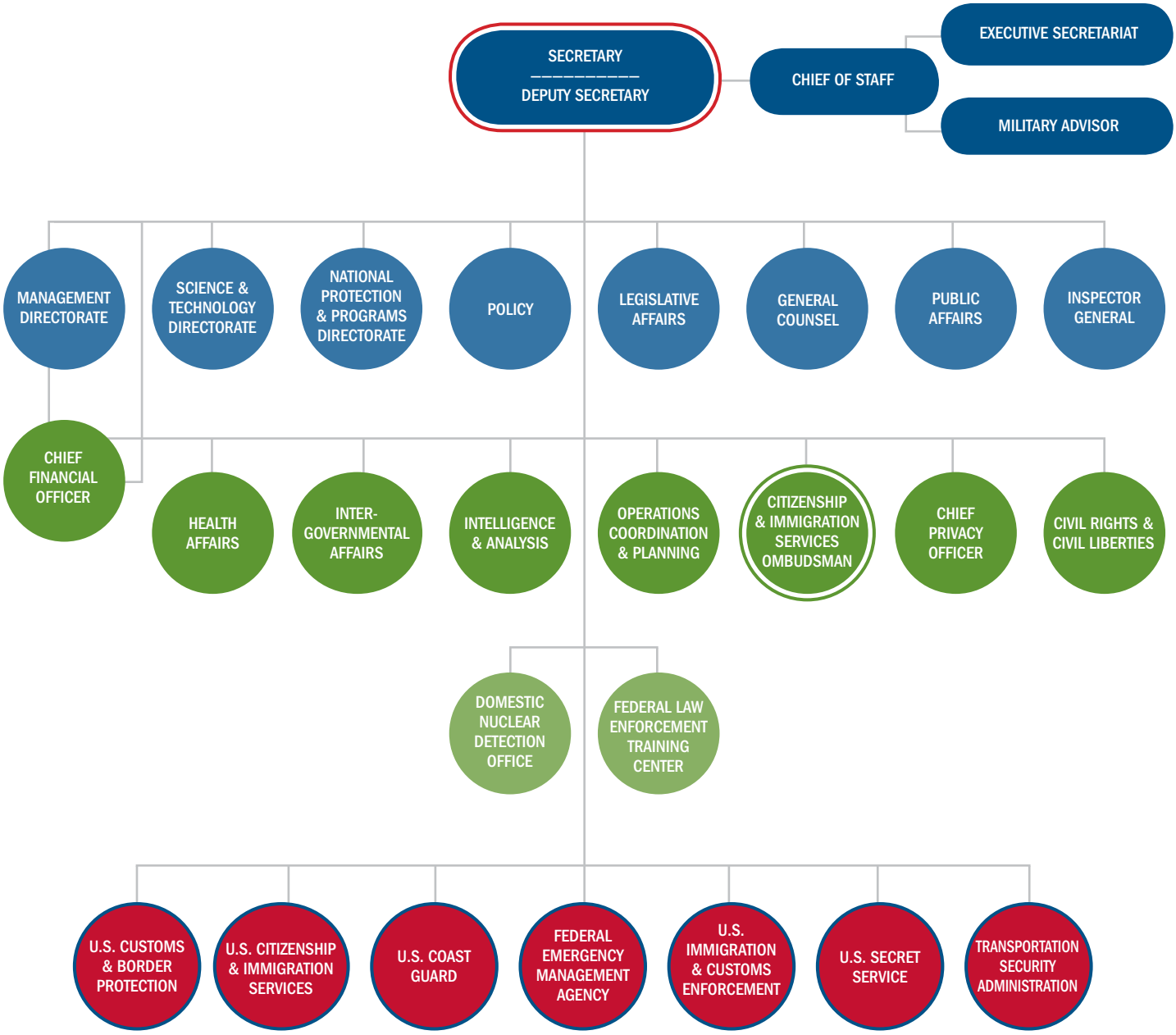
(B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(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.

Appendix 2: U.S. Department of Homeland Security Organizational Chart



Appendix 3: Ombudsman Scope of Case Assistance

Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Homeland Security

Requests for Case Assistance: Scope of Assistance Provided to Individuals

June 2013

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office), established by the Homeland Security Act of 2002, assists individuals and employers in resolving case problems with U.S. Citizenship and Immigration Services (USCIS). The Ombudsman's Office also reviews USCIS policies and procedures, and recommends changes to mitigate identified problems in USCIS's administrative practices.

Pursuant to this statutory authority, the Ombudsman's Office reviews individual cases to provide assistance by examining facts, reviewing relevant data systems, and analyzing applicable laws, regulations, policies and procedures. After assessing each case in this manner, the Ombudsman's Office may contact USCIS service centers, field offices, and other facilities to request that USCIS engage in remedial actions. If the Ombudsman's Office is unable to assist, it will inform the individual or employer that the matter is outside the scope of the Ombudsman's authority or otherwise does not merit further action.

The Ombudsman's Office is not an appellate body and cannot question USCIS decisions that were made in accordance with applicable procedures and law. Additionally, the Ombudsman's Office does not have the authority to command USCIS to reopen a case, or to reverse any decisions the agency may have made.

The Ombudsman's Office is an office of last resort. Assistance should only be sought when an individual or employer has attempted to obtain redress through all other available means. Prior to requesting the Ombudsman's Office assistance in a particular case, individuals and employers should make reasonable efforts to resolve any issues directly with USCIS, using mechanisms such as the e-Service Request, National Customer Service Center, and InfoPass.

The jurisdiction of the Ombudsman's Office is limited by statute to problems involving USCIS. The Ombudsman does not have the authority to assist with problems that individuals or employers experience with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the U.S. Department of State (DOS), the Executive Office for Immigration Review (EOIR), or the U.S. Department of Labor (DOL). However, it may be possible for the Ombudsman's Office to assist if the application involves both USCIS and another DHS component or government agency.

The Ombudsman's Office provides case assistance to address the following procedural matters:

- Typographic errors in immigration documents
- Cases that are 60 days past normal processing times
- USCIS's 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 and/or completed immigration documents (e.g., Employment Authorization Cards, Permanent Resident Cards, etc.), except where USCIS properly mailed the notice or document to the individual's address on file and it was not returned
- Cases where the beneficiary may "age-out" of eligibility for the requested immigration benefit
- Refunds in cases of clear USCIS error
- Lost files and/or file transfer problems

The Ombudsman's Office provides case assistance to address the following substantive matters:

- Clear errors of fact, or gross and obvious misapplication of the relevant law by USCIS in Requests for Evidence, Notices of Intent to Deny, 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
- 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.)

Appendix 4: Initial Benefit Adjudication Data for Commonly Appealed Form Types

	2011			2012			2013		
	Receipts	Approvals	Denials	Receipts	Approvals	Denials	Receipts	Approvals	Denials
I-129 H-1B, Specialty Occupation	267,950	220,779	55,333	307,774	234,167	60,354	299,272	274,261	62,760
I-129 L-1, Intracompany Transferee	41,973	32,370	7,886	41,488	34,625	8,856	42,244	32,390	9,680
I-140 EB-1, Extraordinary Ability	5,012	2,930	1,560	4,940	3,789	1,892	5,689	4,377	1,482
I-140 EB-3, Professionals	18,501	18,740	3,064	10,428	12,217	2,650	4,094	6,862	1,518
I-212, Request for Admission After Deportation or Removal	587	220	181	1,083	368	244	2,992	925	373
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	8,682	4,015	1,479	9,007	3,110	1,421	6,816	9,665	2,660
I-601, Waiver of Grounds of Inadmissibility	3,739	1,999	690	5,787	2,653	630	4,586	3,176	785
I-918, U Nonimmigrant Status	26,801	17,690	4,574	39,894	17,543	4,331	43,695	18,228	3,269
N-600, Certificate for Citizenship	57,606	56,746	4,792	62,862	48,914	4,013	63,599	60,038	5,329

Source: Information provided by USCIS (May 16, 2014).

Citizenship and Immigration Services Ombudsman
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