USCIS Response to the Citizenship and Immigration Services Ombudsman's (CISOMB) 2016 Annual Report to Congress

March 27, 2018

Homeland Security

U.S. Citizenship and Immigration Services

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

March 27, 2018

Julie Kirchner
Ombudsman
Citizenship and Immigration Services
U.S. Department of Homeland Security
Mail Stop 0180
Washington, DC 20528

Dear Ms. Kirchner:

I thank the Citizenship and Immigration Services Ombudsman's Office for the effort and insight put forth in the 2016 Citizenship and Immigration Services Ombudsman's Annual Report to Congress (Annual Report). I value this frank and comprehensive assessment of U.S. Citizenship and Immigration Services (USCIS) processes, policies, and operations. During this time of transition, I have reviewed the Report and discussed its findings with my senior leadership team. I am in concurrence with many of the findings.

We share the objective to improve the quality of adjudications and service delivery across all immigration form types. Also, we appreciate the recognition of our progress on vital issues and of specific accomplishments such as centralizing Special Immigrant Juvenile adjudications, allowing third parties to pay the USCIS Immigrant Fee, and steps to improve policies relating to businesses and immigrant workers. We also acknowledge that our customers deserve timely, professional, and accurate service each and every day.

I recognize there remain opportunities for continuous improvement in USCIS programs and in engagements with all of our customers. Our response mainly covers the 2016 CIS Ombudsman reporting period from April 1, 2015 to March 31, 2016. As we explore these opportunities for continuous improvement, we do so in consideration of President Donald J. Trump's Executive Orders where applicable.

Thank you again for such valuable feedback. I am pleased to present USCIS' response to the 2016 Annual Report for your further consideration.

Sincerely,

Tracy L. Renaud
Acting Deputy Director

A Message from the Acting Deputy Director

March 27, 2018

It is my pleasure to present the U.S. Citizenship and Immigration Services (USCIS) response to the Citizenship and Immigration Services Ombudsman's (CISOMB) 2016 Annual Report to Congress (Annual Report). This response addresses concerns the 2016 Annual Report raises and highlights some of the agency's many accomplishments that the Report did not include.

In its 2016 Annual Report, the Office of the Citizenship and Immigration Services Ombudsman noted many of our achievements over the reporting period, including:

- Significant measures—such as hiring new officers, establishing new suboffices, and developing new Employment Authorization Document procedures;
- Our tireless work to meet the needs of individuals in the U.S. military and their family members, including our diligent efforts to mitigate ongoing processing delays in military naturalization applications; and
- Responsiveness to congressional oversight in hearings focused on refugee processing, executive actions, the use of social media, and alleged fraud among prospective immigrant investors.

The CISOMB also notes the agency's progress in the successful development of improved policies and procedures concerning businesses and immigrant workers, additional guidance on the extreme-hardship standard, and the centralization of Special Immigrant Juvenile adjudications.

We continue to benefit greatly from our interactions with the Ombudsman. I deeply appreciate the opportunities to participate in regular meetings, the CISOMB annual conference, and meetings and teleconferences the Ombudsman has hosted for stakeholders. The open line of communication and the constant interaction between USCIS leadership and the Ombudsman's Office have contributed to the agency's success and benefited the entire immigration community. USCIS, as always, stands ready to work with the CISOMB to ensure we provide the best service possible to our customers, stakeholders, and the American public.

Sincerely,

Tracy L. Renaud

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I. Legislative Requirement

This document responds to the reporting requirement set forth in section 452 of the Homeland Security Act of 2002 (6 U.S.C. § 272), which provides in relevant part:

> (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.[1]

II. Introduction

U.S. Citizenship and Immigration Services (USCIS) thanks the Office of the Citizenship and Immigration Services Ombudsman (CISOMB) for the thoughtful, wide-ranging analysis found in the Annual Report 2016: Citizenship and Immigration Services Ombudsman (2016 Annual Report).[2,3] USCIS appreciates the review of the agency's operations and welcomes the opportunity to respond. This response discusses the areas of concerns the CISOMB raises as well as the agency's accomplishments in those areas and updates to USCIS programs.

USCIS made great strides during 2016 and throughout 2017 to tackle many of the issues the CISOMB cited in the 2016 Annual Report. During the reporting period, the agency focused mainly on improving the experience with USCIS through better and broader online services, greater process clarity and transparency, and smaller backlogs in key areas.

Within the Report's timeframe, the agency processed in a timely and accurate manner the majority of filings made through USCIS ELIS, its Electronic Immigration System. The agency also took bold, innovative steps to bolster its online presence, including:

- Starting a Help Desk for online filers and introducing Internet processing of additional product lines, including applications for Temporary Protected Status (TPS) and applications for naturalization;

- Launching "Emma," a virtual assistant available on the agency's website (www.uscis.gov) that allows customers to quickly find accurate information by answering questions presented in plain English and guiding users to relevant agency Web pages;

- Introducing a series of enhancements that made the USCIS website and online products easier to use on mobile devices; and

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[1] Pub. L. No. 107-296, 116 Stat. 2135 (2002), online at http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf.
[2] This document uses "USCIS" and "agency" interchangeably. It also uses "the CISOMB," "the Ombudsman," and "the Ombudsman's Office" interchangeably.
[3] *See* DHS, "Annual Report 2016: Citizenship and Immigration Services Ombudsman" (June 29, 2016), online at https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report %202016.pdf.

- Launching a Spanish-language version of myE-Verify, the agency Web page where employees can create and maintain secure personal accounts and access new features for identity protection.

In addition, USCIS continued to apply its resources toward stopping fraud, scams that target immigrants, and threats to our national security. During the reporting period, it also made significant advancements in many of its programs.

Among its most noteworthy accomplishments in these areas during the reporting period, USCIS:

- Increased the Asylum Officer onboard rate from 65 percent to 92 percent by the end of Fiscal Year (FY) 2016, established new suboffices, and developed new Employment Authorization Document (EAD) procedures to help mitigate the impact of delayed asylum interviews on asylum-seekers, which were caused by a record number of asylum applications filed;

- Continued its exemplary work to meet the needs of U.S. military personnel and their family members;

- Made it possible for third parties to pay the USCIS Immigrant Fee; and

- Improved the processing and adjudication of petitions to remove conditions on residence.

III. Humanitarian

A. Asylum Backlogs and Continuing Assessment of Problems

In its 2016 Annual Report to Congress, the CISOMB states concern over the volume of affirmative asylum cases pending at USCIS.

The CISOMB notes that USCIS' Asylum Division continues to take significant measures in response to the growing backlog. These measures include hiring new Asylum Officers to fill enhancement positions that were received in FY 2015 but not yet filled, as well as backfilling positions vacant due to departures, establishing new asylum suboffices, and developing new procedures regarding EADs.

However, the CISOMB states that high attrition during FY 2015 undercut efforts to boost the number of Asylum Officers available to adjudicate backlogged applications. It also cites stakeholder reports that USCIS regularly failed to meet the 30-day period prescribed in existing regulations for processing EAD applications based on pending asylum cases, often exceeding the 90-day period provided at that time for other EAD adjudications.

In response, by the end of FY 2016's 3rd quarter, the Asylum Division reached its goal of onboarding 90 percent of its authorized staffing level for Asylum Officers. USCIS continued to evaluate further staffing enhancements for FY 2017.

B. Central American Minors Refugee/Parole Program

Note: *On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for the Department of Homeland Security (DHS) to act to ensure that parole authority under section 212(d)(5) of the Immigration and Nationality Act (INA) is exercised on a case-by-case basis in accordance with the statutes' plain language, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. After review following the Executive Order, DHS rescinded the policy allowing automatic consideration for parole for individuals in El Salvador, Guatemala, and Honduras denied refugee status under the Central American Minors (CAM) Refugee/Parole program.*

In August 2017, DHS announced the termination of the CAM parole program.[4] *The U.S. Department of State (DOS) stopped accepting new applications to the refugee program after November 9, 2017, and USCIS discontinued refugee interviews of CAM applicants on January 31, 2018.*

These responses are provided regarding the program as it was operated at the time of the 2016 Ombudsman Report.

USCIS notes that certain concerns the CISOMB cites about the program are actually within the U.S. Department of State's responsibility. These include issues related to:

- Sharing of case information with, and managing, resettlement agencies;
- Reimbursement for DNA testing expenses; and
- Funding for resettlement agencies.

USCIS notes that it undertook steps related to the Ombudsman's concerns about processes within USCIS' jurisdiction. These included (by topic):

> Lengthy processing times: USCIS and DOS collaborated to streamline processing by handling certain adjudication steps concurrently rather than consecutively. Also, in the second half of FY 2016, USCIS and DOS increased the number of cases for which interviews were held, from an average of 606 cases per quarter in the first half to 1,988 cases per quarter in the second half.

[4] See 82 FR 38926, "Termination of the Central American Minors Parole Program" (Aug. 18, 2017), online at https://www.federalregister.gov/documents/2017/08/16/2017-16828/termination-of-the-central-american-minors-parole-program.

Lack of standardized expedited processing procedures and safety protocols: USCIS and DOS continued to implement a range of options in the case of a child who is at imminent risk. While the primary responsibility to identify cases for expedited processing fell to DOS, standard procedures exist for USCIS to respond to expedite requests based on the level of need. DOS had also implemented measures to provide immediate protection for vulnerable children, including working with the International Organization for Migration to identify trusted shelters in each specific region.

Narrow eligibility criteria: In determining CAM program eligibility criteria, then-President Barack Obama's Administration took into account the need to verify claimed family relationships in order to deter fraud and promote children's safety and welfare by reuniting them with a parent. DHS and DOS continued to assess whether eligibility criteria changes were warranted, consistent with the program's integrity.

On June 26, 2016, the Obama Administration announced expansion of CAM eligibility criteria to include in-country biological parents, adult and/or married sons and daughters of the parent in the United States, and caregivers accompanying a qualifying child.

Prohibitive upfront costs for DNA testing: USCIS notes DNA testing is a standard feature of Priority 3 refugee processing,[5] where access is based on the presence of a relative in the United States with a lawful immigration status. Before this requirement was instituted in October 2012, the Priority 3 program was subject to widespread fraud with regard to claimed family relationships. USCIS took this experience into account when working with DOS to design the CAM program.

DOS developed its reimbursement mechanism in recognition that DNA testing is expensive. Private DNA partner laboratories determine the cost of testing.

Refugee grant rates: USCIS adjudicates all refugee cases on a case-by-case basis consistent with U.S. law and policy. Refugee status can be granted due to past persecution or a well-founded fear of persecution based on one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. Minors in Central America whom USCIS interviewed for U.S. refugee resettlement were evaluated according to this standard; any of the five protected grounds could have applied. USCIS officers receive extensive training in adjudicating all kinds of refugee claims, including "particular social group." They also receive specialized training on adjudicating claims of children, principally in the Central American context.

[5] As per section 207(a)(3) of the INA, the U.S. Refugee Admissions Program allocates admissions among refugees "of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation." As per DOS, Priority 3 indicates "individual cases from designated nationalities granted access for purposes of reunification with anchor family members already in the United States."

Technical Comments: Please note that all statistics USCIS provided to the CISOMB came from DOS's Worldwide Refugee Admissions Processing System, and should be cited accordingly.

C. The Haitian Family Reunification Parole Program

Note: *On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for DHS to act to ensure that parole authority under section 212(d)(5) of the INA is exercised on a case-by-case basis in accordance with the plain language of the statute, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. Consistent with this Executive Order, USCIS has been reviewing its use of parole authority under 212(d)(5), including the Haitian Family Reunification Parole (HFRP) Program, and will keep the public informed of any decisions related to this review.*

The CISOMB reports stakeholders laud the establishment in 2014 of the HFRP Program. However, these stakeholders also express concerns about eligibility requirements for this Program and obstacles that impede realization of its goals. These obstacles include prohibitive filing fees as well as receipt of invitations to apply for the HFRP Program being hindered by the lack of updated mailing addresses.

In June 2016, DOS's National Visa Center (NVC) issued the third batch of HFRP invitations pertaining to 4,900 cases, affecting 9,894 potential beneficiaries. This brought the total number of invitations issued since the HFRP Program's inception to 12,534, reaching 23,993 total potential beneficiaries. Between the HFRP Program's launch and June 2016, the USCIS Lockbox accepted 5,824 HFRP applications and the agency's Field Office in Port-au-Prince, Haiti, issued 1,952 final approvals. USCIS denied only 541 HFRP applications during this time.

The CISOMB also cites HFRP-related stakeholder concerns about:

- The need to expand the HFRP Program to include beneficiaries with expected visa eligibility dates beyond the current limit, proposing 4 to 5 years instead of 3 years; and

- Some HFRP invitees not providing USCIS and the NVC with updated mailing addresses. These petitioners may not have received their invitations, leaving relatives unaware that they can benefit from the HFRP Program.

The CISOMB calls for continued engagement with the Haitian community, especially with members present in the United States, to reiterate the importance of maintaining a current address for each petition filed with USCIS, particularly after the petition has been approved and they are awaiting a current priority date.

USCIS appreciates the concerns raised by the CISOMB report. The agency has taken

numerous actions to address these issues, further improve HFRP Program transparency, and provide better customer service. Since the Administration transition, USCIS has taking a fresh look at the operations and policies associated with the HFRP program.

To increase the response rate and to improve the HFRP Program's value for individual applications, USCIS has expanded the pool of individuals who receive invitations for the Program, from those whose visas would become current in 18 to 30 months to those whose visas would become current in 18 to 42 months.

In efforts to ensure that individuals receive their invitation or can check to see if they should have received one, USCIS:

- Posted information on uscis.gov reminding individuals interested in HFRP to update their address with the NVC;
- Provided its customer service centers with information to allow them to help individuals confirm by phone whether they were sent an invitation; and
- Is exploring creating an online self-check tool to allow customers to verify whether they were issued an invitation.

The CISOMB states HFRP filing fees are prohibitive for some potential participants, and that other potential participants do not believe the benefits of entering the United States a few months earlier outweigh the lower cost of consular processing. USCIS does not believe these fees are prohibitive, as individuals who cannot afford to file may apply for a fee waiver for Form I-131, Application for Travel Document. Through June 2016, fee waivers were used in approximately 8 percent of HFRP applications accepted at the USCIS Lockbox.

D. Deferred Action for Childhood Arrivals

Note: *On September 5, 2017, the Acting Secretary of Homeland Security issued a memorandum rescinding the original June 15, 2012 memorandum that established the Deferred Action for Childhood Arrivals program.*[6]

The CISOMB recommended USCIS offer the option of a substantive review of Deferred Action for Childhood Arrivals (DACA) denials that are based on grounds other than the administrative errors listed online in the agency's DACA Frequently Asked Questions (FAQ) site.[7]

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[6] *See* DHS, "Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA), online at https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[7] Due to DHS's decision to phase out DACA, the FAQs have been archived. They are still available on the USCIS Web page, "Frequently Asked Questions," https://www.uscis.gov/archive/frequently-asked-questions (last visited Jan. 22, 2018).

DACA is an exercise of the Secretary of Homeland Security's non-reviewable prosecutorial discretion to defer removal action against an alien. It is not an immigration benefit (such as asylum or adjustment to lawful permanent resident status) for which there are statutory and regulatory provisions for further administrative review of denials. DHS, however, has provided DACA requestors who believe that certain administrative errors have occurred in their cases with a means to have those concerns addressed, through the USCIS National Customer Service Center (NCSC).

The DACA FAQ site, now archived, gave guidance on USCIS' review of cases upon request, in question number 25 (parentheses added for this response):

> Q25: Can I appeal USCIS' determination?
>
> A25: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of DACA.
>
> You may request a review of your I-821D denial by contacting USCIS' National Customer Service Center at 1-800-375-5283 to have a service request created if you believe that you actually did meet all of the DACA guidelines and you believe that your request was denied because USCIS:
>
> - Denied the request based on abandonment, when you actually responded to a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) within the prescribed time;
>
> - Mailed the RFE or NOID to the wrong address although you had changed your address online at www.uscis.gov **or** with a customer service representative on the phone and submitted a Form AR-11, Change of Address, before USCIS issued the RFE or NOID;
> - To ensure the address is updated on a pending case as quickly as possible, we recommend that customers submit a change of address request at www.uscis.gov/addresschange. Please note that only an online change of address or a Form AR-11 submission will satisfy the legal requirements for notifying the agency of an address change. Therefore, if you called a customer service representative to change your address, please be sure you have also submitted your address change online or with a Form AR-11.
>
> - Denied the request on the grounds that you did not come to the United States prior to your 16th birthday, but the evidence submitted at the time of filing shows that you did arrive before reaching that age;
>
> - Denied the request on the grounds that you were under age 15 at the time of filing but not in removal proceedings, while the evidence submitted at the time of filing show that you indeed were in removal proceedings when the request was filed;
>
> - Denied the request on the grounds that you were 31 or older as of June 15, 2012, but the evidence submitted at the time of filing shows that you were under the age of 31 as of June 15, 2012;

- Denied the request on the grounds that you had lawful status on June 15, 2012, but the evidence submitted at the time of filing shows that you indeed were in an unlawful immigration status on that date;

- Denied the request on the grounds that you were not physically present in the United States on June 15, 2012, and up through the date of filing, but the evidence submitted at the time of filing shows that you were, in fact, present;

- Denied the request due to your failure to appear at a USCIS Application Support Center (ASC) to have your biometrics collected, when you in fact either did appear at a USCIS ASC to have this done or requested prior to the scheduled date of your biometrics appointment to have the appointment rescheduled; or

- Denied the request because you did not pay the filing fees for Form I-765, Application for Employment Authorization, when you actually did pay these fees.

If you believe your request was denied due to any of these administrative errors, you may contact our National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TDD for the hearing impaired). Customer service officers are available Monday – Friday from 8 a.m. – 6 p.m. in each U.S. time zone.

According to the CISOMB, a number of case-assistance requests revealed that DACA recipients unknowingly failed to follow guidelines by traveling outside the United States after receiving an advance parole document but before the effective date or "date issued" printed on the document. The CISOMB proposed that USCIS clarify the "permissible period" for travel to ensure DACA recipients understand the importance of these dates.

Effective August 7, 2016, USCIS updated Form I-512L, Authorization for Parole of an Alien Into the United States, to make it clearer to DACA recipients that:

- Travel must be within the authorized period shown on the document; and

- Departing before or returning after this period may result in termination of their DACA.

E. Provisional Waivers

Background

The CISOMB expresses support for USCIS' proposed regulatory amendments to expand the provisional unlawful presence waiver process to all applicants who are statutorily eligible for an immigrant visa and meet the requirements for a waiver of inadmissibility based on unlawful presence. The CISOMB also expressed support for draft policy guidance that clarifies factors and special circumstances to consider when determining extreme hardship.

Previously, under the 2012 final rule, the provisional unlawful presence waiver process only facilitated immigrant visa issuance for immediate relatives who, but for the 3 and

10-year unlawful presence bars under section 212(a)(9)(B) of the INA, 8 U.S.C. 1182(a)(9)(B), would be admissible to the United States. These bars generally are triggered upon departure from the United States.

Note that it is DOS, and not USCIS, who determines if applicants seeking an immigrant visa abroad directly from DOS are eligible for this visa and whether there are any grounds of inadmissibility that may bar its issuance.

USCIS can deny requests for the provisional unlawful presence waiver. The agency's determination on such a waiver is neither a conclusive finding of inadmissibility nor an assessment of whether a particular crime or pattern of conduct would ultimately bar an individual from obtaining a legal status under the immigration laws.

The "Reason to Believe" standard

Under regulations in place when the CISOMB published its Annual Report, USCIS was required to deny a provisional waiver application if the agency had "reason to believe" the applicant may be subject to a ground of inadmissibility other than unlawful presence at the time of the immigrant visa interview abroad. In its Annual Report, the CISOMB says USCIS had denied applications on the "reason to believe" ground without providing a detailed explanation for the decision and called for the agency to issue clear decisions delineating the specific incident or issue that led to such a denial.

On July 29, 2016, DHS published a final rule that expands eligibility for the provisional waiver process to individuals who are statutorily eligible for immigrant visas (including family-based, employment-based, and special immigrant visas) and those who have been selected to participate in the Diversity Visa (DV) program and who are statutorily eligible for a waiver of the unlawful presence ground of inadmissibility.[8]

Within this final rule, USCIS eliminated the "reason to believe" standard. USCIS will still need to assess whether an applicant both meets the extreme hardship standard required for a waiver of unlawful presence and merits a favorable exercise of discretion, a process entailing a detailed analysis of all factors and specific circumstances of an applicant's case.

Extreme hardship

The CISOMB states that a review of case-assistance requests showed inconsistencies in USCIS' application of the preponderance of the evidence standard toward the extreme hardship requirement. The Annual Report adds that, without a formal appeal process, applicants turn to the Ombudsman for assistance seeking further review of provisional waiver applications.

On October 21, 2016, USCIS issued guidance in its Policy Manual on determining and

[8] *See* 81 Fed. Reg. 50,244 (July 29, 2016), "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility," online at https://www.justice.gov/sites/default/files/pages/attachments/2016/08/01/fr29jul16.pdf.

evaluating extreme hardship.[9] This guidance became effective on December 5, 2016. Accompanied by training, these guidelines should ensure greater consistency among adjudicators and address concerns about officers' application of the standard of proof.

It is the applicant's burden to establish eligibility for the provisional unlawful presence waiver. USCIS encourages applicants to submit all documentation they believe will establish their eligibility for the waiver, including information showing why they warrant a favorable exercise of discretion.

Processing fees

The CISOMB reports receiving case-assistance requests after USCIS denied Forms I-601A, Applications for Provisional Unlawful Presence Waiver, because the DOS system did not reflect payment of the immigrant visa application fee, even where the applicant provided USCIS with a copy of the payment receipt when submitting the form. (As the Annual Report cites, it was later determined that the DOS system accidentally deleted payment records for a number of applications during the summer of 2015.)

USCIS reviewed denied cases to determine which were affected by the DOS systems issue. Cases were identified, reviewed, and reopened, and new decisions were rendered on reopened cases. USCIS confirms this concern has been addressed and resolved.

Processing times

The CISOMB reports noticing an increase in requests for case assistance due to I-601A applications pending outside posted processing times. It states that USCIS reported an increase in processing times, from 3 months in December 2015 to 5 months in February 2016.

USCIS continues to strive to meet the 90-day processing time goal, and will continue monitoring processing times to ensure goals are met.

F. Recommendation Update: Special Immigrant Juveniles (SIJ)

Accomplishments

Filings of the SIJ-based Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, rose significantly through the time this response was prepared. Of the 11,526 filings USCIS received during FY 2015, 8,726 were approved and 381 were denied. During FY 2016, the agency received 19,532 filings, 15,104 of which were approved and 562 of which were denied.

USCIS continued efforts to centralize SIJ-based adjudications, making significant

[9] *See* USCIS, Policy Manual, Volume 9 - Waivers, part B – Hardship (Oct. 21, 2016), online at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html.

progress on operational planning including near completion of updated guidance and training materials. In addition, USCIS further expanded its outreach initiatives to educate juvenile court stakeholders about the SIJ program. In FY 2016, USCIS conducted 16 SIJ outreach engagements. USCIS also published updated outreach materials on its website.

CISOMB December 2015 recommendation

The CISOMB issued its initial recommendation on the SIJ program on April 15, 2011.[10] USCIS responded to this initial recommendation on July 13, 2011.[11]

On December 11, 2015, the CISOMB issued a second formal recommendation on the SIJ program in which it questioned several USCIS practices, including the review of state court orders, what were deemed "burdensome" requests for evidence, and age-appropriate interview techniques.

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

USCIS addressed these concerns in an April 22, 2016 response. Highlights of this response, by topic, include:

> Centralization: Following its April 2015 endorsement to do so, USCIS on November 1, 2016, centralized adjudications of SIJ petitions and SIJ-related adjustment applications at its National Benefits Center (NBC). The agency will refer to Field Offices those cases that require an in-person interview to determine eligibility.
>
> Interviews: USCIS officers now have specific guidance for conducting interviews of children, including specific instruction not to ask questions concerning the details of any abuse suffered. USCIS has developed Child Interviewing Techniques training and has distributed it to Field Offices.
>
> Program guidance: USCIS will continue the Federal rulemaking process to amend its regulations governing the SIJ classification and related applications for

[10] *See* CISOMB, Recommendation: Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices, online at https://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf.

[11] *See* USCIS, Memorandum, Response to Recommendation 47, Special Immigrant Juvenile (SIJ) Adjudications: An Opportunity for Adoption of Best Practices (July 13, 2011), online at https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response47.pdf.

adjustment of status to lawful permanent residence. During calendar year 2016, the agency issued clarifying guidance via its Policy Manual.[12]

USCIS consent: The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008) simplified but did not remove the consent requirement. INA § 101(a)(27)(J)(iii). USCIS no longer expressly consents to the juvenile court order but rather reviews the order as part of the determination that the eligibility requirements have been met. DHS/USCIS continues to interpret its consent function as an essential first step in any adjudication.

USCIS does not determine whether or not a child has been abused, abandoned, or neglected, nor does it reweigh the evidence to form independent conclusions about what is in a child's best interests. Orders that include or are supplemented by findings of fact supporting the conclusions of law as to the required findings will usually be sufficient to establish eligibility.

Note that DHS/USCIS has thoroughly reviewed changes made by the TVPRA of 2008.[13] INA § 101(a)(27)(J)(iii) continues to require DHS/USCIS consent; however, it was clarified that consent is not a precondition to the SIJ petition adjudication. USCIS interprets consent in line with the legislative history from when the term "consent" was first added to the statute.

The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998 added the consent function in order to allow the then Attorney General to limit SIJ eligibility to those who obtained the requisite dependency and the best-interests determinations due to abuse, neglect, or abandonment.[14] The 1998 Act also added that the finding of eligibility for long-term foster care be due to abuse, neglect, or abandonment. The addition of both requirements shows approval was not meant to be based only on a court order containing the findings listed in the INA definition of special immigrant juvenile. DHS/USCIS will consent to SIJ classification when it is determined the request for SIJ classification is bona fide, which means the court order was sought for relief from abuse, neglect, or abandonment and not sought solely or primarily to obtain an immigration benefit.

The CISOMB raises additional concerns and recommendations in its Annual Report, to which USCIS responds below, by topic.

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[12] On Oct. 26, 2016, USCIS published two new sections of its Policy Manual: Volume 6 - Immigrants, Part J – Special Immigrant Juveniles, online at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html; and Volume 7 – Adjustment of Status, Part F – Special Immigrant-Based (EB-4) Adjustment, online at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF.html.

[13] *See* U.S. Department of State, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Jan. 1, 2008), online at http://www.state.gov/j/tip/laws/113178.htm.

[14] *See* U.S. Congress, H.R.2267, online at https://www.congress.gov/bill/105th-congress/house-bill/2267.

Temporary Orders: The CISOMB expresses concern that USCIS is not granting approval of state court-issued orders that appear limited in timeframe or are in any way "temporary." The CISOMB indicates USCIS should not use the TVPRA 2008's provisions as the basis for this requirement. USCIS replies that its position on temporary orders is longstanding and predates the TVPRA 2008. The USCIS Policy Manual, published on October 26, 2016, includes clarifying guidance on this topic.[15]

EB-4 Regressions: The CISOMB states particular concern over the retrogression of SIJ visa numbers (EB-4 category) announced in the May 2016 Visa Bulletin for applicants from El Salvador, Guatemala, and Honduras. (This meant no visa numbers would be available for SIJ applicants from those three countries whose Forms I-360 were received after January 1, 2010.) The CISOMB also calls on USCIS to provide assurance that children with approved I-360s will not be subject to immigration enforcement and will have access to employment authorization while they wait for visa numbers to become available again.

DOS is the Federal agency that determines whether visas are available and authorized for issuance based upon the limits established by Congress, which include per-country numerical limits. USCIS must adhere to DOS's allocation of visas as mandated under U.S. law.

USCIS further responds that it does not oversee immigration enforcement and has no role in the decision-making of other DHS components that determine whether or not enforcement action will be taken. In addition, the current statute does not provide for the granting of work authorization based on classification as an SIJ.

USCIS has developed, disseminated, and posted on its website information to help inform stakeholders in response to EB-4 visa regressions for El Salvador, Guatemala, and Honduras and subsequent regressions for Mexico and India.

IV. Interagency, Customer Service, and Process Integrity

A. Processing Times and Processing Delays

In its 2016 Annual Report, the CISOMB urges USCIS to address lengthening processing times as a serious and pervasive issue. The Annual Report adds USCIS should immediately address the problems preventing it from meeting the processing time goals promised in its 2007 final fee rule.

[15] USCIS, Policy Manual: Volume 6, Part J.

The agency continues to work to resolve issues that the CISOMB identifies as frustrating and confusing to USCIS customers.

Key among these efforts is testing currently under way by the agency's Office of Performance and Quality (OPQ) of a new methodology that, if proven successful and implemented, will help the agency publish processing-time data frequently, more timely and accurately, and in a more customer-friendly format.

If implemented, this new methodology should dramatically decrease the existing delay between calculation of processing times and the posting of these times on the agency's website.[16] In addition, OPQ envisions this system enhancing customers' ability to determine when their applications are beyond the normal processing times. This will help USCIS manage customer expectations, decrease the number of complaints received, and direct resources currently handling customer complaints to assist with other tasks.

Meanwhile, the workload at USCIS Service Center Operations Directorate (SCOPS) facilities has increased over the past year. The agency expects continued increases in the volume and complexity of the applications and petitions SCOPS adjudicates.

The workload growth has led to an increase of pending benefit requests at the Service Centers. Recognizing this, USCIS is working to identify and address factors that are likely contributing to the longer case-processing times. Through these efforts, the agency will continue to tackle its staffing shortages and the workload issues causing the increase in backlogs, to the extent current resources allow.

In FY 2017, USCIS authorized 660 new positions for SCOPS. Authorization for these new positions was distributed across operations in the service centers to maximize efficiency. Once they are fully trained and complete a full background investigation, the new personnel will help USCIS manage its current and incoming workloads. (Note that new employees are hired after undergoing a preliminary background investigation while the full background investigation is under way. A new Immigration Officer cannot access select systems until a full background investigation is complete.)

As of September 30, 2017, USCIS had filled 90.2 percent of the 4,624 positions authorized for SCOPS.

Also, SCOPS has formed a Capacity Planning Working Group to evaluate the workloads among the Centers and consider rebalancing work when appropriate. The agency has been conducting weekly planning sessions to review and identify available capacity at Service Centers and, based on findings, redistribute certain workloads among them where current resources allow. SCOPS allocates overtime as needed to help address cases

[16] *See* USCIS Web page, USCIS Processing Time Information, https://egov.uscis.gov/cris/processTimesDisplayInit.do (last visited June 26, 2017).

pending outside normal processing times. More workload transfers and overtime are planned while USCIS considers longer-term strategies.

B. The Challenges of Background Checks and Clearances on Case Adjudications

According to the Ombudsman, stakeholders continue to experience case processing delays caused by background checks and other security screening efforts that can last several years.

In response to these concerns, the Ombudsman recommends USCIS create a unified monitoring process to follow up on processing of background and security checks—particularly pending Federal Bureau of Investigation (FBI) name checks and U.S. Immigration and Customs Enforcement (ICE) investigations—and prioritize the processing of those in which security is an identified issue.

USCIS carefully monitors and ensures that leadership is kept informed of processing issues related to background and security checks. The USCIS Fraud Detection and National Security Directorate's top priority is ensuring timely, accurate, and reliable exchange with internal and external stakeholders of intelligence related to national security, fraud, and public safety. USCIS makes every effort to ensure the timeliness of the background check process. However, the agency is dependent upon law enforcement agencies' timeframes for conducting their investigations and completing the background check and clearance processes.

USCIS works closely with the law enforcement agencies to seek a response as soon as practicable. One example of this is related to the FBI's current goal of a 90 percent success rate in name-checking and returning results within 30 days. In instances where responses fall outside of this timeframe, USCIS can request the FBI to expedite the name check based upon any of these criteria: membership in the military; compelling case-specific circumstances; mandamus actions; humanitarian reasons; age outs; and selection for the DV program.[17]

Also, with respect to some fraud and criminal (egregious or non-egregious public safety) cases, agency Policy Memorandum 602-0050 provides that if ICE does not take action or otherwise respond within 60 days of the referral, USCIS will proceed with adjudication.[18] USCIS closely monitors the progress of these cases.

In cases where the length of time to complete the background check falls outside of the

[17] FBI Name Check Expedite Process Guide (Feb. 2013), referenced by USCIS Biometrics Division.
[18] USCIS, Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," PM-602-0050 (Nov. 7, 2011), online at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

usual processing timeframes due to a pending investigation, USCIS, in accordance with 8 CFR 103.2(b)(18), may in certain circumstances authorize withholding of adjudication (abeyance) if it determines (e.g., in connection with request for abeyance by a law enforcement agency) that an investigation has been undertaken involving a matter relating to eligibility or the exercise of discretion in connection with the benefit request.[19] The regulations mandate USCIS to review the matter again every 6 months to determine whether more time is needed to complete the investigation.

Clarifications

On page 67 of its Annual Report, the CISOMB states: "USCIS conducts a criminal investigation of all naturalization applicants that includes FBI fingerprint and name checks, and an investigation into an applicant's place of residence and employment."

It is important to note for current and future reference that criminal investigations are conducted only by law enforcement agencies, which USCIS is not.

C. Ensuring the Delivery of Secure Documents

The CISOMB is pleased USCIS is working closely with the U.S. Postal Service (USPS) to test improved protocols for delivering secure documents. It recommends the agency be more proactive in notifying customers when secure documents are returned.

USCIS has partnered with USPS since 2008 to deliver every Permanent Resident Card, EAD, and Refugee Travel Document/Reentry Permit Booklet using Priority Mail with delivery tracking and confirmation. USPS has returned to USCIS as undeliverable roughly 2 percent of secure identification documents mailed over the last 3 fiscal years, due to factors such as the customer not residing at the address USCIS has on file.

Realizing that a portion of its customer base moves frequently, USCIS is acting to improve the process through which customers update their address of record so their secure identification documents and other correspondence reach them. The next anticipated enhancement to the Change of Address tool will cover validation through USPS. This will help mitigate a portion of non-delivery issues by ensuring an accurate address has been captured.

USCIS is also working with USPS to identify other means of solving non-delivery issues, including the use of new tracking technologies and alternative ways to investigate when a document is not delivered.

Additionally, the agency is identifying all system, process, and form changes needed to implement a hold-for-pickup option for customers. This option would let customers choose to have their document held at their local post office rather than delivered to their

[19] *See* USCIS Web page, Service Law Books Menu, https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-11630/0-0-0-11646.html (last visited June 26, 2017).

home or designated representative. As part of this service, USPS will inform customers via email that a package is available for pickup at the local post office. Customers who do not pick up their package within five days would have a notice mailed to their address of record. A package not picked up within 14 days would be returned to USCIS.

The CISOMB continues to recommend USCIS use prepaid couriers or certified mail to track delivery of secure documents and be more proactive in notifying customers when secure documents are returned. This option is not currently viable because the secure identification document production and mailing facilities are geographically separate from the adjudication sites where the customers' files are located. The efficiency at which USCIS produces and mails documents, typically within 96 hours of application approval, does not provide sufficient time for a pre-paid mailer to arrive at the production facility.

D. Transformation Update: E-Filing for Immigration Benefits Begins

Transformation is USCIS' initiative to transition from its current paper-based filing and adjudication system to a single electronic online filing and case management system. The key component to Transformation is USCIS ELIS.

The 2016 Annual Report says nearly 900,000 customers filed and tracked USCIS benefits using the agency's emerging electronic platform that facilitates online filing and enhanced case-status monitoring. The report adds that "the majority of e-filings were processed timely and accurately by USCIS."

However, the Ombudsman cites stakeholder reports of challenges and frustration with locating or obtaining processing times and up-to-date filing information as well as with timeliness of customer service.

The Ombudsman's Office also refers to a March 2016 audit report by DHS's Office of Inspector General (OIG) critiquing the agency's "deeply troubled" Transformation Program.[20]

USCIS is committed to the successful implementation of electronic processing for all immigration benefits. The implementation of any new or enhanced functionality will necessarily include addressing technical and systemic issues that arise prior to, during, or after deployment. USCIS is acting to effectively and efficiently identify these issues, determine their root causes, and implement resolutions.

The agency also agrees it must continue to address its customers' and stakeholders' concerns about processing-time information, provision of case status updates, and

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

timeliness of customer service, and that resolution of these problems must be communicated effectively.

Furthermore, USCIS responds that, while it continues to deliver capability to support electronic benefit processing, it remains committed to practices that ensure stakeholder involvement and provide support to internal and external users of USCIS' electronic immigration system.

Background

Prior to 2012, significant factors contributing to lack of progress on Transformation were:

- Continued reliance on development methodologies that did not allow sufficient flexibility in system development and deployment; and

- Acquisition strategies now known to be deeply flawed in regard to expanding the use of technology to support operations.

The Government Accountability Office (GAO) conducted a number of audits highlighting some of the problems with the Transformation process that needed to be addressed to make the program more efficient.[21]

USCIS, DHS, GAO, and the OIG were aware of the magnitude of these problems in 2011 and in 2012.

In early 2012, USCIS—supported by DHS and the U.S. Office of Management and Budget—fundamentally changed the approach to transformation, implementing sweeping changes to the agency's acquisition strategy, development process, infrastructure, and governance model. In addition, USCIS began to rebuild the Transformation system using a more flexible architecture. (USCIS refers to the system replaced by this rebuilding process as "Legacy ELIS.")

The first benefit deployed in the new ELIS architecture was Form I-90, Application to Replace Permanent Resident Card. Its launch in November 2014 resulted in 2,000 applicants electronically filing their I-90 applications in ELIS.

[21] *See*, e.g., GAO, "USCIS Transformation: Improvements to Performance, Human Capital, and Information Technology Management Needed as Modernization Proceeds," GAO-07-1013R (July 17, 2007), online at http://www.gao.gov/products/GAO-07-1013R; GAO, "Immigration Benefits: Consistent Adherence to DHS's Acquisition Policy Could Help Improve Transformation Program Outcomes," GAO-12-66 (Nov. 22, 2011), online at http://www.gao.gov/products/GAO-12-66.

Program accomplishments

- The enhanced ELIS has taken in more than 2.5 million cases since March 2015. In addition to Form I-90, USCIS has introduced electronic processing and adjudication of additional product lines, including Form I-821, Application for Temporary Protected Status; Form I-821D, Request for Consideration of Deferred Action for Childhood Arrivals; and Form N-400, Application for Naturalization.

- Form N-400 is the largest product line integrated into ELIS. To date, more than 240,000 N-400 applications have been submitted through ELIS.

- In FY 2016, 24 percent of agency receipts were processed through ELIS.

Applying experiences to build on progress

As noted in the CISOMB Annual Report, the OIG said adjudicators "struggled" with the new case management technology, which "is missing critical functionality."

USCIS replies that the functionality OIG refers to involves electronic processing of Form I-90, a procedure that was new to many agency staff members. The system had been modified with input from the first 2,000 cases and, at the time the OIG was auditing processes in the field, full operations had been in place for less than a month. As with any implementation of a software system, there were challenges during the first few months after deployment. With each deployment, lessons were learned and the deployment process, as well as adjudicator familiarity, improved.

When capability for Form N-400 was deployed in mid-April 2016, USCIS immediately sent six members of its Office of Transformation Coordination (OTC) to the NBC to provide support, address questions, and obtain direct end-user feedback. Over the next 60 days, in both May and June, OTC staff conducted follow-up site visits to the NBC.

These visits were aimed at ensuring a smooth deployment and increasing end-user confidence in the product, and allowed OTC staff to gather valuable feedback for the Transformation program.

The deployment of Form N-400 in ELIS did reveal a number of issues that ultimately led to USCIS deciding that the system was not ready for that deployment. Field Office leadership decided to stop ingesting cases into ELIS before the OIG report made such a recommendation.

Also, USCIS has worked to resolve or improve on issues that the OIG report accurately pointed out. These are summarized below:

- Certificate printing: resolved.

- Document uploading/scanning: resolved.

- ELIS interface issues: These issues are much improved, but USCIS continues to address bugs in the system as they arise and develop.

- Contingency plan: (in the event the ELIS system was not available): Resolved. Documents and forms submitted are stored in a separate database system independent of ELIS.

- Background checks: FBI Name Checks and TECS checks have been a primary focus from the beginning. Many "false alarms" have sounded, but the integrity of the agency's work remains secure. USCIS' diligence in validating the ELIS checks outside of the system has allowed the agency to respond quickly and remedy ELIS deficiencies. USCIS continues to validate security check results.

- Case status update/closeout: Despite initial issues encountered in updating the Central Index system after closing out a case in ELIS, USCIS now has a 99.8 percent accuracy rate. The few errors encountered typically relate to individuals who have multiple file numbers. These are quickly identified on a regularly run report and corrected.

- Backlogs: During CY 2017 USCIS received more N-400 applications than anticipated. This affected processing times. While there has been an adjustment period for users with the new system, ELIS has not contributed significantly to those increased processing times.

Moving forward, the agency continues to support its staff in Field Offices and at Service Centers through multiple site visits for each major release.

It is worth noting that the best practices and Agile development methodology used to create ELIS are the same as those used by top technology companies such as Netflix, Amazon, and Google. Other Government agencies visit USCIS to learn about these contemporary best practices. In addition, USCIS participates in public and private-sector information technology communities to identify means to enhance the experience of internal and external users.

Stakeholder involvement

The CISOMB notes that customer participation in online filing initiatives grew during the reporting period. Its Annual Report states that online filings for Form I-90 totaled 291,099, nearly as many as the 351,156 paper-based Form I-90 filings. However, it also states that USCIS needs to examine ways to increase responsiveness to user feedback and to allow for more external user involvement.

USCIS' online filing and electronic processing efforts provide for full communication with, and participation from, internal and external stakeholders. USCIS' Customer Service and Public Engagement Directorate (CSPED) performs qualitative and quantitative research (e.g., interviews and demographic analysis) to inform early design choices. In addition, CSPED administers usability testing with external stakeholder

organizations in agency Field Offices throughout the country. OTC also conducts monthly surveys to gather additional feedback from current online filers.

The agency also directly engages a wide range of internal users, including subject matter experts from within and outside the agency, records clerks and managers, adjudication officers, and background check officers and their supervisors. These same individuals remain involved with the development teams to answer questions, provide feedback on design and development, and test the system's functionality and usability.

Post-deployment user support

In 2013, USCIS provided more effective online service to its customers by:

- Creating the Customer Contact Center (CCC), a new user-support option that serves as an alternative to calling the NCSC. The CCC provides an online form—accessible via a "Need Help?" link on the upper right of all agency online-filing Web pages—to help customers seek assistance from USCIS immigration services officers (ISO).[22] From August 1, 2015 to July 29, 2016, the CCC responded to 144,548 customer inquiries, 13 percent of which related to computer technical issues and 87 percent of which requested ISO assistance; and

- Hiring, under the CCC's Director, contracted technical help-desk personnel to address customer inquiries coming to the NCSC with specific online filing and electronic processing issues. From August 1, 2015 to July 29, 2016, this team resolved 30,794 calls for assistance.

This team of ISOs and help-desk personnel serves as an advocate for customers who recommend improvements to online filing, and enables USCIS to more easily identify user support needs based on trends in customer inquiries. Since 2014, the team has advocated for more than 20 system enhancements to improve customer experience and understanding.

In addition, under the leadership of CSPED, the CCC and NCSC work closely to manage workload and address all customer inquiries in a timely manner. CSPED also partners with USCIS operational directorates to identify service request issues, trends, and delays, and to enhance case status and processing time information.

Elimination of online filing for Forms I-526 and I-539

The CISOMB reports stakeholders' disappointment with the elimination of online filing for Form I-526, Immigrant Petition by Alien Entrepreneur, and Form I-539, Application to Extend/Change Nonimmigrant Status. Both forms were deployed in Legacy ELIS.

A July 2014 OIG report noted that the process of adjudicating Form I-539 on paper was

[22] *See* USCIS Web page, https://my.uscis.gov/account/needhelp (last visited June 26, 2017).

at least two times faster than adjudication through Legacy ELIS.[23] OIG-obtained information revealed ISOs took longer to adjudicate the form in Legacy ELIS due in part to the estimated 100 to 150 clicks needed to move among sublevels and open documents to complete the process. USCIS appreciated and acknowledged the OIG's comments but was limited in its ability to make changes to Legacy ELIS due to the system's complexity. Also, any changes to Legacy ELIS would have been costly.

When USCIS moved to redevelop ELIS in a simplified architecture, the rebuilding and deployment of the electronic Form I-539 was placed in a later release, scheduled for 2018, within a line of business that supports nonimmigrant processing.

Meanwhile, USCIS conducted several webinars and outreach sessions to increase public awareness of the electronic Form I-526 within Legacy ELIS. Despite these efforts, USCIS saw no significant use of Legacy ELIS for EB-5 filings. In April 2015, a total of 68 Form I-526 petitions were filed in Legacy ELIS, representing less than 1 percent of the 14,170 Form I-526 petitions filed since Legacy ELIS began accepting the form.

E. Recommendation Update: Consular Returns

Communication and transparency

The CISOMB reports stakeholders whose approved petitions are returned to USCIS by DOS experience uncertainty and ongoing challenges due to resource limitations, poor interagency communication, and antiquated file transmission between the two entities.

The Annual Report states that customers continue to report lack of notice that the file has been returned to USCIS, as well as issues with file transfers between DOS and USCIS (specifically, where DOS claims it sent the file to USCIS but USCIS claims it has not received it), files sent to the wrong Service Center, and a general lack of action on returned petitions.

The CISOMB recommends that USCIS Service Centers receiving an approved petition verify the file was sent to the right office before storing it. The CISOMB reiterates the agency should consistently send the petitioner a receipt notice regardless of where the petition is received, and that the petitioner be notified of the file's location.

The Ombudsman also recommends files be digitized to ensure efficient processing, eliminating significant delays caused by physical file transfers between the two agencies. Also, the CISOMB again calls upon USCIS to establish and post on its website agency-wide processing goals for consular returns. It adds the agency should also provide the public with clear guidance on the process and timeline for case resolution.

[23] This was based on studies conducted by USCIS Service Centers. *See* DHS, OIG Report 14-112: "USCIS Information Technology Management Progress and Challenges" (July 2014), online at https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-112_Jul14.pdf.

USCIS continues to work to improve processes for handling consular returns through ELIS. The agency recognizes that processing cases in the electronic environment will alleviate uncertainty about routing and the handling of returned cases, as physical file location will no longer affect the appropriate jurisdiction's access to the record.

Processing times following a Notice of Intent to Revoke

The CISOMB states that, while USCIS has reported it tries to respond within 120 days after a response to a Notice of Intent to Revoke (NOIR) is received, requests for case assistance to the Ombudsman reflect different response times.

USCIS replies that, while it makes every effort to provide timely adjudication across all benefit types, it makes no guarantee of a specific processing time following receipt of a response to a NOIR. By nature, a NOIR indicates an individual is substantively ineligible for a previously approved benefit and provides the opportunity to rebut this finding. Cases receiving a NOIR vary substantially in complexity and may involve further investigative action, consultation with counsel and/or Headquarters, or any of a number of other factors that cause processing times to vary.

V. Business and Employment

A. Regulatory and Policy Developments in Employment-Based Immigrant Petitions

The CISOMB notes that USCIS took a number of steps during the reporting period of 2015 into 2016 to implement former President Obama's Immigration Accountability Executive Action for businesses and foreign workers.[24]

- On November 20, 2015, the agency published the draft Policy Memorandum, "Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability" and solicited stakeholder feedback on the memorandum through January 4, 2016.[25]

  After receiving hundreds of comments in response and inviting stakeholders to provide feedback via a public listening session, USCIS published the final Policy Memorandum on March 18, 2016.[26] This final Memorandum, which became

[24] Although the title of this section conforms to the CISOMB Annual Report, USCIS notes Executive Action covers much more than immigrant petitions.

[25] *See* USCIS, Draft Policy Memorandum, Draft PM-602-0122, "Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability" (Nov. 20, 2015), online at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Same_or_Similar_Policy_Memorandum_-_11.20.15.pdf.

[26] *See* USCIS, Policy Memorandum, PM-602-0122.1, "Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability" (Mar. 18, 2016), online at

effective March 21, 2016, provides clarity to employees and their employers with respect to the types of job changes constituting a "same or similar" job for purposes of section 204(j) job portability. The policy was designed to afford foreign workers greater flexibility and stability, while also promoting a more level playing field for U.S. workers.

Because the final memorandum became effective only recently, USCIS believes a large enough sample size of adjudications is not yet available to determine whether further action is warranted. However, the agency will review issues as they arise in this context and pursue clarification should it become necessary.

- On November 18, 2016, DHS published a Final Rule titled, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers."[27] Effective January 17, 2017, this rule provides various benefits to U.S. businesses and certain employment-based high-skilled immigrants and nonimmigrants, including: improved processes and increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers; greater stability and job flexibility for such workers; and increased transparency and consistency in the application of agency policy related to affected classifications. DHS reviewed nearly 28,000 comments after issuing the rule's associated Notice of Proposed Rulemaking (NPRM) on December 31, 2015.

- On January 15, 2016, DHS published the final rule, "Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants."[28] This rule, which went into effect on February 16, 2016, provides H-1B1, CW-1, and principal E-3 nonimmigrants with authorization for continued employment with the same employer if such employer has timely filed for an extension of stay on the nonimmigrant's behalf.

  The rule also expands the list of evidence petitioners may submit on behalf of beneficiaries seeking lawful permanent residence under the employment-based first preference immigrant classification (EB-1) for outstanding professors and researchers, to include evidence comparable to the other forms of evidence already listed in the regulations. This harmonizes the regulations for EB-1 outstanding professors and researchers with certain employment-based immigrant visa categories that already allowed for the submission and consideration of comparable evidence.

- On January 21, 2016, DHS published a draft Policy Memorandum for stakeholder comment addressing the Comparable Evidence Provision for O nonimmigrant visa

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https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/Final_Same_or_Similar_Policy_Final_Memorandum_3-18-16.pdf.

[27] *See* 81 Fed. Reg. 82,398 (Nov. 18, 2016), online at https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.

[28] *See* 81 Fed. Reg. 2068 (Jan. 15, 2016), online at https://www.federalregister.gov/documents/2016/01/15/2016-00478/enhancing-opportunities-for-h-1b1-cw-1-and-e-3-nonimmigrants-and-eb-1-immigrants.

classifications.[29] The aim of the draft memorandum was to provide clarifying and updated guidance on application of the regulatory "comparable evidence" provisions when adjudicating O-1 nonimmigrant visa petitions.

- On March 11, 2016, DHS published a final rule on optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM).[30] This rule was designed to strengthen and extend on-the-job training for STEM graduates from Student and Exchange Visitor Program-certified U.S. universities and colleges, giving the graduates a period to enhance their ability to achieve the objectives of their course of study. The rule also mandates certain procedures that increase program oversight. The final rule also includes "Cap-Gap" relief first introduced in 2008 for F-1 students with a timely filed H-1B petition and request for change of status. This Cap-Gap relief allows such students to automatically extend the duration of F-1 status and any current optional practical training until October 1 of the fiscal year for which the H-1B visa is being requested, subject to certain conditions.

- On January 17, 2017, DHS published the International Entrepreneur Rule (IER), which was first proposed on August 31, 2016, after the CISOMB's 2016 Annual Report was released.[31] This rule, published with an effective date of July 17, 2017, amended regulations to implement the Secretary of Homeland Security's discretionary parole authority in order to increase and enhance entrepreneurship, innovation, and job creation in the United States.

  Note: *On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for DHS to act to ensure that parole authority under section 212(d)(5) of the INA is exercised on a case-by-case basis in accordance with the plain language of the statute, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. Consistent with this Executive Order, USCIS initiated a review of its use of parole authority under 212(d)(5), including under the IER.*

  On July 11, 2017, DHS published a final rule delaying the implementation of the IER as the agency further considered the rule under the Executive Order.[32] *However, on December 1, 2017, the U.S. District Court for the District of Columbia*

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[29] *See* DHS, Draft Policy Memorandum, "Comparable Evidence Provision for O Nonimmigrant Visa Classifications" (Jan. 21, 2016), online at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED_DRAFT_PM_602-0123_-_O_Comparable_Evidence_PM_APPROVED_2.pdf.

[30] *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,039 (Mar. 11, 2016), online at https://www.federalregister.gov/documents/2016/03/11/2016-04828/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and.

[31] *See* 82 Fed. Reg. 5,238 (Jan. 17, 2017), online at https://www.federalregister.gov/documents/2017/01/17/2017-00481/international-entrepreneur-rule.

[32] *See* 82 Fed. Reg. 31,887 (July 11, 2017), online at https://www.federalregister.gov/documents/2017/07/11/2017-14619/international-entrepreneur-rule-delay-of-effective-date.

vacated the delay rule as a result of litigation in National Venture Capital Association v. Duke. Following this ruling DHS has taken steps to implement the IER as required. The agency is however contemplating eliminating the IER, and as of early 2018 was in the final stages of publishing a notice of proposed rulemaking seeking its removal.[33]

The CISOMB also recommends that USCIS revise its position on beneficiary standing in employment-based petitions. Specifically, the CISOMB highlighted the fact that neither the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker, nor the beneficiary's new employer receive notice if the agency reconsiders the underlying Form I-140.

In June 2017, the AAO decided *Matter of V-S-G Inc.* and held that beneficiaries who have properly ported under AC21 are affected parties who are entitled to receive notices pertaining to the potential revocation of the approval of an immigrant visa petition due to their ability to port that petition to new employment and a new employer. On November 11, 2017, USCIS adopted the AAO's decision as a matter of policy. Now, when USCIS sends an original petitioning employer a NOIR for an approved Form I-140, it also sends a separate NOIR to the petition's beneficiary, provided the beneficiary has properly ported under AC21.

B. EB-5 Immigrant Investor Program Update

Processing times

The CISOMB reports processing times for EB-5 petitions continue to exceed a year and have not improved. It adds that current processing times raise the question whether the agency's Immigrant Investor Program Office (IPO) is adequately staffed.

USCIS responds that IPO is adequately staffed to administer the EB-5 program, given the high volume of filings it has received over the past several years.

USCIS adds that the EB-5 program's continuing popularity has led to high volumes of related applications and petitions. Due in large part to three potential sunset dates in FY 2015 and FY 2016, USCIS received nearly 36,000 EB-5 applications and petitions in this 2-year period, which exceeded the number of such applications and petitions the agency received during the four preceding years combined.

Although these influxes of receipts hindered USCIS' efforts to reduce processing times in FY 2016, the agency continues to take steps to improve the processing times for Forms I-526; I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status; and I-924, Application for Regional Center under the Immigrant Investor Pilot Program.

[33] *See* USCIS Web page, "International Entrepreneur Parole" https://www.uscis.gov/humanitarian/humanitarian-parole/international-entrepreneur-parole (last visited Jan. 22, 2018).

In response to the significant increase in application and petition receipts, USCIS has taken many actions to improve overall efficiency, including:

- **Concentrating resources to review and adjudicate aging cases**. USCIS has reduced the number of aging cases (those outside of posted processing time) and continues to focus on reducing processing times.

- **Continued hiring of adjudicators and economists to reduce the backlog**. As of December 31, 2016, IPO had 155 full-time employees, an increase of almost 12 percent from the date of the Ombudsman's report. By the end of FY 2017, IPO had 184 full-time employees.

- **Improving operational efficiencies**. USCIS continued to focus on standardizing and better managing assignment of EB-5 cases in FY 2016 to improve adjudication of cases.

- **Engaging with stakeholders**. USCIS continues to engage its customers through frequent stakeholder events, informing them of operational updates, offering filing tips, and providing the latest statistics on each form type. Improvements made operationally and through regularly scheduled engagements with stakeholders are expected to reduce delays in the processing of EB-5 applications and petitions.

Addressing abuse and increasing integrity

The CISOMB expresses concern over program integrity in light of allegations and findings of fraud or noncompliance with other Federal laws.

USCIS thanks the CISOMB for noting in the Annual Report that IPO is working with various components of the Federal Government to detect, deter, and eliminate abuse in the EB-5 program. The agency agrees that this is critical to its efforts to increase program integrity, and continues to focus on collaborative working relationships with other Federal agencies.

The CISOMB also discusses EB-5 regulatory efforts in addressing abuse and increasing integrity of the EB-5 program. As the CISOMB notes, in FY 2016 USCIS sought individual feedback from stakeholders on prospective areas for policy or regulatory reform, continued to work on such guidance, and sought to publish guidance as quickly as possible.

The CISOMB adds that USCIS has faced EB-5-related criticism from both the DHS OIG (March 2015 memorandum) and GAO (August 2015 report and February 2016 testimony).[34,35,36] USCIS notes that the February 2016 GAO report the CISOMB

[34] *See* DHS, OIG Interoffice Memorandum, "Investigation into Employee Complaints about Management of

discusses is the Statement of the Director of Homeland Security and Justice for GAO in preparation for testimony before the U.S. House Judiciary Committee, and not a new report reflective of any additional audit work.

USCIS continues its efforts to enhance program integrity and implement recommendations to improve it. Recent and ongoing work to this end includes:

- **Removing regional centers that no longer meet program requirements**. USCIS continues to terminate regional centers that no longer promote economic growth or fail to submit required information. In FY 2017, the agency terminated 83 regional centers, which represents 53 percent of all such terminations since the program began.

- **Establishing a compliance review program**. USCIS has hired forensic auditors to support the EB-5 program. The agency completed its first compliance review of a regional center in FY 2017.

- **Conducting site visits and new commercial enterprises (NCEs)**. USCIS completed a pilot in FY 2016, conducting random site visits for project locations. In FY 2017, the agency completed analysis of this pilot, incorporated the lessons learned, and expanded the existing Administrative Site Visit and Verification Program to regularly include EB-5 random site visits. USCIS hired an additional 13 field officers whose primary duty is to conduct EB-5 site visits. During 221 site visits conducted in FY 2017, 153 NCEs were found to be operating as expected, and 68 NCEs were found to be not operating as expected. In cases where NCEs are found to be not operating as expected, interviews will be scheduled and conducted prior to adjudication of the associated Form I-829 petitions.

- **Increasing use of interviews**. In FY 2016, USCIS implemented a procedure to interview EB-5 immigrants at the time they seek to remove the conditions on their conditional permanent residence. In cases where NCE petitioners are associated with NCEs that were found to be not operating as expected after a site visit, interviews are conducted. Twelve remote interviews were conducted in FY 2017.

- **Continuing training**. Staff members receive ongoing training to increase awareness and understanding of potential fraud schemes and scenarios that might take place within the EB-5 program.

Additionally, USCIS implemented the EB-5 protocols shared during former Secretary of

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U.S. Citizenship and Immigration Services' EB-5 Program" (Mar. 24, 2015), online at https://www.oig.dhs.gov/assets/Mga/OIG_mga-032415.pdf.

[35] *See* GAO Report, GAO-15-696, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits" (Aug. 12, 2015), online at http://www.gao.gov/assets/680/671940.pdf.

[36] *See* GAO, "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," before the U.S. House Judiciary Committee, 114th Cong. 2nd Sess. (Feb. 11, 2016) (statement of Rebecca Gambler), online at http://www.gao.gov/assets/680/675138.pdf.

Homeland Security Jeh Johnson's testimony before the Senate Committee on the Judiciary on April 28, 2015.[37] Training on the protocols is mandatory for all DHS employees and contractors who handle EB-5 cases.[38] The protocols provide specific guidance on how senior leaders must respond when asked to intervene in particular EB-5 cases and address concerns raised in DHS OIG's March 2015 report. The protocols were fully implemented as of October 1, 2015.[39]

Configuration of targeted employment areas

The CISOMB cites stakeholder concern over the manipulation of targeted employment areas (TEA) through gerrymandering.

USCIS is exploring possible changes to the TEA designation process and will review available data and stakeholder input in considering regulatory changes to provide the EB-5 community with greater consistency in the designation of these areas.

On January 13, 2017, USCIS published an NPRM that proposes to modernize the EB-5 program. This NPRM includes several provisions that propose to reform the TEA designation process and substantially reduce gerrymandering concerns.[40] USCIS is currently reviewing comments received as part of the final rulemaking process.

Verifying source of funds

The CISOMB says confirming the legitimacy of fund sources remains a major concern in the EB-5 program.

USCIS continues to enhance its efforts to verify source of funds as submitted by EB-5 petitioners. Trained agency adjudications officers review each Form I-526 petition and all supporting documentation to determine whether the petitioner has demonstrated, by a preponderance of the evidence, a lawful source of funds. If a petitioner is unable to demonstrate that funds were derived from lawful sources, USCIS will deny the petition for failure to meet the eligibility requirement.

USCIS conducts robust background checks and has a team of skilled immigration officers and intelligence research specialists specifically dedicated to the EB-5 program. In some

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[37] *See* DHS, "Written testimony of DHS Secretary Jeh Johnson for a Senate Committee on the Judiciary hearing titled 'Oversight of the Department of Homeland Security'" (Apr. 28, 2015), online at https://www.dhs.gov/news/2015/04/28/written-testimony-dhs-secretary-jeh-johnson-senate-committee-judiciary-hearing.

[38] *See* USCIS Web page, EB-5 Resources, EB-5 Protocols Training Slideshow (PowerPoint), "EB-5 Ethics and Integrity Protocols Training," https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-resources (last visited June 26, 2017).

[39] *See* DHS, "Ethics and Integrity: Protocols for Processing of EB-5 Immigrant Investor Visa Petitions and EB-5 Regional Center Applications, Including Stakeholder Communications," online at https://www.uscis.gov/sites/default/files/USCIS/Working%20in%20the%20US/eb5protocols.pdf.

[40] *See* 82 Fed. Reg. 4,738, "EB-5 Immigrant Investor Program Modernization," online at https://www.federalregister.gov/ documents/2017/01/13/2017-00447/eb-5-immigrant-investor-program-modernization.

cases, USCIS may conduct overseas verifications to confirm the authenticity of submitted documents or, in countries where USCIS officers are not present, request verification by DOS personnel.

In addition, as the CISOMB notes, in a statement prepared for testimony before the House Judiciary Committee on February 11, 2016, GAO recognized steps USCIS has taken to enhance the agency's fraud risk management efforts,[41] including:

- Establishing a dedicated entity to design and oversee its fraud risk management activities;
- Creating an organizational structure conducive to fraud risk management;
- Conducting fraud awareness training; and
- Establishing collaborative relationships with external stakeholders, including law enforcement agencies.

USCIS continues to build upon these and other improvements and will continue to focus on verifying legitimacy of fund sources for the EB-5 program.

Applying deference principles more consistently

The CISOMB cites stakeholder concerns about the inconsistent implementation of policy with respect to deference to prior adjudications. Per agency policy, "[a]s a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and such earlier determinations will be presumed to have been properly decided."[42]

However, deference does not apply when there is evidence of fraud or misrepresentation, the previously favorable decision is determined to be legally deficient (involved an objective mistake of law or fact), or the underlying facts have materially changed.[43]

USCIS respectfully disagrees with the characterization that it applies deference principles inconsistently. USCIS applies deference in accordance with agency policy. When the CISOMB previously raised this concern with IPO leadership, USCIS responded with a similar explanation. The agency will continue to educate stakeholders about the application of deference in accordance with EB-5 policy.

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[41] *See* "Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits," before the U.S. House Judiciary Committee, 114th Cong. 2nd Sess.
[42] *See* USCIS, Policy Manual, Volume 6, Part G – Investors, Chapter 6 - Deference, online at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter6.html.
[43] *Id.*

Stakeholder engagement

In 2014, USCIS established the Stakeholder Engagement Branch (SEB). From inception through July 2016, this team has facilitated more than 30 events for stakeholders. These engagements highlight USCIS' efforts to increase staffing, reduce backlogs, and provide opportunities for customers to submit questions, concerns, or comments about the EB-5 program.

Among the events the SEB coordinated in FY 2016 was USCIS' second EB-5 "In Touch" engagement, held in Miami, Florida, in July 2016. These engagements allow the agency to meet in person with national, state, and local government agencies and other stakeholders to increase awareness of the EB-5 program.

Additionally, USCIS held a listening session in April 2016 to hear individual stakeholder feedback on potential EB-5 regulatory and other policy changes, specifically minimum investment amounts, TEA designation, the regional center designation process, and indirect job creation. Based on the listening session feedback, several of these issues were addressed in the Advance Notice of Proposed Rulemaking and the NPRM published in January 2017.

C. H-2 Temporary Workers and Labor Trafficking

The CISOMB Annual Report states that the Ombudsman heard from workers' rights organizations about the vulnerabilities and exploitation of H-2A (temporary agricultural worker) and H-2B (temporary non-agricultural worker) nonimmigrants sponsored by U.S. employers, participated in interagency activities to address stakeholder concerns, and acted to resolve requests for case assistance by workers encountering challenges in their pursuit of protective immigration benefits.

USCIS thanks the CISOMB for its exemplary work in this vital area, including its service as Chair of the Blue Campaign, and looks forward to collaborating further with the Ombudsman and other Federal entities to address employee exploitation and human trafficking.

D. H-2 Temporary Workers—Program Developments and Challenges

The CISOMB reports that stakeholders continue to assert the H-2 program is overly regulated and bureaucratic, causing significant challenges in hiring foreign workers to fill temporary agricultural (H-2A) and non-agricultural (H-2B) jobs.

H-2B processing delays

The Ombudsman states recent regulatory and legislative developments have exacerbated conditions affecting both employers and employees, contributing to an overall increase, at least temporarily, in H-2B processing delays.

USCIS must emphasize that the H-2B-related delays referenced in the Annual Report are primarily rooted in the temporary labor certification process at the Department of Labor (DOL). Because DOL continues to process labor certification applications irrespective of whether a cap has been reached, there is effectively no limit to the size of increased surges in demand. This leads to significantly higher caseloads with DOL.

The CISOMB reports that, while USCIS may have increased its corps of adjudicators available to process H-2 petitions, some were not appropriately trained. Stakeholders complained of USCIS issuing RFEs and denials that revealed incorrect application of H-2B law and regulations. The Annual Report states that "templated RFEs" issued by USCIS compounded DOL processing delays.

While DOL processing delays and the increase in the number of USCIS RFEs on petitions coincided, they were unrelated.

At USCIS, both the California Service Center (CSC) and the Vermont Service Center (VSC) underwent changes in staffing as a part of the normal course of the agency's business. These staffing changes resulted in a temporary increase in the number of RFEs, which often occurs as officers familiarize themselves with a new kind of adjudication.

In response to stakeholder concerns about the increase in RFEs, USCIS issued clarifying guidance on the definition of "temporary need" in the H-2B context to both adjudicating officers and stakeholders.[44] This guidance also helped petitioners comply with existing regulatory requirements when filing H-2B petitions, and quickly led to a reduction in RFEs.

USCIS regularly works with DOL and DOS to streamline the H-2 process wherever possible, and works with both DOL and stakeholders to reduce the impact of surges in demand. However, both the CISOMB and stakeholders have often linked broader processing delays to USCIS, even when such delays have been outside of USCIS control. DOL recently indicated to stakeholders that such processing delays could recur during the same peak filing season in FY 2017.[45] Therefore, while USCIS maintains and often streamlines internal processing standards, delays may still be experienced.

"Returning Workers"

In its "Background" section for this topic, the CISOMB references FY 2016 "returning workers" as exempted from the annual visa cap "provided they previously held H-2B

[44] *See* USCIS, "Guidance on 'Temporary Need' in H-2B Petitions" (updated April 13, 2016), online at https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-temporary-need-h-2b-petitions (last visited June 26, 2017).

[45] Presented during DOL Office of Foreign Labor Certification webinar, "Employer Filing Tips and Best Practices for Preparing and Submitting H-2B Prevailing Wage Requests and H-2A/H-2B Labor Certification Applications," Sept. 13, 2016. Webinar slides accessible online at https://www.foreignlaborcert.doleta.gov/pdf/OFLC_H2_Visa_Programs_Stakeholder_Webinar_September_2016.pdf.

status between October 1, 2012 and September 30, 2015." USCIS notes this statement is somewhat overbroad, as the actual legislative language requires a "returning worker" to have been "counted toward the numerical limitation" (H-2B cap) during this period and not having simply held H-2B status.[46] The CISOMB also does not note that the legislative language requires that "returning workers" must be properly certified as such by the H-2B petitioner. Note that Congress did not renew this provision for FY 2017.

On July 19, 2017, DHS issued a joint final rule to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to an additional 15,000 visas through the end of FY2017. This one-time increased is based on statutory authority and does not affect the H-2B program in future fiscal years.

Definition of temporary need

The CISOMB counts among its "Ongoing Concerns" the 2016 DOL Appropriations Act containing a provision "redefining temporary need." This Act does not redefine temporary need. The provision in question states, "...for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)."

DHS and DOL's jointly issued H-2B regulations on temporary need are consistent with 8 CFR 214.2(h)(6)(ii)(B), and DHS has the ultimate authority to set the definition of temporary need. Further, the above-quoted statutory language directly references the relevant DHS regulation and thus does not mandate that USCIS revise its existing regulations. DHS continues to provide clarifying guidance as needed to its adjudicators and the public with respect to what constitutes temporary need, as defined by statute and in its regulations.

H-2A processing

Since May 11, 2016, USCIS has:

- Electronically sent approval information for H-2A petitions to DOS by the end of the next business day through a new "e-Approval" process. DOS will accept this electronic information in place of a Form I-797, Notice of Action, approval notice and allow its consular posts to process an H-2A nonimmigrant visa application, including the conducting of any required interview.[47]

- Used pre-paid mailers provided by petitioners to send out receipt notices for H-2A petitions. This is a change from standard processing at USCIS Service Centers, which normally use pre-paid mailers only for final-decision notices. H-2A

[46] *See* INA § 214(g)(9)(a), 8 U.S.C. § 1184(g)(9)(a). Certain H-2B workers (e.g., fish roe processors) are exempt from the numerical limitation.
[47] *See* USCIS, news alert, https://www.uscis.gov/news/alerts/uscis-and-department-state-launch-e-approval-h-2a-petitions, last reviewed/updated May 9, 2016 (last visited June 26, 2017).

petitioners may now submit two pre-paid mailers if they want to expedite delivery of both the receipt notice and the final decision notice.[48]

These processing changes were made to reduce delays for H-2A petitioners and to make the visa issuance process more efficient in recognition of stakeholders' need for this time-sensitive classification.

E. Requests for Evidence

High rates of Request for Evidence issuance

The CISOMB believes that USCIS continues to issue significantly high rates of RFEs, particularly in L-1A, L-1B, O-1, and P nonimmigrant product lines.

USCIS recognizes the high rate of RFEs and is actively addressing RFE quality through ongoing interaction with the public and with agency officers.

By the end of CY 2016, USCIS had held two engagements with stakeholders featuring discussions on issues such as comparable evidence and the types of evidence required for favorable and expedient adjudications. Internally, USCIS holds roundtables with its officers and meets biweekly with a working group where representatives from several agency components discuss the types of evidence officers should consider, and how it should be analyzed.

USCIS will continue to work to improve the quality of the RFEs.

California Service Center and Vermont Service Center

As in previous years, the CISOMB monitored the rates at which RFEs are issued at the CSC and VSC in three high-skilled nonimmigrant visa categories: H-1B; L-1A; and L-1B. It reports that FY 2015 RFE rates for these categories continue to show disparities between the two Service Centers, including fluctuations in RFE issuance rates and unexplained divergences.

The Annual Report notes:

- A decrease in H-1B RFE rates and parity at both Service Centers;
- A decrease in L-1B RFEs issued in FY 2015 at both Centers, to 44 percent at the CSC and 33 percent at the VSC; and

[48] *See* USCIS, news alert, https://www.uscis.gov/news/alerts/uscis-will-now-use-pre-paid-mailers-send-h-2a-receipt-notices, last reviewed/updated May 9, 2016 (last visited June 26, 2017).

- An increase in L-1A RFE rates to 55 percent at the CSC, and a decrease in these rates to 29 percent at the VSC, from the previous fiscal year.

The CISOMB calls on USCIS to carefully examine disparities in RFE data from the VSC and CSC.

USCIS is actively working to achieve consistency among the RFE rates between these Centers, to the degree appropriate. The agency holds monthly roundtables with the Centers, providing them the opportunity to improve consistency by asking questions and discussing issues identified from their adjudications.

These Centers are continuously polled for their approach to various scenarios, and USCIS' Office of Policy and Strategy, Office of Chief Counsel, and SCOPS coordinate when necessary to reach a common approach. Also, USCIS monitors its SCOPS RFE email box to identify areas of concerns from stakeholders to address with the Centers.

The RFE rates are monitored regularly, and USCIS will continue working with the Centers and the different components to resolve any significant shift in RFE rates due to trends in filings.

USCIS is cognizant that differences in the RFE rates between the Centers will exist depending on a variety of factors such as filing and adjudicative trends. The agency works consistently with stakeholders to ensure their needs are understood and to address any unnecessary spikes in the RFE rates.

Matter of Simeio Solutions, LLC

The CISOMB Annual Report discusses *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), which held that an H-1B employer must file an amended or new H-1B petition when a Labor Condition Application for Nonimmigrant Workers is required to be certified to USCIS due to a change in the H-1B worker's place of employment.[49]

The CISOMB relays that stakeholders contemplated a marked impact on employers in order to achieve compliance with *Matter of Simeio Solutions*, especially with respect to additional costs to prepare and file amended petitions. The Ombudsman states that, during the processing of these amended petitions, stakeholders reported receiving RFEs requesting information unrelated to the reason for filing the amendment, which resulted in reevaluation of the job opportunity or the foreign national's qualifications.

USCIS appreciates these comments.

[49] *See* Department of Justice Web page (Apr. 2015), https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/04/16/3832.pdf.

Note: *On April 18, 2017, President Trump signed an Executive Order on Buy American and Hire American.*[50] *In accordance with section 5(b) of this Executive Order , USCIS initiated a review of the H-1B program's operations and policies.*

On October 23, 2017, the agency issued PM-602-0151: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status. This PM rescinded the April 23, 2004 memorandum titled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity."[51]

As per PM-602-0151, adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought. Every amended or new H-1B petition must separately meet the requirements for H-1B classification and any requests for extension or amendment of stay.

Premium processing

The agency thanks the Ombudsman's Office for providing data on premium processing.

In its Annual Report, the CISOMB says stakeholders have speculated for years that USCIS engages in a pattern or practice of issuing RFEs in the final days of the 15-day premium processing period as a tactic to "stop the clock" on petitions to avoid issuing a refund to petitioners if adjudication cannot be completed in time.

USCIS responds that the data referred to in the report does not support the notion that USCIS adjudicators follow a practice of issuing RFEs in the final days of the premium processing period solely to "stop the clock." The report notes that very few RFEs were issued on the 15th day of premium processing. Also, data in the report shows that at the CSC, the highest 3 days of RFE issuance during the premium processing period occurred in the middle of the period. While the RFEs issued by VSC skewed more toward the end of the premium processing period (days 9, 13 and 14), those issued on days 13 and 14 accounted for only 28 percent of the total number of premium RFEs issued.

It is vital to note USCIS does not issue unwarranted RFEs to "stop the clock" for premium processing petitions. The agency strives to complete all premium processing petitions within the 15 days allowed under DHS regulations. As indicated in the Form I-907 instructions, USCIS will refund the premium processing fee if it does not take action on the related case within 15 calendar days of receiving a properly filed I-907.

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[50] *See* The White House, Executive Orders (Apr. 18, 2017), online at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/.

[51] *See* USCIS, PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status" (Oct. 23, 2017), online at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf

Taking action includes issuing an approval notice, denial notice, RFE, or NOID, or opening an investigation for suspected fraud or misrepresentation on the related petition.

F. Recommendation Update: Employment Authorization Documents

The CISOMB reports that FY 2015 data showed EAD adjudications after 90 days appeared to reach a troublesome 22 percent (449,307 filings). The CISOMB states that, with USCIS' proposal to eliminate the 90-day processing requirement for Form I-765, timeliness remains a concern for EAD processing.

USCIS recognizes the challenges delayed processing times may create for applicants and their families, is committed to processing cases as efficiently as possible, and continues to work diligently to give an adjudicative response to each employment authorization request.

The requirement that USCIS adjudicate Forms I-765 within 90 days of receipt was eliminated, effective January 17, 2017, due to fraud and national security concerns and in light of technological and process advances with respect to document production.

This requirement was eliminated through "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,"[52] a DHS final rule that greatly enhances I-765 processing for both adjudicators and applicants. In addition to eliminating the 90-day processing requirement, this final rule generally increases the period, from 120 days to 180 days, during which an applicant may file a renewal I-765 before expiration of a current document. It also grants an automatic 180-day extension of work authorization for individuals who file a renewal application under certain circumstances.

Although the time requirement was eliminated, USCIS remains committed to processing Forms I-765 within 90 days.

During FY 2016, USCIS received 2,119,220 Forms I-765, compared to the 2,030,896 I-765s it received in FY 2015. The average cycle time for Forms I-765 in FY 2016 was 2.3 months, well within the 90-day time requirement in effect at the time and less than the 2.6-month average cycle time for FY 2015.

USCIS does not agree that, in FY 2015, 22 percent of Forms I-765 were adjudicated beyond the 90-day period set forth in former 8 CFR 274a.13(d). The data used by the CISOMB as the basis for the 22 percent figure included certain I-765 applications that may have been filed at the same time as the request forming the basis for the EAD application.

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[52] *See* 81 Fed. Reg. 32,398, available online at https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.

The CISOMB data failed to take into account that the 90-day clock did not start in these cases until the applicant's underlying immigration request is actually granted. These cases included, for example, spouses of H-1Bs applying for H-4 status or an extension of stay, petitioners for U nonimmigrant status waiting to receive deferred action and be placed on the waiting list, spouses of L-1 and certain E nonimmigrants applying for derivative nonimmigrant status or an extension of stay, and DACA requestors, who were not eligible to receive an EAD until their underlying application, petition, or request was approved.

Also, the 22 percent does not account for 8 CFR 103.2(b)(10), which provided for resetting of the former 90-day clock when USCIS requested initial evidence or when an individual requiring fingerprinting requested rescheduling of a fingerprinting appointment in relation to either the Form I-765 or the underlying request that created the basis for an EAD application, beginning on the date the required evidence or request for fingerprint rescheduling was received.

As USCIS indicates on its website:[53]

- If USCIS issues a request for initial evidence, the date for calculating the processing time starts over from the date USCIS receives the initial evidence. For example, if a case is pending 60 days when USCIS issues a request for initial evidence and the applicant responds 30 days later, the processing time is reset to day 1 on the date USCIS receives the evidence.

- If USCIS issues a request for additional evidence, which may assist in proving eligibility where the initial evidence submitted does not, the processing time stops on the day the request is issued and resumes from the same point when USCIS receives the additional evidence.

- The processing time also stops if USCIS issues a request for initial evidence pertaining to the principal application/petition that serves as the basis for the application for employment authorization.

- When an applicant requests that his or her fingerprint appointment be rescheduled, the processing time starts over from the date of the request for rescheduling.

To minimize untimely adjudications, USCIS conducts numerous reviews electronically to ensure it processes cases in a first in, first out order. The agency completes further data collections throughout the pending application's life cycle to ensure the regulatory timeframe is met.

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[53] *See* USCIS Web page, "Tip Sheet: Employment Authorization Applications Pending More than 75 Days," https://www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days (last visited June 26, 2017).

When a case approaching the regulatory limit is identified, USCIS takes processing steps already in place to try to adjudicate it as expeditiously as possible. If a Form I-765 has been pending more than 75 days, the applicant may call the agency's NCSC at 1-800-375-5283 or schedule an InfoPass appointment at a local Field Office to ask for creation of an Approaching Regulatory Timeframe "service request." This service request is routed to the appropriate office for review.

In conclusion, USCIS continues to monitor the I-765 workload as part of efforts to meet the highest standards in customer service, and remains firmly committed to timely and quality adjudication of Form I-765 even with the removal of the time limits in 8 CFR 274a.13(d).

VI. Families and Children

A. Barriers to Applying for Naturalization

During the past decade, USCIS welcomed more than 7.4 million naturalized citizens. Nearly 730,000 individuals were naturalized during FY 2015 alone. In FY 2016, 752,800 people were naturalized.[54] In addition, as of March 2016, USCIS adjudicated 334,692 naturalization applications, an increase of 8,344 compared to the same period the previous year.[55]

USCIS works diligently to strengthen existing pathways to naturalization by creating, improving, facilitating access to, and raising awareness about available citizenship preparation resources. Recent examples of agency initiatives to support aspiring citizens include:

- Offering naturalization applicants the option to pay the $680 in fees ($595 filing fee and $85 biometric services fee, if applicable) by check, money order, or credit card. The credit card option may assist applicants who are not eligible for a fee waiver and cannot pay the entire application cost with a check or money order;

- Launching the Citizenship Public Education and Awareness Campaign, which invites lawful permanent residents (LPR) to learn about U.S. citizenship, ensures public access to official trusted sources of information through USCIS and community-based channels, and provides those on the path to citizenship with referrals and access to quality direct service providers;

- Releasing a variety of innovative customer service tools to enhance the user

[54] USCIS Web page, "Naturalization Fact Sheet," https://www.uscis.gov/news/fact-sheets/naturalization-fact-sheet (last visited June 26, 2017).
[55] USCIS, All Form Types Performance report for FY 2016 2nd Quarter – March 2016 (table), online at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2016_qtr2.pdf.

experience and help LPRs prepare for the naturalization process. For example, USCIS launched an interactive civics practice test in English in September 2015, followed by a Spanish version in November 2015, to help people prepare for the civics portion of the naturalization test. Individuals can also use a new online class locator to find local English-language and citizenship preparation classes;

- Notifying LPRs about the naturalization process through ELIS. When seeking to renew or replace a green card online, LPRs can view a pop-up message notifying them that many LPRs currently in the United States are already eligible to apply for naturalization and directing them to resources to learn about U.S. citizenship and the application process; and

- Providing citizenship preparation services to more than 156,000 LPRs through the Citizenship and Integration Grant Program.[56] Since its inception in 2009 through September 2016, the program has awarded $63 million through 308 competitive grants to immigrant-serving organizations in 37 states and the District of Columbia. In March 2016, USCIS announced a new funding opportunity under the program meant to encourage expansion of the existing field of citizenship instruction programs, particularly programs offered by small, community-based organizations that have not previously received a grant from the agency. USCIS announced the recipients of this new funding opportunity in September 2016.[57]

Processing delays

The CISOMB reports the naturalization process is still plagued by prolonged delays and that USCIS is failing to meet its processing-time goal at almost every Field Office.

USCIS responds that its goal is to process naturalization applications in a timely manner for its customers. Although processing times for Form N-400 may vary based on location, the average national processing time typically ranges from 5 to 7 months. USCIS established a standard goal of 5 months to process naturalization applications received, based on its FY 2008/2009 Fee Rule published in the Federal Register in July 2007.[58]

In FY 2015, USCIS met its 5-month average processing time goal for Form N-400 applications.

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[56] USCIS News Release, "USCIS Announces Citizenship and Integration Grant Opportunities" (Mar. 2, 2016), online at https://www.uscis.gov/news/news-releases/uscis-announces-citizenship-and-integration-grant-opportunities. Also, USCIS announcement, "Citizenship and Integration Grant Program," online at https://www.uscis.gov/about-us/citizenship-and-integration-grant-program.

[57] USCIS News Release, "USCIS Announces Fiscal Year 2016 Grant Recipients" (Sept. 1, 2016), online at https://www.uscis.gov/news/news-releases/uscis-announces-fiscal-year-2016-grant-recipients.

[58] *See* Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29,841 (May 30, 2007), online at https://www.federalregister.gov/documents/2007/05/30/E7-10371/adjustment-of-the-immigration-and-naturalization-benefit-application-and-petition-fee-schedule.

In its Annual Report, the CISOMB acknowledges being informed by staff at USCIS facilities of processing delays for applicants caused by waits for FBI background check results. (This issue is discussed in "The Challenges of Background Checks and Clearances on Case Adjudications" portion of this response.)

The CISOMB cites more issues that caused delays in processing Form N-400, including:

- Cancellation of naturalization interviews, an occurrence that may not be the applicant's fault. The CISOMB reports the NBC generally schedules interviews. If a Field Office does not receive the complete file in time, it will cancel the interview, which the Ombudsman's Office says can take months or even years to reschedule. However, interviews also may be cancelled due to pending security checks or because the applicant is placed in removal proceedings.

- Delays in scheduling of U.S. Oath of Allegiance ceremonies resulting from a lack of capacity in some jurisdictions (especially jurisdictions choosing to forego or limit administrative swearings-in). These delays can result in the need to repeat background checks that expire while the application is pending.

The Annual Report recognizes USCIS is limited in its ability to manage Oath ceremonies to meet demand in jurisdictions where the court maintains exclusive authority. For jurisdictions where courts do not retain exclusive authority, the Ombudsman encourages USCIS district directors to assess their naturalization volume to creatively address the community's needs, implementing local models that best serve applicants, increase efficiency, and allow USCIS to meet its processing goals.

USCIS replies there are many reasons why naturalization interviews are canceled, including non-receipt of the complete file in time, pending background checks, the applicant's request to reschedule the interview, the applicant being placed in removal proceedings, and the applicant's relocation to a different jurisdiction.

The rescheduling of an interview is based largely on office calendar availability and the timeframe required for resolving or reconciling the causes for cancellation. Interviews are typically rescheduled within a reasonable period of time. It is atypical for an interview to be pending rescheduling for "years."

Oath ceremonies are typically scheduled within a reasonable period of time. During FY 2015, the average wait time between the naturalization approval and the Oath ceremony was 24 days for administrative ceremonies and 35 days for judicial ceremonies.

USCIS notes that, given the high number of naturalizations each year, there will be cases that extend beyond the average wait time. Reasons for delays in ceremony scheduling vary. They include the discovery of derogatory information after the application's recommended approval, court availability, and applicants' requests to delay naturalization. Oath ceremony scheduling is largely based on court availability and the timeframe required for resolving any causes for delay in scheduling.

While USCIS is limited in its ability to meet ceremony demands in jurisdictions where courts maintain exclusive authority, the agency and the courts maintain a respectful working relationship that allows for as much collaboration as possible with respect to efficiency.

In jurisdictions where courts do not retain exclusive authority, USCIS field leadership routinely takes efficient measures to perform in the best interest of the communities they serve. These measures include scheduling same-day or special ceremonies as well as multiple ceremonies per week.

The cost of applying

Stakeholders told the Ombudsman the cost of applying is a barrier to starting the naturalization process. The CISOMB states that providing a reduced fee to applicants could promote naturalization, especially if the fee is lower than the cost to renew an expiring green card.

The CISOMB also states that USCIS accepting credit cards to pay filing fees does not benefit the millions of permanent residents who still cannot afford the fees. In addition, the Ombudsman remains concerned with the adjudication and processing of fee waiver requests, an issue addressed in this response under "Fee Waiver Processing Update" (*see* next page) as well as on page 30 of the USCIS response to the 2015 CISOMB Annual Report to Congress.[59]

The CISOMB does report that USCIS recently issued an NPRM for a new fee schedule. The final rule on this schedule was published on October 24, 2016, and the new fees went into effect on December 23, 2016.[60] The new fee schedule lightens the cost burden for financially challenged customers.

The current Form N-400 fee has three levels:

(1) The standard N-400 filing fee increased from $595 to $640 (an 8 percent increase). The biometric services fee remained the same at $85.

(2) Applicants with household incomes below 150 percent of the Federal poverty guidelines may request that their fee be waived and pay no N-400 filing or biometric services fee.

(3) Applicants with family income greater than 150 percent and not more than 200 percent of the Federal poverty guidelines may pay $320 (a 50 percent reduction) for the N-400 filing fee and the $85 biometric services fee.

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[59] *See* DHS, "USCIS Response to the 2015 CISOMB Annual Report to Congress," online at https://www.dhs.gov/sites/default/files/publications/USCIS%20Annual%20Report%202015%20Response.pdf.

[60] *See* U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292 (Oct. 24, 2016), online at https://www.federalregister.gov/documents/2016/10/24/2016-25328/us-citizenship-and-immigration-services-fee-schedule.

The third fee level aims to increase access to naturalization for low-income eligible applicants.

Clarification: Form I-942 and biometrics fees

USCIS takes this opportunity to clarify that individuals requesting a reduced fee by filing Form I-942, Request for Reduced Fee, are still responsible for paying the full biometric services fee required when applying for naturalization. The May 4, 2016 proposed fee rule stated that the new $320 fee option required the payment of $85 for biometric services, bringing the total payment to $405.[61] The final rule maintained that requirement.

Customer experiences

The CISOMB reports stakeholder concerns that elderly applicants "often feel 'intimidated' and are nervous during their naturalization interviews." It cites one stakeholder expressing concern over the "lack of sensitivity training with USCIS officers" toward applicants with significant mental illnesses.

USCIS responds that it currently has procedures to allow individuals who need accommodations to make such requests prior to appearing at a USCIS office. USCIS also responds that, without regard to an applicant's abilities or disabilities, its officers make every effort to treat every applicant with dignity, respect, and professionalism. All applicants are encouraged to communicate, ask questions, and request clarification whenever needed.

B. Fee Waiver Processing Update

The revised Form I-912

The CISOMB criticizes the revised Form I-912, Request for Fee Waiver, which USCIS posted on May 3, 2016. The Report claims the updated form—which it describes as more than double the length of its predecessor, with an additional five pages of attestations, requiring more supporting documentation—will have a negative impact, particularly on *pro se* applicants for whom it may serve as a deterrent.

The CISOMB adds USCIS should instead focus on clarifying and simplifying the overall fee waiver application process and train adjudicators on its eligibility guidance to achieve quality and consistency in fee waiver adjudications.

[61] *See* U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 26,903, 26,917 (May 4, 2016), online at https://www.federalregister.gov/articles/2016/05/04/2016-10297/us-citizenship-and-immigration-services-fee-schedule#h-40.

USCIS replies that while the updated Form I-912 does have more pages than its predecessor, it does not collect additional information. The new version clarifies the instructions to make it easier for applicants to complete the form and to reduce the number of fee waiver request rejections.

Because many applicants found it hard to place all requested information in spaces provided on the previous version, USCIS added text boxes to the revision that provide room for explanations. These boxes make the form appear longer, but make it more user friendly and less complex, and may reduce the need for attachments.

USCIS also conducted public outreach focused on the revised form to ensure awareness and clarity. On June 17, 2015 and May 24, 2016, the agency hosted attorneys, customers, and community-based organization representatives at stakeholder engagements during which the form revisions were discussed in detail. Following each engagement, USCIS accepted feedback and answered inquiries through its Public Engagement mailbox. Also, USCIS sent a GovDelivery message on May 3, 2016, to notify stakeholders that the new Form I-912 was available.

Fees

The CISOMB cites USCIS' May 4, 2016 NPRM for a new fee schedule, and expresses concerns over proposed increases. It also cites a partial fee waiver for certain low-income naturalization applicants. USCIS reiterates that the new fee schedule took effect on December 23, 2016, and that the reduced Form N-400 fee is expected to lessen the financial burden for financially challenged naturalization applicants.

Specificity in rejection notices

The Ombudsman states that stakeholders continue to report that fee waiver denial notices provide insufficient guidance as to the inadequacies of the request.

USCIS generates a rejection notice when it does not approve a fee waiver request. As the CISOMB has noted in the 2016 Annual Report and in previous Annual Reports, agency efforts to clarify these notices have included reviews of its rejection process and language as well as editing of letters and templates. USCIS has also added, in updates to its instructions and website content, guidance on filing and on common reasons for rejections.

The agency continues to encourage stakeholders seeking information beyond that given in rejection notices to email the agency at lockboxsupport@uscis.dhs.gov.

C. The Changing Landscape of Parole

Advance parole document

The Annual Report states that USCIS has not yet issued guidance on the meaning of the Board of Immigration Appeal's (BIA) 2012 precedent decision on the effect of travel

from and return to the United States with an advance parole document on an individual's inadmissibility under section 212(a)(9)(B) of the INA . The Annual Report adds that USCIS has not yet issued guidance clarifying the specific types of evidence required for a grant of humanitarian parole.

These CISOMB statements refer to the BIA's decision in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), that a foreign national who has applied for adjustment of status and temporarily left and returned to the United States with an advance parole document has not made a "departure ... from the United States" within the meaning of section 212(a)(9)(B)(i)(II) of the INA. For this reason, the trip did not trigger the 10-year bar to admission. *Id.* at 779. But it is important to note that issuance of an advance parole document is not a grant of parole. *Id.* at 778, fn 6.

USCIS cannot adopt guidance on this matter unilaterally as the issues affect multiple DHS components. USCIS will continue to coordinate with CBP, ICE, and DHS to consider these issues.

U visa

The CISOMB reports it recently issued a formal recommendation asking USCIS to exercise its statutory authority to implement a parole policy for eligible petitioners located abroad who are waiting to receive a U visa.

On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for DHS to act to ensure that parole authority is exercised on a case-by-case basis in accordance with the plain language of the statute, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. Consistent with this Executive Order, USCIS has been reviewing its use of parole authority and will follow this Executive Order in analyzing the CISOMB's recommendation.

Entrepreneurial parole

As cited in Business and Employment (*see* section V of this response, part B, Regulatory and Policy Developments in Employment-Based Immigrant Petitions), DHS published on January 17, 2017, an IER that amended regulations to implement the Secretary of Homeland Security's discretionary parole authority in order to increase and enhance entrepreneurship, innovation, and job creation in the United States.

Note: *On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for DHS to act to ensure that parole authority under section 212(d)(5) of the INA is exercised on a case-by-case basis in accordance with the plain language of the statute, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. Consistent with this Executive Order, USCIS initiated a review of its use of parole authority under 212(d)(5), including under the IER.*

On July 11, 2017, DHS published a final rule delaying the implementation of the IER as the agency further considered the rule under the Executive Order. However, on December 1, 2017, the U.S. District Court for the District of Columbia vacated the delay rule as a result of litigation in National Venture Capital Association v. Duke. *Following this ruling DHS has taken steps to implement the IER as required. The agency is however contemplating eliminating the IER, and as of early 2018 was in the final stages of publishing a notice of proposed rulemaking seeking its removal.*

Concerns about processing times and generic denials

The CISOMB relays stakeholders' concerns about the humanitarian application process lacking standard processing times, and of adjudicators often producing generic denials that provide little or no information on how the applicant failed to meet the criteria or why USCIS denied the application as a "matter of discretion."

USCIS agrees it would be helpful to provide more information in letters about the basis for denials of requests for parole for individuals outside the United States, as well as more information on the process for requesting such parole and the evidence required to establish eligibility. The agency is currently reviewing template responses to establish ways to more effectively communicate those reasons. USCIS hopes it can begin using these more effective methods during the current fiscal year.

Also, in November 2016 the agency posted on uscis.gov public guidance providing more information on the parole request process and clarifying the specific types of evidence required for a grant of humanitarian or significant public benefit parole.

Note: *On January 25, 2017, President Trump signed an Executive Order on Border Security and Immigration Enforcement Improvements calling for DHS to act to ensure that parole authority is exercised on a case-by-case basis in accordance with the plain language of the statute, and only when an individual demonstrates urgent humanitarian reasons or a significant public benefit. Consistent with this Executive Order, USCIS continues to review the operations and policies regarding the use of parole authority.*

D. Military Immigration Issues

The Ombudsman expresses strong support for USCIS' efforts to meet the immigration-related needs of those serving in the U.S. military and their family members. USCIS supports this community to the utmost of its ability, and in FY 2015 naturalized 8,035 of its members.

USCIS' 2009 collaborative launch with the U.S. Army of the Naturalization at Basic Training Initiative exemplifies the agency's commitment to support military naturalization applicants and provide a high level of overall service to military members. This program now includes the Navy, Air Force, and Marine Corps.

The CISOMB reports USCIS conducted 4,756 naturalizations for U.S. military servicemembers during FY 2015. It says, however, that delays in processing background

checks with the FBI prevent USCIS from adjudicating N-400 applications for eligible military members while they are still in basic training. These applications remain pending outside the 5-month processing goal in place for all naturalization applications.

USCIS appreciates the Ombudsman's Office's recognition that the agency has no control over an FBI background check and that the agency can take no action on an application until that process is complete.

USCIS actively engages with the FBI to address delays pertaining to applicants actively serving in the military, including applicants in basic training. As recently as July 2016, some pending background checks were expedited. In addition, USCIS actively communicates with military branches and applicants to inform them of specific naturalization-related challenges.

E. Recommendation Update: Petitions to Remove Conditions on Residence

The CISOMB reports stakeholders continue to express concerns with processing delays for Form I-751, Petition to Remove Conditions on Residence. The Ombudsman strongly urges USCIS to acknowledge longstanding persistent issues in the processing of these petitions and to implement the CISOMB's 2013 recommendations to provide timely, effective, and accurate notice to petitioners concerning their status.

In 2013, USCIS responded to the Ombudsman's recommendations, concurring with them in part and outlining the following steps it had taken or would be taking as a result;

- Make a technical fix to allow Service Centers to obtain the conditional permanent resident's address from the AR-11 change of address information system;
- Update the Marriage Fraud Amendment System so that copies of notices are printed for the petitioner as well as the attorney;
- Transition to an online, centralized manual of immigration policies to include information for Form I-751 adjudications and ultimately replace the Adjudicators Field Manual; and
- Work with DHS's Office for Civil Rights and Civil Liberties to strengthen safe address protections for spouses seeking protection under the Violence Against Women Act and incorporate these procedures into the centralized policy manual.

The CISOMB notes several of these steps were predicated on the deployment of USCIS' electronic immigration system under the Transformation initiative, and that the expected transition of Form I-751 processing to the electronic system by July 2015 did not occur.

The CISOMB Report addresses Form I-751 processing times at the CSC, the VSC, and at USCIS Field Offices. It quotes the average processing time during the reporting period

as 6.25 months at the CSC and 7 months at the VSC.

The CISOMB adds that the Service Center processing times reported do not reflect the time it takes to transfer I-751 petitions to local Field Offices for adjudication and to conduct in-person interviews when necessary. As a result, it says, obtaining a decision can take even longer for petitioners whose cases are transferred to Field Offices for interview. Moreover, the Annual Report states that the agency does not post Field Office processing times for this product line.

USCIS remains committed to processing cases as efficiently as possible and continues to work diligently to give an adjudicative response to each Form I-751 within its purview. However, the agency requests a clear definition of "longstanding persistent issues" in the processing of Form I-751 so it can best address processing disparities and delays.

As published on the USCIS website,[62] as of June 30, 2016, the estimated processing time for Form I-751 at the CSC is 6 months. Also, as of June 30, 2016, the VSC is processing cases with filing dates through August 31, 2015.

USCIS allocates overtime at Service Centers and Field Offices as needed to help address cases pending outside normal processing times. USCIS plans to continue workload transfers and overtime while considering longer-term strategies.

USCIS' Field Offices continue to employ available tools, such as interview waivers, when appropriate to support timely processing of Form I-751.

In addition, the agency's Field Operations Directorate (FOD) continues to actively track Form I-751 Field Office cycle times using an internal formula. This tracking uses "transfers in" to a Field Office as a proxy to estimate Field Offices' receipt of Form I-751. FOD uses this proxy because Forms I-751 arrive at Field Offices as "transfers in" from a Service Center, and not as initial receipts.

As previously reported to the CISOMB, this measure indicated that, at the end of December 2015, USCIS' field operations cycle time for I-751s was 8.5 months. The most recent measurement indicates that, at the end of May 2017, field operations cycle time for I-751s was 8.2 months.

There are many reasons cases may be relocated to an agency Field Office, including:

- A need to confirm the petitioner's identity;
- National security concerns;
- Fraud concerns; and
- Eligibility concerns that cannot be determined through an RFE.

[62] USCIS Web page, "Processing Time Information," https://egov.uscis.gov/cris/processTimesDisplayInit.do (last visited Aug. 19, 2016).

VII. Conclusion

As noted, the 2016 CISOMB Annual Report provided USCIS with another opportunity to assess our progress and identify further refinements to current operations.

As this response notes, USCIS has already taken many actions during the past year to address issues raised in the Annual Report. These include:

- Instituting a new fee schedule that includes a biometrics fee waiver and a partial fee waiver for certain low-income applicants;
- Testing, in close collaboration with USPS, improved protocols for delivering secure documents; and
- Committing to more accurate processing times based on actual, real-time data.

Since the Annual Report's release in April 2016, USCIS has acted to:

- Expand the existing provisional waiver process so that all individuals who are statutorily eligible for immigrant visas and for a waiver of the unlawful presence bars under INA section 212(a)(9)(B) can more easily navigate the immigration process; and
- Expand the capabilities of our virtual assistant "Emma," allowing her to answer questions and direct users to relevant USCIS Web pages in Spanish as well as English; and

In addition, USCIS reports that 24 percent of its incoming receipts were processed through ELIS during FY 2016.

USCIS greatly appreciates the CISOMB's comprehensive and thoughtful evaluation and recommendations, and looks forward to future collaboration.

Appendix A: Acronyms and Abbreviations

AAO	Administrative Appeals Office
ASC	Application Support Center
BIA	Board of Immigration Appeals
CAM	Central American Minors
CBP	U.S. Customs and Border Protection
CCC	Customer Contact Center
CFR	Code of Federal Regulations
CISOMB	Citizenship and Immigration Services Ombudsman
CSC	California Service Center
CSPED	Customer Service and Public Engagement Directorate
DACA	Deferred Action for Childhood Arrivals
DHS	Department of Homeland Security
DOL	Department of Labor
DOS	Department of State
DV	Diversity Visa (proper name of program)
EAD	Employment Authorization Document
ELIS	Electronic Immigration System
FAQ	Frequently Asked Questions
FBI	Federal Bureau of Investigation
FOD	Field Operations Directorate
FY	Fiscal Year
GAO	Government Accountability Office
HFRP	Haitian Family Reunification Parole
I-90	Application to Replace Permanent Resident Card
I-360	Petition for Amerasian, Widow(er), or Special Immigrant
I-526	Immigrant Petition by Alien Entrepreneur
I-539	Application to Extend/Change Nonimmigrant Status
I-601A	Application for Provisional Unlawful Presence Waiver
I-751	Petition to Remove Conditions on Residence
I-765	Application for Employment Authorization
I-821D	Consideration of Deferred Action for Childhood Arrivals
I-829	Petition by Entrepreneur to Remove Conditions on Permanent Resident Status
I-912	Request for Fee Waiver
I-924	Application for Regional Center under the Immigrant Investor Pilot Program
IER	International Entrepreneur Rule
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
IPO	Immigrant Investor Program Office
ISO	Immigration Services Officer
LPR	Lawful Permanent Resident
N-400	Application for Naturalization
NBC	National Benefits Center
NCSC	National Customer Service Center
NOID	Notice of Intent to Deny

NOIR	Notice of Intent to Revoke
NPRM	Notice of Proposed Rulemaking
NTA	Notice to Appear
NVC	Department of State National Visa Center
OIG	DHS Office of Inspector General
OPT	Optional practical training
OPQ	Office of Performance and Quality
OTC	Office of Transformation Coordination
RFE	Request for Evidence
SCOPS	Service Center Operations Directorate
SEB	Stakeholder Engagement Branch
SIJ	Special Immigrant Juvenile
STEM	Science, technology, engineering, or mathematics
TEA	Targeted employment area
TPS	Temporary Protected Status
TVPRA 2008	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
U.S.C.	United States Code
USCIS	U.S. Citizenship and Immigration Services
USCIS ELIS	USCIS Electronic Immigration System
USPS	U.S. Postal Service
VSC	Vermont Service Center