

Executive Summary

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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.