

# Executive Summary

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The Office of the Citizenship and Immigration Services Ombudsman's 2013 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 humanitarian, family, and employment areas, and in customer service and Transformation.

## Ombudsman's Office Overview

The Ombudsman's Office, established by the Homeland Security Act of 2002, helps individuals and employers resolve problems with USCIS. Policy and casework is carried out by a group of professionals with wide-ranging skills and areas of subject matter expertise. From April 1, 2012, to March 31, 2013, the Ombudsman received 4,531 requests for assistance. In 74 percent of cases submitted to the Ombudsman, the individuals and employers previously visited USCIS My Case Status online, 66 percent contacted the USCIS National Customer Service Center telephone line, and 30 percent attended InfoPass appointments at a local field office. Overall, the requests were divided equally among humanitarian, family and employment-based matters.

This year, the Ombudsman visited communities and stakeholders in every region of the United States. After extensive research and outreach, the Ombudsman issued four formal recommendations:

- *Improving the Process for Removal of Conditions on Residence for Spouses and Children (February 28, 2013);*
- *Improving the Adjudication of Applications and Petitions under Section 204(l) of the Immigration and Nationality Act (INA) (November 26, 2012);*
- *Ensuring a Fair and Effective Asylum Process for Unaccompanied Children (September 20, 2012); and*
- *Recommendations Regarding USCIS's Role in the Petition Information Management Service (PIMS) (May 16, 2012).*

## Key Developments and Areas of Study

### Humanitarian

**Victims of Abuse, Trafficking and Other Crimes.** The U.S. Department of Homeland Security and USCIS sponsor key initiatives to protect victims of human trafficking, domestic violence, and other crimes. In December 2012, USCIS issued policy guidance on employment authorization for certain Violence Against Women Act (VAWA) self-petitioners and their derivatives, as well as U visa beneficiaries. While stakeholders welcomed this instruction, ongoing concerns remain regarding employment authorization for derivative applicants and limitations on the ability of nonimmigrant victims to obtain work authorization.

**Unaccompanied Children.** The INA and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) provide procedural and substantive protection for unaccompanied alien children (UACs). Following extensive study, the Ombudsman issued, *"Ensuring a Fair and Effective Asylum Process for Unaccompanied Children."* USCIS subsequently agreed to accept UAC determinations made for custody purposes by U.S. Customs and Border Protection and Immigration and Customs Enforcement. This decision will afford a consistent process to all minors apprehended and placed into custody with the Department of Health and Human Services.

**Special Immigrant Juveniles.** Abused, abandoned or neglected children without immigration status may obtain permission to remain lawfully in the United States. From 2010 to 2011, the Ombudsman received numerous requests for assistance related to Special Immigrant Juvenile (SIJ) cases. Persistent problems include: protracted processing times, inadequate interview techniques and adjudications, and burdensome or intrusive Requests for Evidence (RFEs) relating to juvenile dependency orders. On April 15, 2011, the Ombudsman published a formal recommendation to address these issues. While USCIS adopted some proposed reforms, stakeholders continue to encounter SIJ-related difficulties. The Ombudsman will continue to work with USCIS Field Operations staff to resolve remaining stakeholder concerns.

**Discretionary Relief and Deferred Action for Childhood Arrivals (DACA).** Deferred action is an exercise of agency discretion to allow an individual to remain in the United States without fear of removal. Since 2007, the Ombudsman has issued two formal recommendations identifying ways USCIS can improve transparency and consistency for individuals requesting deferred action. This year, USCIS adopted many of these changes in the context of the DACA program. The level of internal and external information-sharing, and institutional willingness to create and monitor the processing of DACA requests, are examples of best practices for processing deferred action and other discretionary applications.

**Reinstatement of Automatically Revoked Petitions.** USCIS may reinstate certain family-based petitions that were automatically revoked following the death of a petitioner or beneficiary. Such requests for relief must be submitted by surviving immediate relatives. Stakeholders reported lengthy delays in the adjudication of humanitarian reinstatement requests and the lack of a standard process for submitting or evaluating those requests. In practice, humanitarian reinstatement requests can take months if not years to complete, and are frequently denied. The Ombudsman will continue to monitor agency action in this area.

## Family and Children

**Applications and Petitions for Surviving Relatives.** On October 28, 2009, Congress enacted legislation to protect an expanded list of beneficiaries in the family and employment-based preference categories following the death of a qualifying relative. Fourteen months later, USCIS issued a policy memorandum explaining how this new law – INA section 204(l) – should be applied. The guidance deems previously approved petitions filed on behalf of covered beneficiaries automatically revoked and subject to reinstatement. After evaluating case assistance requests and performing research, the Ombudsman issued, *“Improving the Adjudication of Applications and Petitions under Section 204(l) of the Immigration and Nationality Act.”* This recommendation urges USCIS to conduct notice and comment rulemaking to create or designate a standard form, establish a receipt protocol, and stop regarding survivor benefits requests as a form of discretionary reinstatement. The Ombudsman is currently evaluating USCIS’s response to this recommendation, which was received on June 3, 2013.

**Petitions to Remove Conditions on Residence.** On February 28, 2013, following almost two years of outreach to concerned stakeholders, the Ombudsman published, *“Improving the Process for Removal of Conditions on Residence for Spouses and Children.”* Key problems identified in this recommendation include: ineffective notice and barriers to

securing information; inefficient processes and inconsistent adjudications; a lack of professionalism, sensitivity and awareness of legal requirements, especially concerning waivers, by some USCIS adjudicators; and inadequate electronic systems to support the processing of Form I-751 petitions. To address these difficulties, the Ombudsman called upon USCIS to improve processing protocols, update and consolidate guidance materials and systems, and conduct comprehensive training. USCIS’s response to the recommendation was due May 28, 2013, but has not yet been received.

**Provisional and Other Waivers of Inadmissibility.** During this reporting period, USCIS began to accept, through the Phoenix Lockbox, waivers of inadmissibility filed by applicants overseas, and shifted the adjudication of such requests to the Nebraska Service Center. On January 9, 2012, USCIS announced its plan to adjudicate provisional waivers of unlawful presence for certain immediate relatives living in the United States. On March 4, 2013, after publishing proposed and final regulations, the agency began implementing this initiative. Centralized waiver filings and adjudication in the United States, along with the Provisional Unlawful Presence Waiver Process, promise to improve consistency and minimize delays for thousands of individuals and their families. Many have urged USCIS to extend provisional waiver coverage to family preference categories.

## Employment

**Requests for Evidence.** Individuals and employers continued to raise concerns regarding what they consider inappropriate or unduly burdensome RFEs. This reporting period, USCIS reviewed and posted for public comment RFE templates for several nonimmigrant employment-based categories, excluding H-1B Specialty Occupations and L-1B Intracompany Transferees with Specialized Knowledge. While the templates offer a valuable mechanism to standardize and improve employment-based case processing, persistent issues remain. These include USCIS not recognizing various modern business practices and managerial decisions.

The agency continues to utilize the Validation Instrument for Business Enterprises (VIBE), which aims to reduce the need for companies and organizations to submit identical paper documentation with each petition to establish their current level of business operations. Some stakeholders find that, contrary to VIBE’s express purpose, they continue to have to submit paper documentation with the initial filing and to receive RFEs.

In the context of its Entrepreneurs in Residence initiative, which enlists private sector experts to inform immigration policies and procedures, USCIS conducted training and modified RFE templates for certain nonimmigrant visa categories to incorporate new sources of evidence. Both the California and Vermont Service Centers (CSC and VSC) have implemented periodic quality assurance review of RFEs and other adjudicative decisions.

### **H-1B Special Occupation and L-1 Intracompany**

**Transferees.** In earlier Reports, the Ombudsman described problems related to H-1B Special Occupation and L-1 Intracompany Transferee categories. Stakeholders focused on USCIS policies that appear to subject small and start-up companies to inordinate scrutiny. These same concerns were shared with the Ombudsman this year. For example, some denials in these categories state that the petitioner has not demonstrated that the company is sufficiently developed to require the presence of an executive or manager. Such denials may overlook regulations that permit “new office” situations for a limited period of one-year to allow the business to become operational.

**EB-5 Immigrant Investor Program.** From FY 2010 to 2012, USCIS received nearly 300% more filings in the fifth employment-based (EB-5) preference category from immigrants seeking to invest capital and create jobs for U.S. workers. This year the Ombudsman received 441 requests for EB-5 case assistance, representing approximately 10 percent of the office’s workload. The vast majority of these inquiries came from investors and regional center applicants whose cases had been pending beyond normal processing times. Other difficulties included a perceived lack of responsiveness by USCIS, the issuance of duplicative RFEs, and needed guidance regarding processing protocols and requirements.

On December 3, 2012, USCIS announced publicly the transfer of its EB-5 adjudications unit from the CSC to Washington, D.C. by mid-2013. Approximately two weeks later, on December 20, 2012, USCIS issued a policy memorandum addressing tenant occupancy methodologies and attribution of tenant jobs to EB-5 enterprises for job creation purposes. On February 14, 2013, USCIS posted a policy memorandum for public comment that appears to reverse the agency’s earlier position as to the effect of a “material change” to a business plan. Just prior to the publication of this Report, on May 30, 2013, USCIS issued a detailed “*EB-5 Adjudications Policy*.” This memorandum emphasizes that preponderance of the evidence is the standard of proof in EB-5 adjudications, and addresses

many longstanding stakeholder concerns, including when deference will be afforded to prior adjudications and the need for flexibility to accommodate business realities. The Ombudsman will monitor these key efforts by USCIS to address systemic issues affecting the EB-5 program.

### **Petition Information Management System (PIMS).**

On May 16, 2012, the Ombudsman issued a recommendation to improve the transfer of employment-based immigration petition information by USCIS to the Department of State (DOS). When a nonimmigrant petitioner (or his/her legal representative) fails to submit the required duplicate copy of the Form I-129, *Petition for a Nonimmigrant Worker*, package to USCIS, the agency does not forward evidence of action on the petition to the DOS Kentucky Consular Center. This causes processing delays, economic hardship, and other problems for individuals and employers. The agency declined to implement two of the three actions recommended by the Ombudsman, noting that in the future it plans to provide all petition information to DOS through the USCIS Electronic Information System (ELIS).

### **USCIS Customer Service**

**Processing Times.** Processing times for Form I-485, *Application to Register Permanent Residence or Adjust Status*, and Form N-400, *Application for Naturalization*, mirror those reported last year, at approximately five and four and a half months, respectively.

**Customer Service and Public Engagement.** During this reporting year, USCIS established the “USCIS Customer Service and Public Engagement Directorate,” which is divided into two divisions. The Public Engagement Division coordinates and directs dialogue with external stakeholders, while the Customer Service Division provides information and guidance to USCIS applicants, petitioners and advocates regarding immigration benefits. USCIS continued robust public engagement, hosting over 1,600 public events with over 520,000 participants.

**Policy Manual.** Effective January 22, 2013, USCIS announced the creation of a new, comprehensive Policy Manual designed to adapt easily to changes in immigration law and policy. USCIS has released one chapter of the Policy Manual, titled “Citizenship and Naturalization.” No specific timeframe has been established for future releases.

**The Administrative Appeals Office.** The Administrative Appeals Office (AAO) has delegated authority to adjudicate appeals of certain USCIS decisions. In 2005, in an effort to increase transparency, the Ombudsman recommended that the AAO make available to the public its standard of review; precedent decision process; criteria by which cases are selected for oral argument; and decision-making statistics. Since that time, the AAO has eliminated lengthy processing times, but stakeholders continue to raise concerns regarding the AAO's authority, independence, and procedures. The AAO is a current area of study for the Ombudsman.

**Fee Waivers.** On November 23, 2010, USCIS published a first-ever fee waiver request form. While use of Form I-912, *Request for Fee Waiver*, is optional, it simplifies the process for applicants by specifying eligibility criteria and required documentation. However, many low-income applicants continue to encounter barriers to securing a fee waiver. Since 2012, an increasing number of stakeholders have sought assistance from the Ombudsman on this

topic. Applicants report repeated rejections of fee waiver requests, inconsistent adjudications, and misapplication or misunderstanding of proper evidentiary requirements by USCIS officers.

**Transformation.** The USCIS Office of Transformation Coordination oversees the agency's broad effort to modernize processes and systems, and move from a paper-based application and adjudication environment to an electronic one. Transformation has the potential to improve dramatically the experience of those seeking immigration benefits and services, but it has been marked by protracted delays in implementation, design defects, and cost overruns. On May 22, 2012, the agency launched "the foundational release" of its new system, USCIS ELIS. This release enables individuals seeking immigration benefits and/or their legal representatives to create an account and file a stand-alone Form I-539, *Application to Extend/Change Nonimmigrant Status*. Additional releases are scheduled for summer 2013.