



Annual Report 2017

Citizenship and Immigration Services
Ombudsman

June 29, 2017



Homeland
Security

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*Office of the Citizenship and Immigration Services
Ombudsman*

U.S. Department of Homeland Security
Mail Stop 0180
Washington, DC 20528-0180



**Homeland
Security**

June 29, 2017

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

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

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

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

Dear Chairmen and Ranking Members:

The Office of the Citizenship and Immigration Services Ombudsman is pleased to submit, pursuant to section 452(c) of the Homeland Security Act of 2002, its 2017 Annual Report.

I am available to provide additional information upon request.

Sincerely,

A handwritten signature in blue ink that reads "Julie Kirchner". The signature is written in a cursive style with a large initial "J".

Julie Kirchner
Citizenship and Immigration Services Ombudsman

Message from the Ombudsman



Congress created the Citizenship and Immigration Services Ombudsman out of a sincere desire to improve the functioning of our immigration system. That is clear from our statutory mission, found in Section 452 of the Homeland Security Act of 2002. In Section 452, Congress charged

us with the duty to aid applicants and their sponsors who are experiencing difficulties applying for immigration benefits with U.S. Citizenship and Immigration Services (USCIS). In addition, Congress bestowed on us the responsibility of identifying trends and ongoing problems in the administration of our immigration system and, where possible, making recommendations on how to solve those problems.

Both aspects of our mission are explored in this report. The Year in Review offers Congress and the public an opportunity to see the important case work our office handled in 2016 and how we often function as the last resort for prospective immigrants whose applications or petitions are stuck in the system. As you will see in the following pages, demand for our assistance has been steadily growing. In fact, requests to our office increased 25 percent between 2015 and 2016 and more than doubled since 2012.

While we believe this growth in requests is partly due to increasing awareness of the services we provide, it is also the result of an immigration system that is expanding, both in complexity and in the benefits it offers. Indeed, between creating new immigration programs, expanding the classes of aliens who qualify for existing programs, and a general increase in applications, USCIS' workload has grown significantly over the past several years. In FY 2016 alone, USCIS received approximately 8.070 million applications for benefits, a 5 percent increase over FY 2015 and a 34 percent increase over FY 2012.

The impact of this expanding immigration system is examined in the second part of our report, which analyzes trends and issues in the administration of our immigration system. For example, this report examines growing backlogs in naturalization applications and the challenges facing USCIS as it digitizes case processing through the Electronic Immigration System. It also looks at the increasing number of asylum applications, the growing demand for U visas, and complexities facing the EB-5 program. We hope you find it illuminating.

Before concluding, I would like to thank my staff for diligently working on the annual report throughout the year, conducting in-depth research and meeting with scores of stakeholders. I would especially like to thank them for their patience in finishing this publication, as I assumed the role of Ombudsman only weeks before the report was completed. In addition, I'd like to express my sincere gratitude to the staff at USCIS for the time and effort they spent gathering data and answering questions. Our work is only possible through their ongoing cooperation and commitment to public service.

With that, I am pleased to present the 2017 Citizenship and Immigration Services Ombudsman's report to Congress.

Sincerely,

A handwritten signature in blue ink that reads "Julie Kirchner". The signature is fluid and cursive, with a large initial "J".

Julie Kirchner
Citizenship and Immigration Services Ombudsman

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) 2017 Annual Report covers calendar year 2016, as well as key developments in early 2017, and contains:

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

2016 in Review

In 2016, the Ombudsman received 11,900 requests for case assistance, an increase of 25 percent from 2015. Just less than half (43 percent) of the requests came from individuals who were represented in seeking these services, either by attorneys or accredited representatives.

Overall, 26 percent of the requests were for employment-based matters; 32 percent for humanitarian-based matters; 21 percent for family-based matters; and 21 percent for general immigration matters, such as applications for naturalization. In 2016, individuals sought the most assistance for problems related to Form I-485, *Application to Register Permanent Resident Status or Adjust Status*, which constituted 17.17 percent of the cases received, closely followed by Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*, with 17.14 percent.

The Year in Outreach

In 2016, the Ombudsman conducted 91 stakeholder engagements to better understand and discuss ways to address concerns about the delivery of immigration services and benefits. To inform stakeholders of new initiatives and receive feedback on a variety of topics and policy trends, the Ombudsman hosted six public teleconferences and held its Sixth Annual Conference at the National Archives and Records Administration in Washington, D.C. on December 6, 2016.

Key Developments and Areas of Focus

Families

The Perfect Storm: Fee Increases, Call to Citizenship, and ELIS

In FY 2016, USCIS received over 972,000 naturalization applications—nearly 200,000 more than projected—in advance of a scheduled fee increase and the presidential election. In April 2016, USCIS expanded its Transformation initiative to include the processing of naturalization applications. Introducing Form N-400, *Application for Naturalization*, into the Electronic Immigration System (ELIS), the Transformation platform, represented a major undertaking for the agency because naturalization processing is the most complex application to be incorporated thus far. However, USCIS initiated Form N-400 into ELIS at a time when the agency was dealing with significantly higher demand. At the same time, USCIS also continued to process N-400 applications through paper-based adjudications. USCIS suspended ELIS processing of new naturalization applications 4 months after the initial launch because of multiple technical problems, which negatively impacted processing times. While many of these initial difficulties have been resolved, applicants for naturalization continue to face delays in obtaining the rights and privileges of citizenship.

Military Immigration Issues: Immigration Services for Those Who Serve

The delivery of military immigration benefits to our service members, veterans, and their families is essential to military readiness and to national security. Background and name checks continue to cause processing delays and hinder USCIS from completing military naturalization applications in accordance with the Naturalization at Basic Training Initiative. Service members continue to experience difficulties as their files are transferred among multiple jurisdictions. Additionally, the clearance requirements imposed by a September 30, 2016 Department of Defense Memorandum on the Military Accession Vital to the

National Interest program has led to substantial delays and status issues for those joining the Armed Services through this program and applying for naturalization.

Changes in Policy and Practice for Provisional Waivers

The Provisional Unlawful Presence Waiver program was implemented in 2013 to “promote and preserve family unity” for certain spouses or parents of U.S. citizens who are unlawfully present in the United States and must depart in order to obtain lawful permanent resident status. In 2016, USCIS expanded the program to include all statutorily eligible applicants, updated the USCIS Policy Manual to expand the extreme hardship standard, and updated the form instructions to include a summary of extreme hardship factors. USCIS also stopped denying provisional waiver applications based on the “reason to believe” ground. The majority of the requests for case assistance the Ombudsman received involved denials (issued prior to the regulation change) that did not provide specificity of the “reason to believe” there were other grounds of inadmissibility, did not appear to reflect a complete review of the documentation supporting the claim of extreme hardship, and lengthy processing times.

Employment

USCIS Administrative Review in Employment-Based Decisions: Appeals and Motions

Administrative review, through motions to reopen and reconsider to the field and appeals to the Administrative Appeals Office (AAO), provides individuals and employers an opportunity to obtain reexamination of a USCIS denial. The AAO has made significant improvements to its processing times, completing most administrative appeals within 180 days. However, when the AAO posts processing times, they do not include the time the appeal is first reviewed by the USCIS field office or service center that made the initial decision. There are a variety of steps USCIS could take to ensure that administrative review is meaningful and timelier, including:

- Establish processing time goals for initial field review of motions;

- Publish more accurate processing times for AAO appeals that include the time it takes to conduct the initial field review. For most form types, the AAO processing time is currently 3 months or less; and
- Clarify the Form I-290B by providing more explicit instructions, or alternatively, separate motions and appeals into two separate forms.

EB-5 Investors

Congress extended the Immigrant Investor (EB-5) Regional Center Program, most recently through September 30, 2017, but a series of short-term extensions has triggered surges in Form I-526, *Immigrant Petition by Alien Entrepreneur* filings in 2015 and 2016. There is a high demand for EB-5 visas. Investors and their dependents from China who are at the end of the Form I-526 adjudication queue may have to wait 10 years or longer for immigrant visas under the EB-5 program. On November 30, 2016, USCIS released a six-chapter addition to its Policy Manual titled “Investors,” synthesizing and aligning the agency’s regulations, decisional law, policies, and procedures with the statute. Amidst ongoing legislative reform efforts, in January 2017, USCIS published proposed rules that would establish a Regional Center compliance and oversight program, increase minimum investment levels, and amend the methodology for determining Targeted Employment Areas.

The AC21 Regulation

In November 2016, USCIS published a long-awaited final regulation, often referred to as “AC21” after the authorizing legislation, intended to improve and modernize several employment-based immigrant and nonimmigrant programs by increasing flexibility, transparency, and certainty for foreign workers and U.S. employers. The rule centralized many of USCIS’ long-standing policies for the H-1B Specialty Occupation and employment-based immigrant visa programs. DHS received tens of thousands of comments on the proposed rule and related forms from stakeholders, particularly foreign workers, voicing concerns over the elimination of the 90-day regulatory processing requirement for initial employment authorization applications, and over other areas of work authorization.

While it is too early to determine the full effect of the new rule, the Ombudsman will continue to track these changes and their impact on stakeholders.

Humanitarian

Delays in Asylum Processing

A confluence of factors, including a spike in applications, has led to a significant backlog of affirmative asylum cases pending before USCIS; by the end of 2016, more than 223,433 affirmative asylum cases were awaiting adjudication by USCIS. The agency has taken steps to address the asylum backlog, including expanding the asylum officer corps and opening satellite asylum offices. However, these efforts, building on others implemented in 2015, have not yet significantly reduced the asylum backlog. A large volume of credible and reasonable fear cases with prioritized processing timeframes continues to limit the Asylum Division's capacity to direct its resources to the adjudication of pending affirmative asylum cases.

U Visa Backlogs

Demand for U nonimmigrant visas is now so high that petitioners and their family members wait nearly 3 years before placement on the U visa waiting list if deemed approvable, pending an available visa. Correspondingly, individuals and their family members seeking U visas must wait years before they receive employment authorization; they may be living in the United States and subject to removal, or residing abroad in vulnerable situations. USCIS has taken steps to accelerate nonimmigrant U visa processing, most notably by having the Vermont Service Center, which has traditionally housed the unit that conducts humanitarian benefits adjudications, share the adjudication of U petitions with the Nebraska Service Center. Stakeholders would benefit from greater transparency regarding the backlog, including a clearer breakdown of the number of U nonimmigrant petitions that are pending adjudication before placement on the waiting list.

Interagency, Customer Service, and Process Integrity

The Escalating Cost of Immigration Services

USCIS case processing and services are almost entirely funded by application and petition fees paid by applicants and petitioners, rather than by Congressional appropriations. USCIS regularly assesses its fee structure to reflect the actual cost of processing benefits and services. The most recent fee rule, published on October 24, 2016 and effective December 23, 2016, raised fees by a weighted average of 21 percent. When announcing the 2016 and prior fee increases, USCIS committed to timely processing of applications and petitions, but has been unsuccessful in achieving its processing goals. Processing delays at the agency are largely due to fluctuations in filing levels, the lag time between fee increases and the onboarding of new staff, the complexity of case review, and enhanced fraud detection and security check requirements.

The Continuing Challenge of Transformation

USCIS is in the midst of a troubled, years-long modernization effort, referred to as "Transformation," to move from paper-based to electronic filing, adjudication, and case management across approximately 90 immigration product lines. After more than 10 years of work, at the end of 2016, USCIS stakeholders were only able to file online consistently for two immigration benefits via ELIS. USCIS internal use of ELIS did advance, with the agency now adjudicating five forms through ELIS by the end of 2016. Despite substantial planning and training, however, USCIS' major internal launch in ELIS, the Form N-400, experienced significant technical problems that forced USCIS to temporarily halt ELIS naturalization adjudications and delayed the launch of other product lines for electronic processing. The slow development of Transformation and challenges in ELIS operations are being closely scrutinized by the Office of the Inspector General (OIG), the Government Accountability Office (GAO), Congress, and the media. Both the OIG and GAO reviewed the program in 2016 and expressed concern with the progress and problems that continue to plague the project.

USCIS Processing Times: Improved Accuracy Needed

USCIS processing times set the public’s expectations regarding how long the agency is taking to adjudicate applications and petitions. However, USCIS’ current approach to processing times often does not accurately convey the actual time it is likely to take to adjudicate cases. Lack of transparency in processing times diminishes trust in the agency and hinders stakeholders’ ability to make informed decisions impacting their professional and personal lives. Processing times are fundamental to holding USCIS accountable for timely services, yet currently posted processing times do not include the agency’s processing time goals.

Mailing Issues

Despite recent improvements to USCIS mailing protocols, including the agency’s online change of address system, thousands of pieces of mail are not received as intended, returned as undeliverable, or delivered to someone other than the addressee. When notices and documents do not reach their intended recipient, individuals miss important appointments, deadlines, and documents, with potentially significant adverse consequences. Improper delivery of notices and documents creates security vulnerabilities, including the potential for misuse of secure documents such as lawful permanent resident cards. USCIS should consider additional options for the delivery of notices and documents, including requiring a signature for delivery of secure documents, launching a long-planned “hold for pickup” pilot, and expanding use of pre-paid courier service mailing labels.

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The Office of the CIS Ombudsman: 2016 in Review

Overview

The statutory mission of the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman)¹ is to:

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

The Ombudsman is an independent, impartial, and confidential resource within the U.S. Department of Homeland Security (DHS).

- The Ombudsman is an independent DHS headquarters office, reporting directly to the DHS Deputy Secretary, and is neither a part of nor reports to USCIS.
- The Ombudsman works in an impartial manner to improve the delivery of immigration benefits and services.
- Individuals and employers seeking assistance from the Ombudsman may do so in confidence. Any release of confidential information is based on prior consent, unless otherwise required by law or regulation.

The Ombudsman performs its mission by:

- Evaluating requests for assistance from individuals and employers and recommending that USCIS take corrective action, where appropriate;
- Facilitating interagency collaboration and conducting outreach to a wide range of public and private stakeholders; and

- Reviewing USCIS operations, researching applicable laws, regulations, policies and procedures, and issuing recommendations, both formal and informal, to bring systemic issues to USCIS' attention for resolution.

Requests for Case Assistance

The Ombudsman works directly with USCIS service centers, field offices, asylum offices, and other components to resolve case issues. The Ombudsman also relies, in part, on requests for case assistance to identify trends and systemic issues, which may become policy priorities and the subject of formal or informal recommendations.

The Ombudsman asks that individuals, employers, and their representatives first attempt to resolve issues directly with USCIS.³ If USCIS is unable to resolve the issue, applicants and petitioners may contact the Ombudsman for assistance. The Ombudsman requires applicants and petitioners to wait 60 days past USCIS posted processing times before submitting requests for case assistance, absent exigent circumstances. In addition, the Ombudsman accepts requests for case assistance for employment authorization applications (Form I-765, *Application for Employment Authorization*) 75 days after filing, or 30 days before expiration for those who timely filed and whose employment authorization has been automatically extended for 180 days.⁴

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

² Homeland Security Act of 2002 (HSA) § 452, 6 U.S.C. § 272.

³ USCIS service options include: the National Customer Service Center (NCSC), InfoPass, and e-Request. See USCIS Webpage, "National Customer Service Center," <https://www.uscis.gov/about-us/contact-us/national-customer-service-center> (accessed Mar. 3, 2017), USCIS Webpage, "InfoPass," <https://infopass.uscis.gov/> (accessed Mar. 3, 2017), USCIS Webpage, "e-Request," <https://egov.uscis.gov/e-Request/Intro.do> (accessed Mar. 3, 2017).

⁴ See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82412 (Nov. 18, 2016). Meanwhile, Deferred Action for Childhood Arrivals (DACA) renewal applications, which include employment authorization requests, may be submitted after the application has been pending for 105 days. See USCIS Webpage, "Renew Your DACA," <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/renew-your-daca> (accessed Mar. 3, 2017). Those seeking assistance for DACA-related EADs should still contact USCIS before seeking intervention from the Ombudsman.

When submitting a request for assistance, individuals and employers should include information about their previous attempts to resolve the issue, including the USCIS service request number, InfoPass confirmation number, or the date and USCIS email address to which they submitted their concerns. If the applicant or petitioner contacted another U.S. government agency or Member of Congress, the Ombudsman asks that they provide this information. The Ombudsman’s jurisdiction is limited by statute to matters involving USCIS.⁵

How the Ombudsman Processes a Request for Assistance.

The Ombudsman reviews requests for case assistance within 7 days of receipt to identify cases that warrant immediate action. Using the same criteria as USCIS, the Ombudsman will expedite a request for assistance based on an emergency or hardship.⁶ Those seeking expedited assistance should include relevant evidence with their request for assistance to avoid unnecessary delays. USCIS makes an independent decision whether to expedite handling of the Ombudsman’s inquiry. The Ombudsman also reviews requests for proper consent from the petitioner or applicant, a completed Form G-28, *Notice of Appearance of Attorney or Representative* (if represented), and other necessary documentation.

Approximately 45 days after receipt, the Ombudsman takes action on behalf of the applicant. Actions taken by the Ombudsman include:

STEP 1: Evaluate information submitted, and, if necessary, contact the applicant for additional information.

STEP 2: Review USCIS databases to determine the current status of the application or petition. As the Ombudsman is not a part of USCIS, analysts have limited, read-only access to USCIS databases.

STEP 3: Analyze relevant laws, policies, and practices to assess whether and how the Ombudsman can help. Analysts consult with senior policy advisors on complicated cases, and identify trends.

STEP 4: Contact the USCIS office of jurisdiction—field office, service center, asylum office, etc.—with a request for review or action. Initial inquiries are sent individually to USCIS.

STEP 5: Notify the individual or employer when USCIS has been contacted and responds to the Ombudsman’s inquiry.

STEP 6: Follow-up with USCIS as necessary. When engagement does not result in resolution, the request is escalated. Inquiries for applications or petitions pending longer than 6 months past posted USCIS processing times with no action are placed on an “Extended Review” list (see below).

STEP 7: Continue to communicate with the individual or employer until the issue is resolved.

STEP 8: Close the request for assistance when USCIS takes action. USCIS action can include issuing a notice or decision, scheduling an interview, or mailing a secure document such as a permanent residence card.

USCIS Responses. USCIS has 15 business days to respond to a routine inquiry from the Ombudsman and 5 business days to respond to expedited inquiries.⁷ Within that timeframe, USCIS is expected to provide a substantive response that explains the current status of the application or petition, steps being taken to evaluate or resolve the inquiry, the rationale for any decision made on the application or petition, factors relating to any delay in processing, where applicable, and an approximate timeframe for resolution of the issue presented.

⁵ HSA § 452(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice. When a case assistance request falls outside of the Ombudsman’s jurisdiction, the individual or employer is referred to the appropriate government agency.

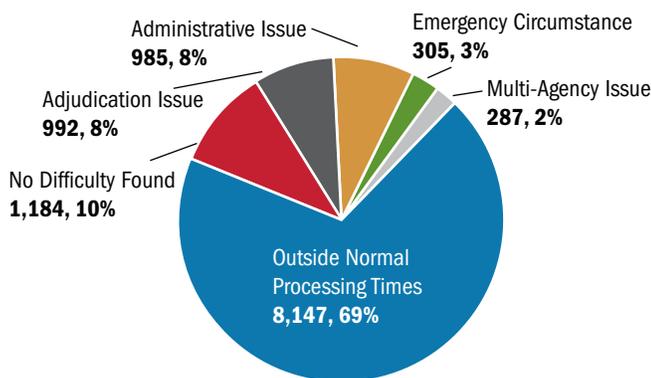
⁶ USCIS Webpage, “Expedite Criteria” (Jul. 27, 2016); <https://www.uscis.gov/forms/expedite-criteria> (accessed Mar. 3, 2017). The criteria are: severe financial loss to company or person; emergency situation; humanitarian reasons; nonprofit organization whose request is in furtherance of the cultural and social interests of the United States, Department of Defense, or national interest situation; USCIS error; or compelling interest of USCIS. Individuals or employers requesting expedited handling are instructed to clearly state so in Section 8 (“Description”) of Form DHS-7001, briefly describe the nature of the emergency or other basis for the expedite request, and provide relevant documentation to support the expedite request. All expedite requests are reviewed on a case-by-case basis.

⁷ “Memorandum of Understanding between U.S. Citizenship and Immigration Services and the Citizenship and Immigration Services Ombudsman” (Mar. 30, 2016) (copy on file with the Ombudsman).

When USCIS does not provide a specific timeframe for resolution, and the case is 6 months or more past USCIS posted processing times, the Ombudsman will place the application or petition in a queue of long-pending cases, referred to as Extended Review. The Ombudsman follows up with USCIS headquarters every 3 months and monitors these cases until the agency takes action.

To maintain impartiality, the Ombudsman generally does not ask USCIS to approve or deny a case. The majority of requests involve cases that have fallen outside USCIS case processing times for a variety of reasons. See Figure 1.1, *2016 Issues Submitted in Requests for Ombudsman Case Assistance*. Cases that fall outside normal processing times may be due to pending background checks or investigations being conducted by another agency. The Ombudsman also reviews substantive case issues that involve clear error(s) of fact, or gross and obvious misapplication of the relevant law by USCIS at any point in the process (Requests for Evidence (RFE), Notices of Intent to Deny (NOID), or denials). The Ombudsman’s case assistance is never a substitute for legal recourse; individuals and employers should preserve their rights through Motions to Reopen/ Reconsider and appeals.⁸

Figure 1.1: 2016 Issues Submitted in Requests for Ombudsman Case Assistance⁹



⁸ See generally 8 C.F.R. § 103.3.

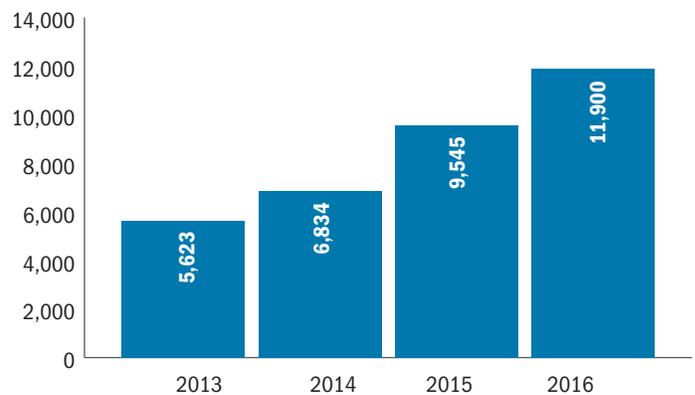
⁹ In previous years, because of the timing of the Annual Report, the Ombudsman examined a “reporting year” (April 1 to March 31), which did not align with either a fiscal or calendar year. The Ombudsman is now using a calendar year (2016) to review and compare data wherever possible, although in some instances this report must rely on data from the 2016 federal fiscal year (October 1, 2015 to September 30, 2016). The Ombudsman is grateful to USCIS for its generous sharing of data used in this Report.

2016 in Review

In 2016, the Ombudsman’s Office was staffed with approximately 30 full-time employees with diverse backgrounds and subject matter expertise in immigration law and policy. Approximately half of the staff are Immigration Law Analysts devoted to addressing individual requests for case assistance. Their experience includes work for not-for-profit organizations, private law firms, and government offices such as USCIS, the U.S. Department of State (DOS), and the U.S. Department of Labor (DOL). In addition, senior policy advisors, with extensive immigration law and policy experience, are tasked with review of systemic issues. The Senior Advisors lead outreach and interagency working groups, research and draft recommendations and white papers, and help respond to complex case inquiries.

In 2016, the Ombudsman received 11,900 requests for case assistance, an increase of 25 percent from 2015. See Figure 1.2, *Requests for Ombudsman Case Assistance Received Annually, 2013–2016*.

Figure 1.2: Requests for Ombudsman Case Assistance Received Annually, 2013 – 2016



Just less than half (43 percent) of the requests came from individuals or attorneys in connection with the request for case assistance submitted to the Ombudsman.

The following cases demonstrate some of the types of assistance provided by the Ombudsman in 2016.

Humanitarian Assistance

A mother sought assistance from the Ombudsman after requesting humanitarian parole for her 10-year-old son to enter the United States, so he could serve as a bone marrow

donor for his 5-year-old sister. The Ombudsman contacted USCIS to expedite the humanitarian parole request so the boy could arrive in time for the urgently needed surgery. After the Ombudsman brought the case to USCIS' attention, the agency adjudicated the parole request, enabling the boy to temporarily enter the United States to ensure a successful bone marrow transplant.

Serving Those Who Serve

The Ombudsman assisted an Army Reservist who graduated from Advanced Individual Training (AIT) on May 10, 2016. The soldier joined the Army through the Military Accessions Vital to the National Interest (MAVNI) program. While her naturalization was pending, she was not able to work or enroll in school. The Army allowed her to remain at the base temporarily, but she was in danger of losing her housing before she naturalized. As a result of the Ombudsman's inquiry, the soldier's background check was promptly completed and she naturalized in May 2015.

Meeting U.S. Employer Needs

An agricultural association received RFEs in connection with two separate petitions when it attempted to transfer 112 employees to a new worksite. As these workers were assigned to harvest perishable crops, the association sought the Ombudsman's assistance. The Ombudsman notified USCIS of the time-sensitive nature of the petitions and worked with USCIS to clarify the information requested. In response, USCIS expedited processing of these cases and approved both petitions.

Agency Error

USCIS approved a university's Form I-129, *Petition for a Nonimmigrant Worker* (H-1B Classification), but shortened the requested 3-year validity period to 1 year. The school contacted USCIS twice to ask for review of this decision. In response, USCIS replied that the validity dates issued were correct. The Ombudsman requested that the service center conduct an additional review of the file, highlighted concerns about the shortened validity period, and escalated its concerns to USCIS headquarters. USCIS subsequently confirmed that the service center had shortened the validity period in error, and USCIS issued an amended approval notice.

Correcting Improper Denials

When a family-based petitioner contacted USCIS to request that a child be granted the same priority date as the principal parent, USCIS denied the request, erroneously stating that the child had turned 21 after the parent's visa

“ It feels so good to know that we, the people and vulnerable immigrants, have an organization such as yours to speak on our behalf and to represent us when we have a complaint against USCIS. ”

was issued and was therefore ineligible for the earlier priority date. The Ombudsman noted that the child had in fact turned 21 a year before his parent's visa was issued and otherwise met the requirements to be accorded the same priority date and preference classification as his immediate relative parent. USCIS acknowledged its error and granted the earlier priority date—based on a petition filed 24 years earlier.

Preventing Children from “Aging Out” and Losing Eligibility

A young woman filed Form I-601A, *Application for Provisional Unlawful Presence Waiver*, as soon as the newly promulgated regulations permitted, but was in danger of turning 21 and “aging out” of eligibility for the benefit before it was adjudicated. USCIS initially denied her request to expedite, incorrectly stating that the agency does not expedite provisional waiver applications. The Ombudsman then brought the case to the attention of USCIS headquarters. USCIS subsequently determined the applicant met the expedite criteria and approved the waiver just weeks before she would have aged out.

Preventing Future Problems

USCIS erroneously approved an applicant's employment-based adjustment of status (green card) application without a medical examination report. Knowing that this could cause future problems with the legality of the permanent resident status, the applicant filed Form I-290B, *Notice of Appeal or Motion*. Per the applicant's request, the Ombudsman facilitated this process, resulting in USCIS reopening the application, accepting the proper medical documentation, reapproving the application, and refunding the fee the applicant paid for the Motion to Reopen.

Change of Address

An applicant for employment authorization notified USCIS of his change of address on the same day that his new

Employment Authorization Document (EAD) was approved and ordered produced. Since card production is completed at a different facility from the office that adjudicates applications and processes address changes, the update was not timely shared with the production facility. As a result, the applicant's EAD was mailed to the old address. When it was not returned to USCIS by the U.S. Postal Service, USCIS informed the applicant he was required to file a new application, with the appropriate fee (\$365 at that time). As the applicant had timely notified USCIS of his move, and the non-delivery was not a result of the applicant's actions, the Ombudsman intervened, and USCIS produced a new card without a new application or fee.

Refunds

An entertainment management company contacted the Ombudsman for assistance when it did not receive a receipt notice for a petition filed on behalf of a group of Haitian musicians. USCIS accepted the filing fee, but the petition was never processed. The company contacted USCIS more than 20 times over the course of 6 months to request a refund. The Ombudsman intervened and was able to obtain a refund for the company. Unfortunately, the musicians were unable to travel to the United States and missed their American tour dates.

The Year in Outreach

In 2016, the Ombudsman conducted over 90 stakeholder engagements with state and local officials, Congressional offices, national and community-based organizations, attorney bar associations, employer associations, and individuals and employers.¹⁰ The Ombudsman also conducted outreach through webinars and teleconferences with stakeholders across the country, as well as with USCIS service centers and field offices.

Social Media. The Ombudsman engages with stakeholders through Facebook.¹¹ Additionally, stakeholders can receive regular email updates from the Ombudsman by

¹⁰ The Ombudsman established a performance measure to conduct 90 outreach activities in FY 2016. See DHS Quarterly Performance Report Management Measures FY 2016 End of Year (Dec. 13, 2016), p. 58. Ombudsman stakeholder engagements were conducted in 2016 in the following locations: National: New York, NY; Newark, NJ; Providence, RI; Washington, DC; Silver Spring, Rockville, and Baltimore, MD; Durham, NC; Philadelphia, PA; Louisville, KY; Destin, Miami, Pensacola, and Tampa, FL; Macon and Atlanta, GA; Birmingham and Mobile, AL; New Orleans, LA; Austin, El Paso, and Houston, TX; Las Vegas, NV; Westminster, Denver, and Boulder, CO; Omaha, NE; Indianapolis, IN; Chicago, IL; Kansas City, MO. International: Mexico City, Mexico; San Salvador, El Salvador; Guatemala City, Guatemala.

¹¹ <https://www.facebook.com/dhs.cisombudsman>.

subscribing online.¹² The DHS blog¹³ and Twitter account¹⁴ occasionally feature the Ombudsman's work.

Teleconferences. The Ombudsman hosted the following public teleconferences to provide information and to receive feedback on issues and policy trends:¹⁵

- Fee Waivers (October 26, 2016)
- EADs/H1B Issues (August 31, 2016)
- 2016 Annual Conference Recap (July 28, 2016)
- Processing Times (April 27, 2016)
- U.S. Department of Motor Vehicles Benefits (February 25, 2016)
- Transformation of USCIS Systems (January 28, 2016)

The Ombudsman's Annual Conference. On December 6, 2016, the Ombudsman held a sixth Annual Conference: *Government and Stakeholders Working Together to Improve Immigration Services*.¹⁶ The conference included over 300 in-person participants, and over 4,000 more viewed the conference via YouTube. Then-USCIS Director León Rodríguez delivered remarks calling for the agency to remain fair and service-oriented. Shelly Pitterman, former UNHCR Regional Representative for the USA and the Caribbean, followed, reflecting upon the global migration crisis and the U.S. role in responding. Juan Osuna, then-Director of the Executive Office for Immigration Review (EOIR), remarked on the role of EOIR, emphasizing that "[t]he system is poised to do great things ... protecting due process, protecting review." He noted the importance of adequate resourcing to enable the immigration courts to function efficiently. A plenary panel, focused on the future of the agency and featuring current and former USCIS officials, concluded the morning session. The afternoon break-out panels included panels on Employment and Humanitarian Hot Topics; Temporary Workers; Regional Refugee Resettlement Issues and the Central American Minors Program; and Citizenship and Naturalization for Special Populations.

¹² https://service.govdelivery.com/accounts/USDHS/subscriber/new?topic_id=USDHS_14.

¹³ <https://www.dhs.gov/news-releases/blog>.

¹⁴ <https://twitter.com/dhsgov>.

¹⁵ Recaps of the Ombudsman's teleconference series can be found at <https://www.dhs.gov/ombudsmans-public-teleconference-series>.

¹⁶ Links to the conference agenda and YouTube video recording can be found at <https://www.dhs.gov/event/citizenship-and-immigration-services-ombudsman-sixth-annual-conference>.



Key Developments and Areas of Focus

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

- (1) Families
- (2) Employment
- (3) Humanitarian
- (4) Interagency, Customer Service, and Process Integrity



Families

Family unification and immigrant integration are a significant component of U.S. immigration principles. In 2016, USCIS was challenged by a significant increase in naturalization applications while attempting to implement a major transition to electronic processing. Military immigrants saw increasing delays in the processing of their naturalization applications. USCIS also made changes to the provisional waiver process, including all statutorily eligible applicants and expanding the extreme hardship standard, as well as eliminating the “reason to believe” denial standard.



The Perfect Storm: Fee Increases, Call to Citizenship, and ELIS

Responsible USCIS Office: Field Operations Directorate

Key Facts and Findings

- In FY 2016, USCIS received over 972,000 naturalization applications—nearly 200,000 more than projected—in advance of the scheduled fee increase and U.S. presidential election.
- In April 2016, USCIS expanded its Transformation initiative to include the processing of naturalization applications. Introducing Form N-400, *Application for Naturalization* into the Electronic Immigration System (ELIS), the Transformation platform, represented a major undertaking for the agency because naturalization processing is the most complex application to be incorporated thus far in ELIS.
- However, USCIS initiated Form N-400 into ELIS without a full grasp of the business needs or system capacity, and at a time when the agency was dealing with higher demand.
- USCIS scanned naturalization applications, submitted on paper versions of the Form N-400, into ELIS to create an electronic record for adjudication. At the same time, USCIS continued to process N-400 applications submitted on the prior form version through paper-based adjudications using CLAIMS 4, the agency’s legacy case management system for naturalization applications.
- USCIS suspended ELIS processing of new naturalization applications 4 months after launch due to a wide array of technical problems, all of which negatively impacted processing times and agency productivity.
- While many of these initial difficulties have been resolved, applicants for naturalization continue to face delays in obtaining the rights and privileges of citizenship.

Background

In 2016, there was an increase in naturalization applications, typical of presidential election years and announced fee increases.¹⁷ Notwithstanding the likely increase in the number of filings, in April 2016, USCIS expanded electronic adjudication in ELIS to include Form N-400. While the introduction of ELIS processing for a key immigration benefit represented a significant step forward for the agency, systems issues within ELIS forced USCIS to discontinue inputting naturalization applications into ELIS in August 2016.¹⁸ See Figure 2.1, *Naturalization Timeline*, outlining key events relating to the introduction of Form N-400 into ELIS processing.

In 2016, the Ombudsman received 1,294 requests for case assistance related to N-400 applications—almost three times more than the prior year. The difficulty experienced by customers most often was that of applications pending past processing time, often (but not exclusively) awaiting completion of FBI name checks.

Miscalculations in Projecting the Naturalization Workload. To make workload projections, USCIS considers immigration receipt data from the past 15 years, historical events, and its own assessment of future developments.¹⁹ According to data between 2000 and 2015, USCIS experienced an overall increase in N-400 receipts from 460,916 in FY 2000 to 783,062 in FY 2015.²⁰

In addition to the historical data, USCIS was in the process of announcing a fee increase likely to have an impact on receipts. In May 2016, USCIS issued a Notice of Proposed Rulemaking for a new fee schedule that included increasing the standard N-400 filing fee from \$595 to \$640

(an eight percent increase).²¹ USCIS also proposed a new reduced application fee of \$320 (a 50 percent reduction) for applicants with family income greater than 150 percent but no more than 200 percent of the Federal Poverty Guidelines.²² This reduced fee is in addition to the full fee waiver for applicants with household incomes below 150 percent of the Federal Poverty Guidelines.²³ Typically, those intending to file for a benefit would file at the lower fee, but the partial waiver may have been thought to provide an incentive to applicants to wait for the rule to take effect.

Finally, USCIS planned this expansion just several months prior to a presidential election. This was likely to increase receipts as would-be voters sought the benefit of naturalization. A similar situation took place in 2007, preceding an increase in filing fees and the 2008 presidential elections.²⁴ In fact, in FY 2007, USCIS witnessed the single largest increase in applications recorded (since the government began tracking naturalization applications in 1907). According to Pew Research Center, “the number of applications in fiscal 2007 spiked to nearly 1.4 million, an 89% increase over the previous year.”²⁵

Nevertheless, despite an imminent fee increase and the 2016 elections, USCIS projected it would receive 774,634 naturalization applications in FY 2016, below the number of receipts received in FY 2015.²⁶ USCIS ultimately received 972,151 applications in FY 2016, nearly 200,000 more than anticipated.²⁷ While the increase in receipts was not as significant as 2007, it was higher than anticipated. In addition to these new receipts, USCIS was still processing 362,976 naturalization applications filed

¹⁷ See U.S. Citizenship and Immigration Services Fee Schedule; Proposed Rule, 81 Fed. Reg. 26904 (May 4, 2016).

¹⁸ “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Oversight and Management Efficiency Subcommittee of the U.S. House Committee on Homeland Security*, 115th Cong. 1st Sess. 3 (2017) (statement of then-Acting USCIS Director Lori Scialabba); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed Mar. 27, 2017). See also OIG, “Management Alert—U.S. Citizenship and Immigration Services’ Use of the Electronic Immigration System for Naturalization Benefits Processing,” OIG-17-26-MA (Jan. 19, 2017); <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA.pdf> (accessed May 22, 2017).

¹⁹ U.S. Citizenship and Immigration Services Fee Schedule; Proposed Rule, 81 Fed. Reg. at 26916.

²⁰ DHS, “2015 Yearbook of Immigration Statistics,” Table 20, Petitions for Naturalization Filed, Persons Naturalized, And Petitions For Naturalization Denied: Fiscal years 1907 To 2015 (Dec. 2016); https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf (accessed Dec. 16, 2016).

²¹ U.S. Citizenship and Immigration Services Fee Schedule; Proposed Rule, 81 Fed. Reg. at 26916.

²² 81 Fed. Reg. at 26906. The new fee schedule took effect December 23, 2016. See U.S. Citizenship and Immigration Services Fee Schedule; Final Rule, 81 Fed. Reg. 73292 (Oct. 24, 2016).

²³ See USCIS Webpage, “I-912, Request for Fee Waiver” (May 3, 2016); <https://www.uscis.gov/i-912> (accessed May 4, 2017).

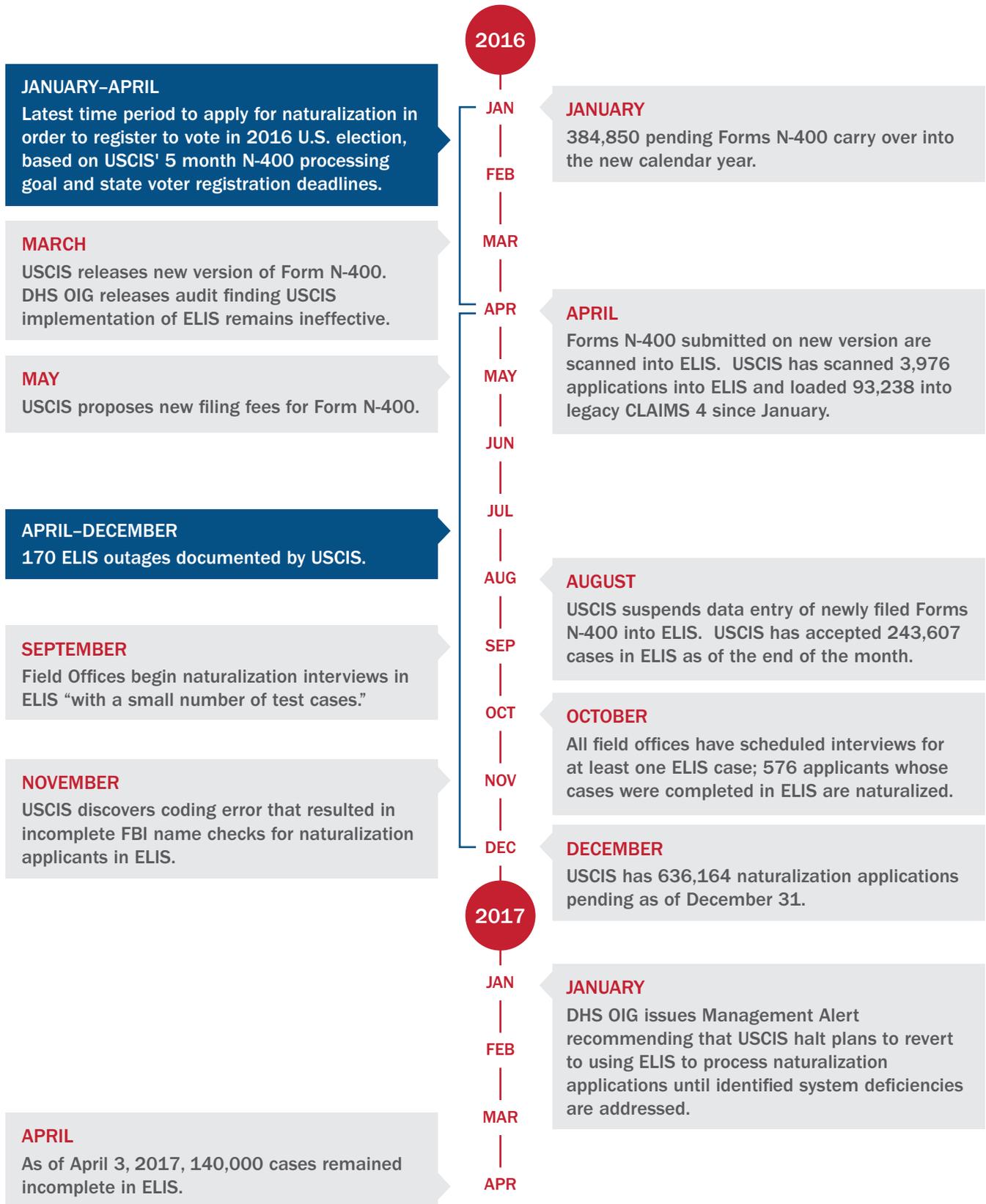
²⁴ Jens Manuel Krogstad, “Immigrant naturalization applications climb, but not as much as past years” (Pew Research Ctr., Washington, D.C.) (Sep. 15, 2016); <http://www.pewresearch.org/fact-tank/2016/09/15/immigrant-naturalization-applications-up-since-october-but-past-years-saw-larger-increases/> (accessed Sept. 16, 2016).

²⁵ *Id.* In FY 2007, USCIS received 1,382,993 naturalization applications. DHS, “2015 Yearbook of Immigration Statistics” (Dec. 2016), Table 20, Petitions for Naturalization Filed, Persons Naturalized, and Petitions For Naturalization Denied: Fiscal years 1907 To 2015; https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf (accessed Dec. 16, 2016).

²⁶ Information provided by USCIS (Mar. 24, 2017).

²⁷ *Id.*

Figure 2.1: Naturalization Timeline



Source: Information provided by USCIS.

in previous fiscal years.²⁸ Combining new receipts and previous filings still not adjudicated, USCIS had over 1.3 million pending applications for naturalization in various stages of processing in FY 2016.²⁹

ELIS and Naturalization Processing. Prior to April 2016, USCIS processed and tracked paper-based naturalization applications and managed interview and oath ceremony scheduling through its CLAIMS 4 system.³⁰ After preliminary processing, USCIS forwarded the paper application and supporting documents from the National Benefits Center (NBC) to the responsible field office for adjudication and the applicant’s signature at the interview.

On April 13, 2016, USCIS began processing naturalization applications in ELIS. USCIS incorporated naturalization applications submitted in hardcopy on the new version of the Form N-400 (bearing the validity date of March 26, 2016) into ELIS for adjudication and file management, while applications submitted on the prior version of the form (bearing the September 13, 2013 validity date) continued to be adjudicated and tracked via the legacy CLAIMS 4 system.³¹ Under the new process, USCIS scanned applications and supporting documents into ELIS to create an account containing the information entered on the form and electronic copies of the documents submitted. The field office reviewed the information and documents on a monitor and, during the interview, applicants gave their signatures on tablet computers. This represented a major undertaking as the N-400 is the first field office-dedicated function and “most complicated” application to be incorporated thus far in ELIS.³²

While ELIS is intended to be a fully electronic process, paper-based N-400 application submissions remain the norm. In 2016, USCIS scanned into ELIS 243,094 paper-

based applications for electronic adjudication, while just 513 electronic applications were successfully filed online.³³ Online filing of Form N-400 continues to be a limited option.³⁴

Challenges with ELIS Processing. The DHS Office of Inspector General (OIG) identified significant “technical and functional issues” with ELIS before and after the introduction of N-400s.³⁵ Problems related to the N-400 included:

- Deficiencies in background and security checks for applicants;
- Inadequate interface between ELIS and external systems;
- Inability to print naturalization certificates;
- Multiple or erroneous cancellation of naturalization interviews; and
- Lack of contingency planning for continued processing of applications during ELIS outages.³⁶

The agency was challenged first with ensuring all officers were fully trained and equipped, then with maintaining sufficient vetting of applicants and, finally, with establishing parity in processing between applications processed in ELIS and CLAIMS 4.

USCIS began training officers in naturalization adjudications using ELIS in June 2016.³⁷ Training included a week-long live “train-the-trainer session” at the NBC and a subsequent virtual training session.³⁸ By the end of September 2016, every USCIS office had at least one fully trained officer, and “nearly every single [officer] in every field office except eight [out of almost 90 offices] had been [initially] trained in adjudicating N-400s in ELIS.”³⁹ The training was rolled out deliberately: USCIS interviewed a small number of applicants in ELIS as test cases at field offices in San Francisco, Chicago, Raleigh, Philadelphia,

²⁸ Information provided by USCIS (May 12, 2016). As noted in Figure 2.1, *Naturalization Timeline*, that number increased to 384,850 by January 1, 2016, the second quarter of FY 2016.

²⁹ The total is based on information provided by USCIS on May 12, 2016 (total pending non-military N-400s) plus information provided by USCIS on March 24, 2017 (actual N-400 receipts for Fiscal Year 2016).

³⁰ See generally DHS Privacy Impact Assessment, “Computer Linked Application Information Management System 4 (CLAIMS 4)” (Nov. 5, 2013); <https://www.dhs.gov/sites/default/files/publications/privacy-pia-update-uscis-claims4-november2013.pdf> (accessed Mar. 21, 2017).

³¹ Information provided by USCIS (Apr. 12, 2017). USCIS receipts that begin with “IOE” indicate that the submission is being processed through the Integrated Operating Environment, or the ELIS system.

³² “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Oversight and Management Efficiency Subcommittee of the U.S. House Committee on Homeland Security*, 115th Cong. 1st Sess. 3 (2017) (statement of Lori Scialabba); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed Mar. 27, 2017).

³³ Information provided by USCIS (Apr. 15, 2017).

³⁴ USCIS has chosen to maintain limited access to an online filing feature through the *myUSCIS* portal on the USCIS website. Information provided by USCIS (June 8, 2017).

³⁵ OIG, “Management Alert—U.S. Citizenship and Immigration Services’ Use of the Electronic Immigration System for Naturalization Benefits Processing,” OIG-17-26-MA at 2 (Jan. 19, 2017); <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA.pdf> (accessed May 22, 2017).

³⁶ *Id.* at 3-4.

³⁷ Information provided by USCIS (Apr. 19, 2017).

³⁸ *Id.*

³⁹ *Id.*

Requests for Case Assistance

An applicant received an email from USCIS stating: “On September 7, 2016, we scheduled an interview for your Form N400, APPLICATION FOR NATURALIZATION We will mail you an interview notice.” After waiting 10 days to receive the notice, the applicant contacted USCIS and was told that the email was a mistake and was provided no further explanation.

and Overlook Park, Florida.⁴⁰ However, the deliberate nature of the implementation had consequences; as of November 30, 2016, less than two percent of the applicants that were part of the new ELIS process had been naturalized.⁴¹

Another challenge USCIS experienced during this process was system outages. From the inception of N-400 ELIS processing to the end of December 2016, USCIS experienced 118 planned and 52 unplanned ELIS outages.⁴² Twelve of the unplanned outages were outside the control of USCIS.⁴³

Although some challenges are expected during any major technology implementation, then-Acting Director Lori Scialabba testified before Congress that these challenges were significant enough to force USCIS to suspend the entry of N-400s into ELIS in August 2016 and revert to “ingesting newly filed N-400s into our . . . legacy system, known as CLAIMS 4,” until the agency resolved the problems.⁴⁴ As of April 20, 2017, USCIS informed the Ombudsman that it had resolved all of the identified issues.

ELIS Processing Delays. USCIS has worked to address disparities in processing times between applications done electronically (in ELIS) versus through paper-based processes (in CLAIMS 4).⁴⁵ However, USCIS was not able to provide the Ombudsman with distinct cycle time data

for ELIS and non-ELIS cases.⁴⁶ Stakeholders with pending N-400 filings have informed the Ombudsman, however, that it appears cases adjudicated in ELIS are taking longer to complete than paper-based applications.

ELIS and Security Issues. Thorough background and security vetting is a critical component of the U.S. immigration system. USCIS performs background checks on all naturalization applicants that include fingerprint and name checks conducted by the FBI, as well as vetting through USCIS and interagency systems.⁴⁷ USCIS cannot schedule an applicant’s interview until the background check process is complete.⁴⁸

On November 28, 2016, USCIS discovered the incomplete submission of approximately 15,000 naturalization applicants’ names to the FBI.⁴⁹ USCIS immediately suspended the approval of naturalization applications or administering the oath of allegiance for any applicant whose case was processed in ELIS while the agency determined the extent of the problem. USCIS approved 1,098 ELIS applications before identifying the coding error, but since those applicants had not yet taken the oath of allegiance, the agency placed their applications on hold pending the results of repeat FBI name checks.⁵⁰ USCIS received new name check results and determined that all the individuals were approved properly.⁵¹ Subsequent to this incident, USCIS proactively conducted background checks on applications twice, “once through ELIS and again outside of ELIS,” to ensure the integrity of the naturalization vetting.⁵² These redundancies—essential to ensure the integrity of the U.S. immigration system—have contributed to processing delays.

⁴⁰ Information provided by USCIS (May 12, 2017).

⁴¹ Letter from León Rodríguez, then-USCIS Director, to Rep. Robert Goodlatte, Chairman, U.S. House of Representatives Judiciary Committee (January 17, 2017) (copy on file with the Ombudsman).

⁴² Information provided by USCIS (Apr. 19, 2017).

⁴³ *Id.*

⁴⁴ “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Oversight and Management Efficiency Subcommittee of the U.S. House Committee on Homeland Security*, 115th Cong. 1st Sess. 3 (Mar. 16, 2017) (statement of Lori Scialabba, Acting USCIS Director); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed Mar. 27, 2017).

⁴⁵ Information provided by USCIS (Oct. 5, 2016).

⁴⁶ Information provided by USCIS (Feb. 24, 2017).

⁴⁷ See generally Ombudsman’s Annual Report 2016, pp.35–39 for an overview of background and security checks and the Ombudsman’s concerns.

⁴⁸ USCIS Policy Manual, Volume 12—Citizenship & Naturalization, Part B—Naturalization Examination, ch 2—Background Check and Security Checks (Jan. 5, 2017); <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html> (accessed Mar. 9, 2017).

⁴⁹ Letter from Rodríguez to Goodlatte, *supra* note 41.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Oversight and Management Efficiency Subcommittee of the U.S. House Committee on Homeland Security*, 115th Cong. 1st Sess. 3 (Mar. 16, 2017) (statement of Lori Scialabba, Acting USCIS Director); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed Mar. 27, 2017).

Two months later, the OIG outlined its security-related concerns in an unusual Management Alert.⁵³ In particular, the OIG reported,

Our subsequent, ongoing review is now discovering alarming security concerns regarding inadequate applicant background checks, as well as significant USCIS problems in using ELIS to process naturalization benefits for immigration. Because of the problems encountered, USCIS decided in August 2016 to revert to legacy processing and discontinue using ELIS to process new naturalization applications. We have been informed that USCIS is now considering a return to processing naturalization applications in ELIS. Because of significant unresolved functional and technical issues surrounding ELIS, we advise against it until corrective actions are taken to ensure security and integrity in naturalization benefits processing.⁵⁴

Pursuant to the January 2017 OIG Management Alert, USCIS identified the following systems issues that needed to be addressed before resuming processing of new Forms N-400 in ELIS: (1) inaccurate background checks; (2) inconsistent coding associated with naturalization certificate production; (3) delays in printing naturalization certificates; (4) disruption of operations; and (5) inability to scan documents directly to a case in ELIS.⁵⁵ USCIS informed the Ombudsman that as of April 20, 2017, it had addressed all of the concerns raised in the Management Alert.⁵⁶ Of the 243,607 naturalization cases that were initially received in ELIS, 140,000 remained pending as of April 3, 2017.⁵⁷

⁵³ OIG, “Management Alert—U.S. Citizenship and Immigration Services’ Use of the Electronic Immigration System for Naturalization Benefits Processing,” *supra* note 35 at 3 (“[A]pproximately 175 applicants were granted citizenship as of January 11, 2017 before the problem was detected.”). USCIS resubmitted the names of those applicants to the FBI for new checks. See Letter from Rodriguez to Goodlatte, *supra* note 41.

⁵⁴ *Id.*

⁵⁵ Information provided by USCIS (Apr. 12, 2017).

⁵⁶ Information provided by USCIS (Apr. 20, 2017).

⁵⁷ Information provided by USCIS (May 11, 2017).

Ongoing Concerns

USCIS initiated Form N-400 into ELIS to take the next step forward in electronic processing of applications. The agency began implementation of this complex process without properly anticipating its impact on the system, adjudicators, and applicants. The Ombudsman urges USCIS to communicate to stakeholders the current state of naturalization cases being processed in ELIS and how use of the new system is affecting processing times. The Ombudsman will continue to monitor the transition of naturalization applications to ELIS processing and its impact on stakeholders.

Military Immigration Issues: Immigration Services for Those Who Serve

Responsible USCIS Offices: Service Center Operations and Field Operations Directorates; Office of Policy and Strategy; Office of Chief Counsel

Key Facts and Findings

- Pursuant to a combination of laws and programs, foreign nationals who serve in the military are eligible for special immigration benefits, including naturalization upon completion of basic training.
- Background and FBI name checks are causing processing delays and hindering USCIS from completing military naturalization applications in accordance with the Naturalization at Basic Training Initiative.
- Service members continue to experience difficulties as their files are transferred among multiple jurisdictions due to deployment and change of duty station as well as agency processing delays.
- A September 30, 2016 Department of Defense (DOD) memorandum on the MAVNI program has led to confusion and processing issues for those joining the Armed Services through this program and applying for naturalization.

- A December 22, 2016 Presidential Memorandum regarding the delivery of immigration services to members of the U.S. Armed Services, veterans, and their families improved interagency information sharing and collaboration.

Background

In previous Annual Reports, the Ombudsman described USCIS initiatives for members of the Armed Services and their families, including the Naturalization at Basic Training Initiative, the MAVNI program, parole-in-place for family members, particularized services for military members seeking immigration benefits, and expedited processing of naturalization applications.⁵⁸ These services and programs came about as a result of mutual interest on the part of Congress, military leaders, and DHS in supporting the distinct needs of military members and their families.

In 2016, the Ombudsman received 168 requests for case assistance from members of the Armed Services.⁵⁹ The most common problems faced by service members included delays in naturalization processing due, in part, to FBI name checks, as well as MAVNI processing issues. The Ombudsman also received requests for case assistance to expedite the adjudication of naturalization applications due to upcoming deployments or changes in duty stations.

Naturalization and other adjudication delays are problematic as service members do not control their deployment dates and depend on USCIS to complete processing while they are based in the United States. These delays also affect service members who are unable to obtain the required security clearances needed to perform their duties, preventing them from deploying abroad or performing specific functions.⁶⁰

“ I was amazed learning how you were willing to assist to make quality changes to happen. I believe that is because you and your colleagues in DHS are the kind of people who are dedicated to participate in immigration issues, but part of it also are the relationships that you guys are developing there with individuals, the linkages you take, and the respect you develop for other people and for other countries, other customs and approaches. ”

Military Naturalization Statistics. The Naturalization at Basic Training Initiative, established in August 2009, seeks to enable non-citizen enlistees to naturalize upon graduation from basic training.⁶¹ From FY 2002 through the end of FY 2015, USCIS naturalized through its various military programs (including Naturalization at Basic Training) a total of 109,321 service members (98,252 in the United States, and 11,069 abroad).⁶² In FY 2016, USCIS naturalized 8,707 service members (8,667 in the United States and 40 abroad), indicating that this initiative has been successful in naturalizing a majority of service members domestically.⁶³

MAVNI. The MAVNI program was authorized in 2009 by DOD as a pilot program to enlist certain nonimmigrants and other foreign nationals with skills considered vital to the national interest of the United States.⁶⁴ The program is currently open to individuals with certain health care skills and individuals fluent in select foreign languages.⁶⁵ In 2016, USCIS completed a total of 9,822 MAVNI naturalizations with an average processing time of 147 days.⁶⁶

⁵⁸ Ombudsman’s Annual Report 2016, pp. 75–76; Annual Report 2015, pp. 29–32; Annual Report 2011, pp. 19–21; Annual Report 2010, pp. 63–66; Annual Report 2009, pp. 37–39; and Annual Report 2008, p. 58. See also USCIS Webpage, “Naturalization Through Military Service: Fact Sheet” (Dec. 22, 2016); <https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet> (accessed Mar. 15, 2017). USCIS specialized resources include a direct help line for military families to receive assistance with immigration-related information requests.

⁵⁹ By contrast, in 2015, the Ombudsman received 44 requests for case assistance from members of the Armed Services.

⁶⁰ See Letter from Lofgren, Thonberry, Conyers, Pence, et. al, Members of the House of Representatives to then-Secretary of Homeland Security Janet Napolitano (Jul. 9, 2010) (copy on file with the Ombudsman); see Letter from then-Secretary of Homeland Security Janet Napolitano to Zoe Lofgren, Member of the House of Representatives (Aug. 30, 2010), <http://cmsny.org/wp-content/uploads/Napolitano-Letter-08.30.101.pdf> (accessed May 11, 2017).

⁶¹ Naturalization Through Military Service: Fact Sheet, *supra* note 58.

⁶² *Id.*

⁶³ Information provided by USCIS (Apr. 5, 2017).

⁶⁴ USCIS Policy Alert, “Department of Defense Military Accession Vital to National Interest Program” (Aug. 3, 2016); <https://www.uscis.gov/policymanual/Updates/20160803-MAVNI.pdf> (accessed Mar. 15, 2017).

⁶⁵ U.S. Army Webpage, “Military Accessions Vital to the National Interest (MAVNI)” (Feb. 17, 2016); <http://www.goarmy.com/benefits/additional-incentives/mavni.html> (accessed May 10, 2017).

⁶⁶ Information provided by USCIS (Apr. 5, 2017).

On May 23, 2016, U.S. Immigration and Customs Enforcement (ICE) issued a Guide for Designated School Officials explaining how the MAVNI program relates to F and M student visa holders, describing the application process for foreign students, and providing guidelines on how the program affects eligible dependent family members.⁶⁷ On August 3, 2016, USCIS integrated existing MAVNI program guidance into the USCIS Policy Manual.⁶⁸

On September 30, 2016, DOD issued a memorandum titled, “Military Accessions Vital to the National Interest Pilot Program Extension.”⁶⁹ The memo is significant for several reasons. First, it extends the MAVNI program through September 30, 2017, and replaces all previously issued program guidance. Second, the DOD memorandum requires that MAVNI enlistees maintain an immigration status or obtain deferred action and expressly provides that Deferred Action for Childhood Arrivals (DACA) beneficiaries are eligible for MAVNI. Third, the memorandum requires that each MAVNI applicant satisfactorily complete all security screening requirements “[p]rior to shipping to basic training or serving for any period of time on active duty in the Armed Forces.”⁷⁰ Finally, the memorandum provides that MAVNI enlistees are not eligible for an interim security clearance until the completion of first enlistment and a positive national security eligibility determination is made.

U.S. Military Family Member Immigration Benefits.

USCIS has statutory authority to streamline the naturalization process for U.S. service members, veterans, and their qualifying dependents.⁷¹ Section 319(e) of the INA allows qualifying spouses of U.S. service members to naturalize abroad, waiving the physical presence requirements. In FY 2016, USCIS processed 2,692 military spouse naturalization applications, of which 280 applications were granted abroad.⁷² Similarly, qualifying children of U.S. service members may be naturalized

abroad under section 322 of the INA. In FY 2016, USCIS processed 12 such naturalization applications abroad.⁷³

A policy memorandum issued by USCIS on November 23, 2016, “Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans and Enlistees,” provided guidelines on the application of parole-in-place for family members of certain military personnel and veterans.⁷⁴ The memorandum provided guidelines on deferred action for MAVNI candidates and eligible family members currently present in the United States; this includes enlistees in the DOD’s Delayed Entry Program (DEP) whose nonimmigrant status has expired.⁷⁵ The memorandum also provides guidelines for petitioning relatives and work authorization. As this Report is being finalized, however, USCIS has not indicated whether parole-in-place processing remains operative. USCIS District Directors have indicated to the Ombudsman that they are continuing to grant parole-in-place, while stakeholders have reported a lack of movement or denial of requests.

Presidential Memorandum. A December 22, 2016 Presidential Memorandum, “Supporting New American Service Members, Veterans, and Their Families, Memorandum for the Heads of Executive Departments and Agencies,” directs Executive Branch departments and agencies to enhance interagency collaboration to ensure that military members, veterans and their dependents receive the immigration benefits they earned through their service to the United States.⁷⁶ An interagency working group was established and tasked with “coordination and sharing of military records; enhancing awareness of naturalization and immigration benefits; coordinating and facilitating the process of adjudication; and other efforts that further support service members, veterans and their families.”⁷⁷ The working group, which includes the

⁷³ *Id.* USCIS stated that it does not track the number of children naturalized in the United States.

⁷⁴ USCIS Policy Memorandum, “Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans and Enlistees” (Nov. 23, 2016); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/PIP-DA_Military_Final_112316.pdf (accessed Apr. 20, 2017).

⁷⁵ *Id.* (“The DoD receives approximately 250,000 individuals into the all-volunteer force each year. To effectively sustain this large volunteer force, DoD uses the DEP to manage and predictably meet the accession requirements of the military services. Individuals who have no previous military experience and are seeking to enlist in the U.S. military must sign a contract by which they enter into the DEP for a period of up to 365 days while awaiting Basic Training.”)

⁷⁶ Supporting New American Service Members, Veterans, and Their Families; Memorandum for the Heads of Executive Departments and Agencies, 81 Fed. Reg. 95849, 95851 (Dec. 22, 2016).

⁷⁷ *Id.*

⁶⁷ ICE Webpage, “F and M Nonimmigrants and MAVNI: A Guide for Designated School Officials” (May 23, 2016); <https://www.ice.gov/sites/default/files/documents/Document/2016/mavniFactsheetDSO1.pdf> (accessed Mar. 15, 2017).

⁶⁸ Department of Defense Military Accession Vital to National Interest Program, *supra* note 64.

⁶⁹ DOD Policy memorandum, “Military Accessions Vital to the National Interest Pilot Program Extension” (Sept. 30, 2016).

⁷⁰ *Id.*

⁷¹ Naturalization Through Military Service: Fact Sheet, *supra* note 58.

⁷² Information provided by USCIS (Apr. 12, 2017).

Ombudsman, is tasked with developing a 3-year strategic action plan, conducting outreach activities and collecting feedback from stakeholders.

Special Immigrant Visa Program (SIV). The SIV program was authorized by Congress under section 1059 of the National Defense Authorization Act for FY 2006.⁷⁸ The program provided the Secretary of Homeland Security with authority to grant special immigrant status to Afghan and Iraqi individuals who served as translators and interpreters with U.S. Armed Forces. The program originally authorized 50 visas per fiscal year (status granted to spouses and children does not count toward the numerical limitation).⁷⁹ That limitation was increased to 500 visas in FY 2007 and FY 2008.⁸⁰ In FY 2009, the visa limitation reverted to the 50 visa per year limit, and the program was amended to include Afghan and Iraqi translators and interpreters who worked directly with U.S. Armed Forces or under the Chief of Mission authority at the U.S. Embassies in Baghdad or Kabul.⁸¹ Congress reauthorized the SIV program in the Consolidated Appropriations Act of 2017, making available 2,500 additional visas for Afghan nationals who served alongside U.S. troops in Afghanistan.⁸²

Ongoing Concerns

Naturalization at Basic Initiative and Processing Delays. Stakeholders report that prolonged processing times are preventing service members from naturalizing upon graduation from basic training, pursuant to the Naturalization at Basic Training Initiative. The Ombudsman has received a number of requests for assistance for naturalization applications outside normal processing times. Members of the military have indicated to the Ombudsman that the USCIS military help line sometimes provides vague responses. The Ombudsman's review of requests for case assistance reveals that many of

Request for Case Assistance

A member of the Armed Forces submitted a request for case assistance to the Ombudsman after experiencing delays in the processing of her Form N-400. Upon enlistment in the U.S. Army in February 2016, the service member was sent to Basic Combat Training (BCT) in South Carolina. Delays in processing prevented her from naturalizing after completing BCT; she was assigned to an installation in Virginia in May 2016 for her Advanced Individual Training (AIT). Upon arrival, the service member requested that her file be transferred from the field office where it was initially filed to the nearest field office in Virginia. Despite contacting the USCIS military help line and the field office on multiple occasions, her case was never transferred. Five months later, after completing AIT, the service member was given her first assignment. She requested that her file be transferred to a third field office. Despite repeated attempts, the service member was unable to resolve the matter directly with USCIS. She submitted a request for case assistance to the Ombudsman in December 2016. The third field office received the file two weeks later. The service member was able to naturalize in March 2017, more than 1 year after the initial filing and 6 months beyond USCIS posted (non-military) naturalization processing times.

these cases were delayed due to background investigations outside USCIS control.

FBI Name Checks. As discussed in the Ombudsman's 2016 Annual Report, FBI name check delays prevent USCIS from timely completing a number of naturalization applications filed by service members and their dependents.⁸³ As of April 2017, a total of 2,125 military naturalization applications for service members were pending due to FBI name checks.⁸⁴ Generally, the FBI does not treat name checks for military service members differently from other pending requests. However, the FBI has expedited name checks for military members on a case-by-case basis at the request of USCIS, particularly if there is an upcoming deployment or change in duty station.⁸⁵

Concerns with MAVNI and Naturalization Processing. Stakeholders have expressed concerns that there has been a slowdown in the adjudication of MAVNI naturalization

⁷⁸ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (codified as amended in scattered sections of 8 U.S.C.).

⁷⁹ DOS Webpage, "Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/Interpreters," <https://travel.state.gov/content/visas/en/immigrate/iraqi-afghan-translator.html> (accessed Apr. 17, 2017).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² H.R. 244 Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 7083, 115th Congress (2017–2018). As of September 30, 2016, 6,733 applications for principal applicants were pending in one of the 14 SIV application stages; of those, 196 petitions were pending with USCIS. Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program—January 2017; https://travel.state.gov/content/dam/visas/SIVs/Afghan%20SIV%20public%20report_Jan%202017.pdf (accessed May 22, 2017).

⁸³ Ombudsman's Annual Report 2016, pp.75–76.

⁸⁴ Information provided by USCIS (Apr. 5, 2017).

⁸⁵ Ombudsman's Annual Report 2016, pp.75–76.



applications since the issuance of the memoranda by DOD on September 30, 2016, and by USCIS on November 23, 2016.⁸⁶ MAVNI enlistees placed in the reserves are eligible for expedited naturalization pursuant to the applicable statute and regulations, but are not able to pursue expedited naturalization because they are unable to complete security and background checks to enable them to attend basic combat training.⁸⁷ Stakeholders have also expressed concern that USCIS has denied or placed requests for deferred action on indefinite hold, despite the memoranda requiring that MAVNI enlistees either maintain their prior status or obtain deferred action. These applicants are left without lawful immigration status or the ability to work while awaiting adjudication of their naturalization applications or deployment to basic training.

The Ombudsman will continue to provide case assistance and monitor service members' concerns about timeliness in adjudications of their and their dependents' immigration benefits. Additionally, the Ombudsman will continue to engage USCIS and partner agencies to promote more effective interagency communication and coordination in the delivery of benefits to service members and their families.

⁸⁶ Frances Robles, *Vetting Delays Snarl Path to Citizenship for Thousands in Military*, The New York Times (Apr. 29, 2017), https://www.nytimes.com/2017/04/29/us/united-states-citizenship-and-immigration-servicesmilitary-screening.html?_r=1 (accessed May 11, 2017).

⁸⁷ INA § 329; 8 U.S.C. § 1440; 8 CFR 329.2(a). See also Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002) (designating the period beginning September 11, 2001 as a period of hostilities for the purposes of expedited naturalization under INA § 329); information provided by stakeholders.

Changes in Policy and Practice for Provisional Waivers

Responsible USCIS Offices: Field Operations Directorate; Office of Policy and Strategy

Key Facts and Findings

- The Provisional Unlawful Presence Waiver program was implemented in 2013 to “promote and preserve family unity” for certain spouses or parents of U.S. citizens who are unlawfully present in the United States and must depart in order to obtain lawful permanent resident (LPR) status.
- Form I-601A, *Application for Provisional Unlawful Presence Waiver* waives the 3- or 10-year unlawful presence bars prior to the applicant departing the United States for the required DOS immigrant visa interview.

“ Thank you so much for your excellent assistance with this case. Your office's work is extremely important and beneficial. ”

- Initially, provisional waivers were available for individuals who: (1) entered the United States without authorization or overstayed a lawful temporary entry; (2) are the spouse or child of a U.S. citizen; (3) have no other grounds for inadmissibility (such as multiple unlawful entries, criminal history, or fraud); and (4) can demonstrate that their U.S. citizen spouse or parent would experience extreme hardship if the U.S. citizen had to be separated from the individual or had to relocate to another country.
- In 2016, USCIS expanded the program to include all statutorily eligible applicants, updated the USCIS Policy Manual to expand the extreme hardship standard, and revised the form instructions to include a summary of extreme hardship factors.
- Beginning August 29, 2016, by regulation, USCIS stopped denying provisional waiver applications based on a “reason to believe” the applicant would be inadmissible for reasons other than unlawful presence. Since USCIS is no longer addressing other inadmissibility issues, applicants may not be aware that DOS may deny the visa on other grounds until after departing the United States for immigrant visa interviews. If another waiver is available and needed, the applicant may file Form I-601, *Application for Waiver of Grounds of Inadmissibility*, but must remain overseas pending adjudication.
- The Ombudsman continued to receive requests for case assistance relating to provisional waivers in 2016. The majority of these requests involved denials (issued prior to the regulation change) that did not provide specificity for the “reason to believe” there were other grounds of inadmissibility, denials that did not appear to reflect a complete review of the documentation supporting the claim of extreme hardship, and processing times beyond those posted. There is no administrative or judicial review of a provisional waiver denial.

Background

DHS launched the Provisional Unlawful Presence Waiver program on March 4, 2013,⁸⁸ and expanded the program to all statutorily eligible applicants on July 29, 2016.⁸⁹ The program permits individuals who are inadmissible, but who qualify for a waiver of inadmissibility, to remain in the United States while waiting the resolution of their application. Previously, an eligible applicant was required to file Form I-601 with USCIS after departing the United States and then visit a U.S. consulate for an interview.

In July 2016, USCIS expanded the program to all statutorily eligible applicants.⁹⁰ The expansion was the result of a 2014 policy memorandum issued by then-Secretary of Homeland Security Jeh Johnson.⁹¹

The final rule, which became effective August 29, 2016, also expanded the provisional waiver process to permit the applicant to show extreme hardship to a permanent resident spouse or parent.⁹² The final regulation also includes the following changes to the program:

⁸⁸ Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 535 (Jan. 3, 2013). The Provisional Unlawful Presence Waiver Program only waives inadmissibility of the 3- or 10-year unlawful presence bars under INA § 212(a)(9)(B) for applicants who must depart the United States to complete their immigrant visa process, provided they can demonstrate their qualifying relative will be subject to extreme hardship with relocation and separation. Applicants cannot apply to waive the permanent bar under INA § 212(a)(9)(C). In its response to the Ombudsman’s 2015 Annual Report, USCIS stated, “[t]he goal of the provisional unlawful presence waiver process is to facilitate immigrant visa issuance for immediate relatives who are admissible to the United States except for the 3-year and 10-year unlawful presence bars under section 212(a)(9)(B).” See USCIS 2015 Annual Report Response, p. 5; <https://www.dhs.gov/publication/2015-uscis-response> (accessed Apr. 25, 2017). See also Ombudsman’s Annual Reports for 2013, 2014, 2015, and 2016.

⁸⁹ Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule, 81 Fed. Reg. 50244 (Jul. 29, 2016). Intending immigrants of any preference category with an approved Form I-130, I-140, or I-360 who paid the immigrant visa fee, or who were selected for the Diversity Visa Program under INA § 203(c), may file an I-601A application if they have a U.S. citizen or permanent resident spouse or parent who would experience extreme hardship if the applicant is not granted a waiver.

⁹⁰ *Id.*

⁹¹ DHS Policy Memorandum, “Expansion of the Provisional Waiver Program” (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Apr. 25, 2017).

⁹² Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule, 81 Fed. Reg. 50244, 50245 (Jul. 29, 2016). Prior to the expansion, only certain immediate relatives of U.S. citizen spouses or parents could apply for the provisional waiver.

- Provides that USCIS has jurisdiction over all provisional waivers, including those filed by an applicant who “is or was in removal, deportation, or exclusion proceedings;”
- Removes the “reason to believe” basis for denials;⁹³
- Eliminates date restrictions to allow applicants to file a provisional waiver request even if DOS already scheduled an immigrant visa interview; and
- Clarifies that an applicant may not file a provisional waiver request if ICE or U.S. Customs and Border Protection (CBP) previously reinstated an order of removal, deportation, or exclusion.⁹⁴

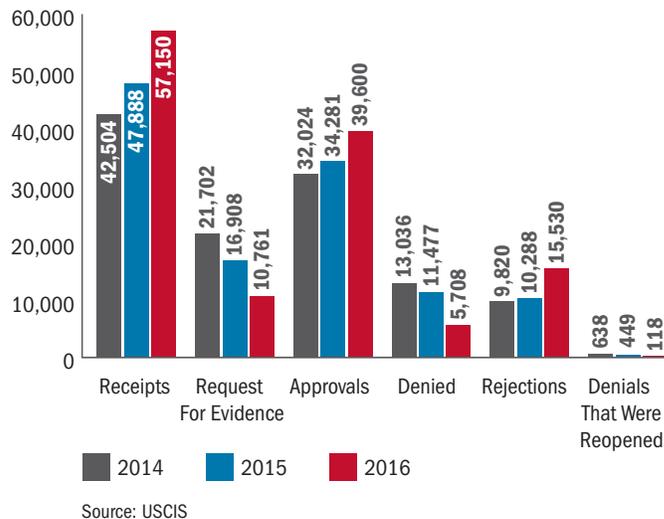
In his November 20, 2014 memorandum, then-Secretary Johnson directed “USCIS to provide additional guidance on the definition of ‘extreme hardship.’”⁹⁵ On October 21, 2016, USCIS published this policy guidance in Volume 9, Part B of its Policy Manual.⁹⁶ The guidance, which took effect on December 5, 2016, expands the definition of extreme hardship through several changes. First, it provides that USCIS will consider extreme hardship to additional qualifying relatives for purposes of the provisional waiver.⁹⁷ A qualifying relative is the U.S. citizen or permanent resident spouse or parent of the provisional waiver applicant who can demonstrate extreme hardship due to separation or relocation. Second, the guidance also provides that an applicant can show extreme hardship to the qualifying relative if there is relocation or separation, rather than both, as required prior to the regulation change.⁹⁸ Finally, the guidance provides a non-exhaustive list of significant factors that USCIS officers may consider when adjudicating the waiver, such as family ties, social and cultural impact, economic impact, health conditions and care, and country conditions.⁹⁹

Provisional Waiver Data. As a result of the expansion in eligibility, the National Benefits Center (NBC), which adjudicates all provisional waiver requests, received 57,150

⁹³ Under prior regulations, provisional waivers were unavailable to applicants who USCIS had a “reason to believe” were subject to a ground of inadmissibility other than unlawful presence. 8 C.F.R. § 212.7(e)(4)(i) (2016).
⁹⁴ 81 Fed. Reg. at 50262. See also 8 C.F.R. §§ 212.7(e)(2) and 212.7(e)(4)(v).
⁹⁵ Expansion of the Provisional Waiver Program, *supra* note 91.
⁹⁶ 9 USCIS Policy Manual, Pt. B; <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html> (accessed May 4, 2017).
⁹⁷ *Id.*
⁹⁸ *Id.*
⁹⁹ *Id.*

applications in 2016, a 19 percent increase from 2015 and a 35 percent increase from 2014.¹⁰⁰ See Figure 2.2, *USCIS I-601A Receipts and Actions Taken*.

Figure 2.2: USCIS I-601A Receipts and Actions Taken



Ongoing Concerns

The Ombudsman has monitored the Provisional Unlawful Presence Waiver program since its implementation in March 2013 through review of requests for case assistance, as well as engagements with stakeholders and USCIS.¹⁰¹ The Ombudsman received 434 requests for case assistance involving Form I-601A from the time the program was implemented through December 31, 2016. During 2016, stakeholders reported several issues regarding provisional waivers, including denials due to lack of extreme hardship

¹⁰⁰ Information provided by USCIS (Jan. 3, 2017 and Mar. 2, 2017). In 2016, USCIS received 12,538 Form I-601A filings between January 1 and March 30; 13,543 between April 1 and June 30; 12,939 between July 1 and September 30; and 18,130 between October 1 and December 31. In comparison, in 2015, USCIS received 11,097 Form I-601A filings between January 1 and March 30; 12,409 between April 1 and June 30; 12,192 between July 1 and September 30; and 12,190 between October 1 and December 31. During the Ombudsman’s Annual Conference in 2016, USCIS noted that Form I-601A receipts increased by 25–28 percent since August 29, 2016, the date that the provisional waivers program was expanded.
¹⁰¹ See Ombudsman’s Annual Report 2016, p. 24; Ombudsman’s Annual Report 2015, p. 21; Ombudsman’s Annual Report 2014, p. 10; and Ombudsman’s Annual Report 2013, pp. 25–26. The Ombudsman also hosted panel discussions on provisional waivers at the Ombudsman’s Annual Conference in 2013, 2015, and 2016.

or “reason to believe” grounds, and cases pending past posted processing times.

Adjudication Issues. Of the 164 requests for case assistance submitted in 2016 involving provisional waiver applications, 44 percent pertained to denials for lack of extreme hardship to the qualifying relative or “reason to believe” there were other inadmissibility grounds not waived by the provisional waiver. The agency responded that it “encourages all applicants to submit all documentation they believe will establish their eligibility for the provisional unlawful presence waiver including documentation to address potential grounds of inadmissibility.”¹⁰² USCIS further noted that it “does not make inadmissibility determinations” and that such decisions are made by DOS at the time of the immigrant visa interview.¹⁰³

¹⁰² USCIS 2014 Annual Report Response, p. 2 (June 9, 2015); <https://www.dhs.gov/publication/2014-uscis-response>. See also USCIS 2015 Annual Report Response, pp. 5–6 (June 30, 2016); <https://www.dhs.gov/publication/2015-uscis-response>. As of the time this report was being finalized, the Ombudsman has not received USCIS’ response to the 2016 Annual Report.

¹⁰³ USCIS 2014 Annual Report Response, p. 2.

Longer Processing Times. USCIS average processing times for provisional waiver applications increased from 3.3 months in 2015 to 5.75 months in 2016, but stakeholders reported adjudications taking as long as 8 months.¹⁰⁴ As of December 31, 2016, the NBC reported 29,761 pending Form I-601A applications.¹⁰⁵ One reason for increased processing times appears to be a growing number of cases pending FBI name checks. USCIS also notes that officers spend approximately 5 to 6 hours reviewing an application, compared to 2 hours in 2015, and noted that the average physical size of a provisional waiver filing has grown to 6.5 inches due to increased documentation supporting extreme hardship.¹⁰⁶

The Ombudsman will continue to monitor the Provisional Unlawful Presence Waiver program and Form I-601 processing.

¹⁰⁴ Information provided by USCIS (Jan. 3, 2017 and Mar. 2, 2017).

¹⁰⁵ Information provided by USCIS (Mar. 2, 2017). Form I-601A receipts increased by 25–28 percent since August 29, 2016.

¹⁰⁶ Information provided by USCIS at Ombudsman’s Sixth Annual Conference (Dec. 6, 2016).



Employment

U.S. immigration policy helps foster economic growth, seeks to respond to labor market needs, and enhances U.S. global competitiveness. In this year's Annual Report, the Ombudsman reviews USCIS administrative review of employment-based decisions through motions to reopen and reconsider to the field and appeals to the USCIS Administrative Appeals Office, offering ways to make the review more meaningful. The Ombudsman reviewed the EB-5 immigrant investor program's continuing scrutiny and increasing program delays. A new regulation, effective in early 2017, consolidated policy in many of USCIS' high-skilled nonimmigrant and immigrant programs, but missed opportunities for additional clarification.



USCIS Administrative Review in Employment-Based Decisions: Appeals and Motions

Responsible USCIS Offices: Service Center Operations and Field Operations Directorates; Administrative Appeals Office

Key Facts and Findings

- Administrative review, through motions to reopen and motions to reconsider to the field and appeals to the USCIS Administrative Appeals Office (AAO), provides individuals and employers an opportunity to obtain reexamination of USCIS denials.
- Motions to reopen and motions to reconsider are filed with the office that made the initial decision; an appeal, by contrast, is filed with the initial field office, and will be reviewed by that office before sending the appeal to the AAO for review and decision. If the field office agrees with the appeal, it may reverse itself and not forward the appeal.
- The AAO has made significant improvements to its processing times, completing most administrative appeals within 180 days. However, when the AAO posts its forecasted processing times, the time the appeal is first reviewed by the USCIS field office or service center is not included.
- Upon receipt of Form I-290B, *Notice of Appeal or Motion*, the initial USCIS field office must review the case to determine whether the arguments presented overcome the reason(s) for denial regardless of whether the case is brought back on motion or appeal.
- There are a variety of steps USCIS could take to ensure that administrative review is meaningful and timely, including:

- Establish and publish processing time goals for motions;
- Publish more accurate processing times for AAO appeals that include the time it takes to conduct the initial field review. For most form types, the AAO processing time is currently 3 months or less; and
- Clarify the Form I-290B by providing more explicit instructions, or alternatively, separate motions and appeals into two separate forms.

Background

Form I-290B is used to: (1) request reopening a petition based on new evidence; (2) request reconsideration of a decision based on incorrect application of law or policy; or (3) appeal a decision to the AAO.¹⁰⁷ Administrative review by USCIS is available for almost all immigration forms.¹⁰⁸ The type of review depends in part upon the benefit type and whether a motion or appeal is sought.¹⁰⁹ See Figure 3.2, *Motions to Reopen, Motions to Reconsider, and Appeals*.

Due to processing time concerns, some stakeholders and their legal representatives choose to refile with USCIS rather than pursue administrative review of adverse decisions. There is limited transparency for motions to reopen and motions to reconsider because USCIS field offices do not publicly post these processing times. Meanwhile, AAO appeal processing times are uniformly listed at 6 months, although most cases are completed in less time.¹¹⁰

The Ombudsman has issued formal recommendations to USCIS on both motions and appeals. In 2005, the Ombudsman recommended that the AAO publicize the appellate standard of review, the process to designate precedent decisions, its oral argument criteria, and

decision-making statistics.¹¹¹ In 2009, the Ombudsman recommended that USCIS establish uniform filing and review procedures for motions and improve public communication concerning these processes.¹¹² USCIS has implemented some of these recommendations, including making the preponderance of the evidence standard clear, making more information about motions¹¹³ and appeals publicly available, and implementing timelines for administrative review. However, stakeholders continue to express concerns regarding the complexity of Form I-290B, the depth of the initial field office’s review, and the timeliness of the administrative review process.

Form I-290B provides six options for administrative review: three related to motions and three related to appeals. See Figure 3.1, *Form I-290B Options for Administrative Review*.

Figure 3.1: Form I-290B Options for Administrative Review

You must select only one box indicating that you are filing an appeal or a motion, not both. **If more than one box is selected, your filing may be rejected.**

- 1.a. I am filing an **appeal** to the Administrative Appeals Office (AAO). My brief and/or additional evidence is attached.
- 1.b. I am filing an **appeal** to the AAO. My brief and/or additional evidence will be submitted to the AAO within 30 calendar days of filing the appeal.
- 1.c. I am filing an **appeal** to the AAO. No supplemental brief and/or additional evidence will be submitted.
- 1.d. I am filing a **motion to reopen** a decision. My brief and/or additional evidence is attached.
- 1.e. I am filing a **motion to reconsider** a decision. My brief is attached.
- 1.f. I am filing a **motion to reopen** and a **motion to reconsider a decision**. My brief and/or additional evidence is attached.

Source: Form I-290B, p. 1, Part 2, Information about the Appeal or Motion, 1.a-f (Apr. 10, 2017).

¹⁰⁷ 8 C.F.R. §§103.3 and 103.5.

¹⁰⁸ The AAO has jurisdiction over most applications and petitions. See 8 C.F.R. § 103.1(f)(iii) (2003). The BIA has appellate authority over most family-based immigrant petitions filed under section 204 of the INA, including Form I-130, *Petition for Alien Relative*, among others. See 8 C.F.R. § 1003.1(b)(5). Other applications and petitions, such as Forms I-751, *Petition to Remove the Conditions of Residence* and Form I-485, *Application to Adjust Status or Register Permanent Residence*, are filed pursuant to section 245 of the INA; Form I-765, *Application for Employment Authorization*, cannot be appealed. 8 C.F.R. §§ 216.4(d)(2), 245.2(a)(5)(ii), 274a.13(c). Most, but not all, denials not subject to appeal may still be challenged by filing a motion to reconsider or reopen. See USCIS Webpage, “When to Use Form I-290B, Notice of Appeal or Motion” (Feb. 23, 2016); <https://www.uscis.gov/i-290b/jurisdiction> (accessed Apr. 3, 2017).

¹⁰⁹ USCIS Webpage, “When to Use Form I-290B, Notice of Appeal or Motion,” *supra* note 108.

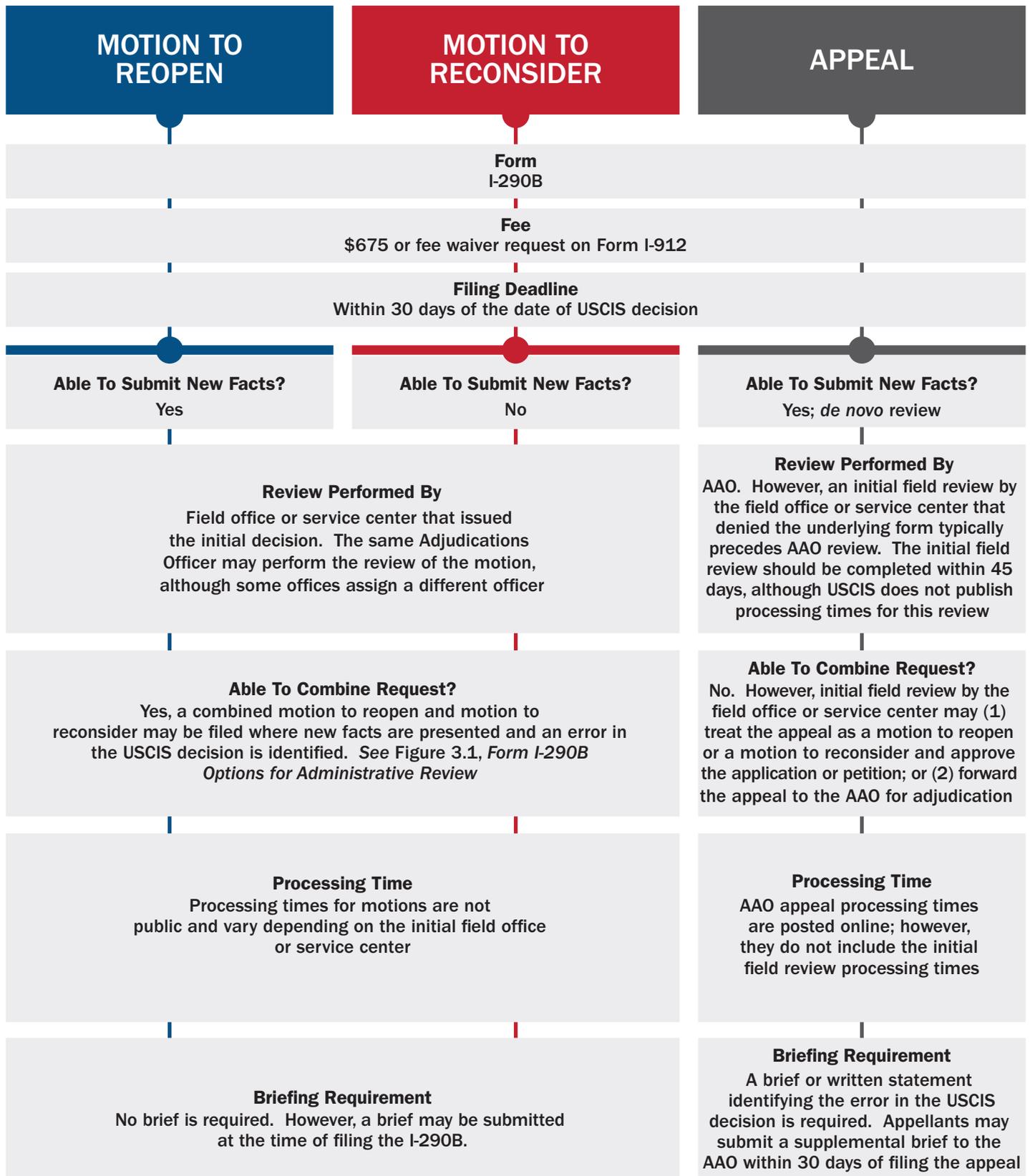
¹¹⁰ See Figure 3.3, *AAO Appeals Adjudications, Fiscal Years 2012–2016*; see also information provided by AAO (Mar. 20, 2017).

¹¹¹ Ombudsman Recommendation 20 (Dec. 6, 2005); https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf (accessed Apr. 6, 2016).

¹¹² Ombudsman Recommendation 42, “Motions Matter: Improving the Filing and Review Process for Motions to Reopen and Reconsider” (May 15, 2009); https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_recommendation_42_5-15-09.pdf (accessed Apr. 6, 2016).

¹¹³ USCIS Response to Recommendation #20 (Dec. 19, 2005); https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf (accessed May 10, 2017).

Figure 3.2: Motions to Reopen, Motions to Reconsider, and Appeals



Sources: 8 C.F.R. §§ 103.3, 103.5; Form I-290B, Notice of Motion or Appeal, Instructions; AAO Practice Manual Section 3.

Motions to Reopen and Motions to Reconsider. Form I-290B and the \$675 filing fee (or fee waiver request) must be filed within 30 days of the date of the decision with the USCIS office that initially performed the adjudication.¹¹⁴ The applicant or petitioner may file a motion to reopen or a motion to reconsider, or, alternatively, may file a combined motion to reopen and reconsider.¹¹⁵ The Adjudicator’s Field Manual (AFM) contemplates that the officer who rendered the initial decision also makes the final determination on a motion.¹¹⁶ However, the process differs from office to office; some require a supervisory adjudicator or a specially designated motions unit to adjudicate the motion.¹¹⁷

A motion to reopen must state new facts supported by affidavits and other documentary evidence to establish eligibility and qualification for the benefit sought.¹¹⁸ A motion to reconsider, by contrast, must demonstrate that the denial was based on an incorrect application of law or USCIS policy.¹¹⁹ The latter is a legal review based on the record of proceedings at the time of the initial filing.¹²⁰ A combined motion both provides new facts and asserts an incorrect application of law or policy.

¹¹⁴ 8 C.F.R. §§ 103.5(a)(1)(ii)-(iii), 103.7(b)(1). If the decision was sent by mail, the applicant or petitioner must submit the motion within 33 days of the date of the decision. See 8 C.F.R. § 103.5a(b).

¹¹⁵ A motion to reopen or a motion to reconsider a decision may be filed provided the request meets the requirements of 8 CFR § 103.5. Motions to the BIA must meet the requirements of 8 CFR § 3.2. Ordinarily a motion is adjudicated by the same officer who made the original decision. In all cases, the motion must be considered by the same USCIS office that most recently decided the case. A motion may be filed by the applicant or petitioner or by USCIS. See also Form I-290B, *Notice of Motion or Appeal*, p. 1, pt. 2, question 1(d)-(f).

¹¹⁶ USCIS Adjudicator’s Field Manual (AFM), Ch. 10.17(a), “Motions to Reopen or Reconsider: General” (Mar. 2009); <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-2012.html#0-0-0-304> (accessed May 18, 2017). In all cases, the motion must be considered by the same office (district, service center, immigration court, AAO, or BIA) which most recently decided the case. 8 C.F.R. § 103.3(a)(2)(ii). A motion may be filed by the applicant or petitioner or by USCIS. 8 C.F.R. § 103.3(a)(1)(iii).

¹¹⁷ USCIS AFM, Ch. 10.17(a), “Motions to Reopen or Reconsider: General,” *supra* note 116. Depending on local office policy, a different officer may adjudicate the motion if the original adjudications officer is unavailable. See also information provided by USCIS (Sept. 9, 2016; Nov. 7, 2016; Apr. 28, 2017; May 3, 2017).

¹¹⁸ 8 C.F.R. § 103.5(a)(2); see also 8 C.F.R. § 103.5(a)(2)(i)-(iii) (detailing additional requirements for filing a motion to reopen when USCIS denies a case due to abandonment); 8 C.F.R. § 103.5(b)-(c) (relating to special agricultural worker and legalization applications, and replenishment agricultural worker petitions).

¹¹⁹ 8 C.F.R. § 103.5(a)(3).

¹²⁰ *Id.*

Appeals. Form I-290B is also used to initiate an appeal with the AAO. Appeals must be filed within 30 days of the date of the decision to the initial USCIS office, either by filing a brief at the time of the appeal or within 30 days of that date.¹²¹ Untimely appeals may be treated as a motion by the initial adjudication office if it otherwise satisfies the substantive requirements for a motion under the regulations.¹²²

When the initial field office receives a Form I-290B appeal, it has 45 days to review the case to determine whether the arguments presented overcome the reasons for the adverse decision.¹²³ If the initial field office determines that the appeal is meritorious, it may treat the appeal as a service motion to reopen or motion to reconsider and approve the case.¹²⁴ If the initial field office finds the arguments do not overcome the basis of the denial, the office must “promptly” forward the appeal to the AAO.¹²⁵ Some USCIS field offices conduct a thorough review of the appeal; others do not complete their review of the appeal within 45 days; some do not conduct a review at all before forwarding the appeal to the AAO.¹²⁶ Current regulations allow for submission of a brief and any additional evidence at the time of filing Form I-290B, or within 30 days after the service of the denial notice.¹²⁷

The AAO conducts a *de novo* review of all issues of fact, law, policy, and exercise of discretion,¹²⁸ applying a preponderance of evidence standard of proof.¹²⁹ Under this standard, the appellant must present evidence that demonstrates eligibility for the benefit sought based upon the facts and evidence presented.¹³⁰

¹²¹ 8 C.F.R. § 103.3(a)(2)(i). If the decision was sent by mail, the applicant or petitioner must submit the motion within 33 days of the date of the decision. See 8 C.F.R. § 103.8.

¹²² 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

¹²³ USCIS AFM, Ch. 10.8(a)(1), “Preparing the Appellate Case Record: Administrative Appeals Office (AAO) Cases” (Mar. 2009); <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1482.html#0-0-0-286> (accessed May 18, 2017).

¹²⁴ 8 C.F.R. § 103.3(a)(2)(iii). An appeal can only be treated as a motion to issue a favorable decision.

¹²⁵ 8 C.F.R. § 103.3(a)(2)(iv); USCIS AFM, Ch. 10.8(a)(1), “Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases,” *supra* note 123. The regulations and USCIS field guidance do not make clear what constitutes “promptly” for purposes of forwarding an appeal to the AAO.

¹²⁶ Information provided by USCIS (Sept. 9, 2016; May 3, 2017).

¹²⁷ 8 C.F.R. § 103.3(a)(2)(i).

¹²⁸ AAO Practice Manual, Section 3.4; <https://www.uscis.gov/about-us/directories-and-program-offices/administrative-appeals-office-aaof/practice-manual/chapter-3-appeals> (accessed May 18, 2017).

¹²⁹ AAO Practice Manual, Section 3.6.

¹³⁰ *Id.*

Precedent Decisions, Non-precedent Decisions, and Adopted Decisions. The AAO issues precedent decisions¹³¹ that may assert new legal interpretations of statute, regulation or policy. In recent years, USCIS has issued few precedent decisions, presumably because of the cumbersome interagency clearance process.¹³² AAO precedent decisions are binding on all DHS employees in cases applying the same statute, regulations, and policy.¹³³

The AAO also issues non-precedent decisions that are binding only on the parties involved in the specific case. USCIS states that it does not articulate new constructions of law or establish agency policy through non-precedent decisions.¹³⁴

In addition, the AAO issues “adopted decisions,” which constitute binding interpretations and guidance on all USCIS employees. The difference between precedent decisions and adopted decisions is that the latter are not binding on third-party agencies or their personnel.¹³⁵ USCIS has issued ten adopted decisions since 2005.¹³⁶ The clearance process to designate an adopted decision is less cumbersome than for precedent decisions.

Ongoing Concerns

The Ombudsman’s review of the administrative review process was prompted by concerns raised by stakeholders, including:

- The timeliness and quality of the administrative review process; and
- Confusion in completing Form I-290B.

¹³¹ AAO Practice Manual, Section 1.3; <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/practice-manual/chapter-1-administrative-appeals-office> (accessed May 18, 2017).

¹³² AAO has issued only seven precedent decisions since 2010. See U.S. Department of Justice Webpage, “DHS/AAO/INS Decisions” (Dec. 27, 2016); <https://www.justice.gov/eoir/dhs-ao-ins-decisions> (accessed May 3, 2017). In a March 20, 2017 meeting with the Ombudsman, the AAO stated that precedent decisions require the review and approval of the U.S. Attorney General via the U.S. Department of Justice, a lengthy process that prevents the AAO from issuing precedent decisions in a timely manner. See also AAO Practice Manual at Section 3.15(c).

¹³³ AAO Practice Manual, Section 1.5, 3.15(c).

¹³⁴ AAO Practice Manual, Section 3.15(a).

¹³⁵ AAO Practice Manual, Section 3.15(b).

¹³⁶ USCIS Webpage, “AAO Adopted Decisions” (Apr. 19, 2017); <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/adopted-ao-decisions> (accessed May 8, 2017).

Timeliness of the Motions and Appeals Process.

According to USCIS, it does not track the amount of time it takes for the agency to adjudicate a motion to reopen or motion to reconsider.¹³⁷ Consequently, USCIS does not provide processing times for Form I-290B motions to reopen or motions to reconsider at field offices and service centers. Meanwhile, although the AAO posts its processing times online, USCIS does not track the length of the initial field review that precedes the AAO’s review.¹³⁸ This leads to a lack of predictability and transparency in the administrative review process.

Stakeholders report they forgo the administrative appeals process and instead refile the application or petition because of the unpredictability of processing times. They believe that by reframing the case with the possibility of another adjudicator reviewing the evidence, they may be more likely to obtain an approval with the benefit of a more predictable processing timeframe. Refiling a petition with premium processing, when available, typically results in the issuance of a decision within 15 days.¹³⁹

Stakeholders would be better informed to make decisions regarding administrative review if USCIS established and posted accurate processing times for motions and appeals. When stakeholders waive review and file new petitions because of the perception of lengthy processing times, this prevents erroneous decisions from being corrected, and may result in repeated service error. It also deprives the public from enhanced transparency in the adjudication process. The Ombudsman therefore urges USCIS to post processing time goals by form type for motions at initial field offices.

In January 2017, the AAO improved the display of its posted processing times. Where previously all product lines had been listed at 6 months, the website now shows the percentage of cases for each product line that are completed within the 6-month target processing goal.¹⁴⁰ The AAO informed the Ombudsman that its average processing times for some of form types is actually less than 6 months.¹⁴¹

Finally, initial field review of an appeal may be made more effective through the availability of an accompanying legal

¹³⁷ Information provided by USCIS (Sept. 9, 2016).

¹³⁸ *Id.*

¹³⁹ USCIS Webpage, “How Do I Use Premium Processing” (Mar. 9, 2017); <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service> (accessed Mar. 30, 2017).

¹⁴⁰ USCIS Webpage, “AAO Processing Times” (Apr. 6, 2017); <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/ao-processing-times> (accessed May 3, 2017).

¹⁴¹ Information provided by AAO (Mar. 20, 2017).

brief. Many appellants choose to file their briefs with the AAO after first filing Form I-290B, giving themselves additional time to develop their arguments. However, when the brief is not filed with the I-290B, the initial field office does not have the opportunity to consider the briefing when conducting its review. The Ombudsman suggests that USCIS develop a process that provides the initial field office the opportunity to review the appellant's brief.

Quality of AAO Decisions. Until recently, many non-precedent AAO decisions dismissing the appeal did not include a detailed analysis of the facts and law, preventing appellants from understanding why a decision was made.¹⁴² However, in the past year, AAO leadership reports a deliberate effort to improve the writing quality of AAO decisions.¹⁴³ There is now an in-depth analysis section in most of the AAO's non-precedent decisions, and a focus on using plain language.¹⁴⁴ This improvement in decisions provides transparency and helps individuals, employers, and their representatives better understand the reasoning behind the outcome of their appeal.

Confusion in Completing a Bifurcated Form. USCIS published an updated Form I-290B and instructions on April 10, 2017. The new form clarified some of the information sought and expanded the instructions. However, the new form and instructions still do not explain or distinguish the various administrative review options with sufficient clarity. *See* Figure 3.1, *Form I-290B Options for Administrative Review*. Further, attorneys and

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Request for Case Assistance—A Common Mistake

An attorney filed Form I-290B on behalf of his client, checking the box for a motion to reconsider and a motion to reopen. He had clearly written on the Form I-290B that if USCIS denied the motions, the case should be forwarded to the AAO. USCIS responded that the form allowed for only one option, and that if the attorney wanted to appeal the case, he needed to file a second Form I-290B. However, if the attorney had simply selected the appeal option, the case would have been reviewed by the initial field office and forwarded to the AAO within 45 days if the field declined to change its decision.

accredited representatives are in many cases unaware of the initial field review afforded to them by filing an appeal.

Accordingly, further revisions to Form I-290B and its instructions could better clarify the overlapping yet distinct review processes for motions to reopen, motions to reconsider, and appeals. *See* Figure 3.2, *Motions to Reopen, Motions to Reconsider, and Appeals*.¹⁴⁵ Alternatively, USCIS could explore creating separate forms for motions and appeals.

¹⁴⁵ As this Report was being finalized, USCIS published a notice under the Paperwork Reduction Act revising the I-290B, and provided the public a 60-day period in which to comment on the revisions. Agency Information Collection Activities: Notice of Appeal or Motion, Form I-290B; Revision of a Currently Approved Collection, 82 Fed. Reg. 22557 (May 16, 2017). The revised draft form has not yet been posted.

Figure 3.3: AAO Appeals Adjudications, Fiscal Years 2012 – 2016

AAO Appeal Adjudications															
Form Type	FY12			FY13			FY14			FY15			FY16		
	Dismiss	Sustain	Remand												
I-129F	75	17	0	69	20	0	47	19	2	112	20	3	107	58	0
I-129 H-1B	904	17	11	751	10	25	509	16	12	504	16	9	369	8	14
I-129 H-2	35	4	1	14	0	0	7	2	0	12	0	1	29	5	3
I-129 H-3	12	0	0	3	0	1	6	0	0	9	1	2	7	2	1
I-129 L-1	246	26	10	435	37	8	166	16	11	233	43	13	178	21	23
I-129O	8	0	2	22	0	1	19	0	0	31	0	2	21	0	1
I-129P	22	0	0	8	0	0	22	0	0	27	0	0	19	0	0
I-129Q	4	1	0	0	1	0	2	0	0	2	0	0	2	0	0
I-129R	69	11	29	57	1	12	30	0	22	25	6	11	25	15	3
I-140A	204	14	0	122	8	2	88	5	3	102	13	0	68	17	2
I-140B	38	1	0	18	1	0	2	0	0	5	3	0	4	2	0
I-140C	182	25	7	175	26	15	84	14	8	98	13	9	69	13	12
I-140D	362	20	25	290	39	27	123	15	28	69	18	6	82	15	6
I-140E	1646	76	82	1036	81	117	76	6	12	36	5	8	35	2	7
I-140F	2	0	0	106	10	7	31	5	5	20	3	3	23	1	3
I-140G	61	7	0	29	6	1	9	1	1	2	0	1	1	0	1
I-140I	92	4	1	82	5	0	115	6	3	72	7	1	48	10	0
I-212	136	38	7	77	31	2	43	9	2	44	10	4	36	13	1
I-352	27	3	0	36	1	0	10	1	0	15	5	0	8	4	0
I-360C	5	1	1	10	4	1	3	1	1	41	6	7	62	6	3
I-360D	241	2	44	57	1	6	24	1	11	17	12	2	25	10	4
I-360I	182	17	4	156	23	2	205	30	8	399	49	15	190	9	8
I-485/LIFE	43	4	2	10	1	2	2	0	0	2	0	1	4	0	1
I-485 Sect. 13	48	0	0	118	0	0	78	0	3	37	0	0	22	0	0
I-485/T	0	0	0	0	0	0	0	0	0	4	0	1	4	0	0
I-485/U	6	0	0	3	0	2	11	2	1	23	1	4	45	6	0
I-526	17	0	0	51	0	13	22	0	3	7	0	1	33	2	0
I-600/I-600A	17	1	4	18	0	4	29	3	1	19	1	1	21	4	0
I-601	1730	452	67	1469	383	49	335	114	9	324	85	10	190	153	15
I-612	6	0	0	2	2	0	4	8	0	6	5	0	1	0	0
I-687	486	36	10	84	27	7	16	2	3	8	1	0	11	0	3
I-690	0	1	0	0	2	0	0	1	0	1	0	0	1	0	1
I-698	34	5	9	17	6	7	2	2	2	8	1	3	8	0	3
I-700	3	0	0	3	1	2	5	0	0	16	2	2	4	0	0
I-821	244	15	40	180	23	31	156	9	23	142	18	26	70	2	7
I-914	13	7	0	9	0	0	3	0	0	63	0	1	15	0	0
I-918	141	4	8	89	0	5	130	0	9	337	5	50	122	1	11
I-924	2	0	0	3	0	0	3	0	0	1	0	0	4	1	1
N-565	9	2	0	20	6	0	21	12	2	10	3	0	25	5	1
N-600	96	9	5	89	9	9	102	26	16	64	31	8	71	20	5

Source: USCIS Webpage, "AAO Decision Data" (Oct. 25, 2016).

EB-5 Investors

Responsible USCIS Office: Immigrant Investor Program Office

Key Facts and Findings

- Congress extended the Immigrant Investor (EB-5) Regional Center Program, most recently through September 30, 2017.
- There is a high demand for EB-5 visas. There are approximately over 88,000 intending EB-5 investors with approved or pending I-526 petitions. Investors and their dependents from China who are at the end of the Form I-526 adjudication queue may have to wait 10 years or longer for immigrant visas under the EB-5 program.
- On November 30, 2016, USCIS released a six-chapter addition to its Policy Manual titled “Investors,” synthesizing and aligning the agency’s regulations, decisional law, policies, and procedures with the statute.
- Amidst ongoing legislative reform efforts, in January 2017, USCIS published proposed rules that would establish a Regional Center compliance and oversight program, increase minimum investment levels, and amending the methodology for determining Targeted Employment Areas (TEAs).

Background

Congress established the EB-5 program in 1990 to encourage foreign entrepreneurs to make capital investments in the United States.¹⁴⁶ Entrepreneurs who invest a minimum of \$1 million in a new or existing U.S. business, or a reduced amount of \$500,000 if invested in a TEA (a rural area or an area with high unemployment rates),¹⁴⁷ and who create ten full-time positions for U.S. workers, are eligible for an immigrant visa.¹⁴⁸ Congress allocated approximately 10,000 immigrant visas annually to foreign nationals and their immediate family members.¹⁴⁹

¹⁴⁶ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; as codified in scattered section of the U.S. Code.

¹⁴⁷ See INA § 203(b)(5)(B)-(C), 8 U.S.C. § 1153(b)(5)(B)-(C).

¹⁴⁸ INA § 203(b)(5)(A)(i), 8 U.S.C. § 1153(b)(5)(A)(i). If the investment is made into a troubled business, the investor need only show that “the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least 2 years.” 8 C.F.R. § 204.6(j)(4)(ii).

¹⁴⁹ *Id.* The fifth employment-based preference category receives 7.1 percent of visas per year, of which 3,000 are set aside for TEAs.

With low utilization of the EB-5 visa category, Congress created the Regional Center program in 2002 to encourage the pooling of investments into larger projects expected to have a greater economic impact than individual EB-5 capital investments.¹⁵⁰ Under this program, investors in a USCIS-designated Regional Center may satisfy the job creation requirement through both direct and indirect job creation, as demonstrated through the submission of certain job-calculation methodologies.¹⁵¹

Despite the creation of the Regional Center Program, underutilization of the EB-5 immigrant visa category continued until the financial crisis in late 2008, when conventional financing became unavailable. Project developers then began recruiting foreign investors and using EB-5 funds to finance large-scale projects, most of which were in the real estate development and construction sectors. In FY 2016, approximately 91 percent of all EB-5 investments were made through a Regional Center,¹⁵² and 99 percent of all EB-5 projects were located in a TEA.¹⁵³ Seventy-six percent of all EB-5 investments were made by Chinese nationals.¹⁵⁴

¹⁵⁰ The Regional Center program was first enacted as a pilot in 1992. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, Title VI, § 610, 106 Stat. 1828, 1874 (1992). Under this program, a certain number of EB-5 visas are set aside annually for immigrant investors in Regional Centers. *Id.* In May 2017, the program was extended to September 30, 2017. A Regional Center is defined as any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. 8 C.F.R. §§ 204.6(e) and (m)(3)(v).

¹⁵¹ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), Title VI, § 610, as amended by the Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1637 (2000) § 402 (permitting petitioners under the Regional Center program “to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program”).

¹⁵² DOS, Report of the Visa Office 2016, Statistical Tables, Table V (Part 3); <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableV-Part3.pdf> (accessed Apr. 25, 2017).

¹⁵³ U.S. Government Accountability Office (GAO) Report, “Immigrant Investor Program, Proposed Project Investments in Targeted Employment Areas,” GAO-17-487T (Mar. 2017); <https://www.gao.gov/assets/690/683231.pdf> (accessed Apr. 25, 2017).

¹⁵⁴ Report of the Visa Office 2016, Statistical Tables, Table V (Part 3), *supra* note 152.

The USCIS Immigrant Investor Program Office (IPO) administers the EB-5 program.¹⁵⁵ The IPO is authorized to employ up to 247 full-time employees (including adjudicators, compliance officers, economists, and fraud and national security officers, as well as administrative support); approximately 90 unfilled positions remained as of March 3, 2017.¹⁵⁶

USCIS,¹⁵⁷ stakeholders,¹⁵⁸ and Members of Congress¹⁵⁹ generally agree that increased compliance is necessary to strengthen the integrity of the EB-5 program. Fraud—in the form of embezzlement, securities violations, investment schemes, and criminal conduct—has plagued the Regional

Center program since its inception.¹⁶⁰ USCIS has taken several steps to address these serious threats to the program.¹⁶¹ DHS implemented protocols in 2015 to bolster public trust in the integrity and impartiality of government officials who administer the program and interact with the IPO.¹⁶² Additionally, USCIS administers the EB-5 program with input from subject-matter experts from the Securities and Exchange Commission, Department of Justice (DOJ), FBI, DOS, and other components of government.¹⁶³ The IPO disclosed plans to conduct 250 “for cause” and “random” site visits of Regional Centers and specific job-creating enterprises in FY 2017 through its Compliance Division, including audits of designated Regional Centers that began in April 2017.¹⁶⁴

In November 2016, USCIS released an addition to its Policy Manual titled “Investors.”¹⁶⁵ This six-chapter policy treatment is a significant achievement, as it synthesized

¹⁵⁵ See USCIS Webpage, “Executive Summary: A Discussion about the EB-5 Immigrant Investor Program Teleconference” (Feb. 26, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-ExecSummary_02-26-14.pdf (accessed Apr. 25, 2017). The IPO became operational in March 2013.

¹⁵⁶ Remarks by IPO Chief Nicholas Colucci at the USCIS EB-5 National Stakeholder Engagement (Mar. 3, 2017); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_EB5NatStakeholderEng072816_ColucciRemarks.pdf (accessed Apr. 25, 2017).

¹⁵⁷ Remarks by IPO Chief Nicholas Colucci at the USCIS EB-5 Miami, Florida Stakeholder Engagement (July 28, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_EB5NatStakeholderEng072816_ColucciRemarks.pdf (accessed Apr. 25, 2017). See also “The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse,” *before the U.S. Senate Committee on the Judiciary*, 114th Cong. 2nd Sess. (Apr. 13, 2016); <https://www.judiciary.senate.gov/meetings/the-distortion-of-eb-5-targeted-employment-areas-time-to-end-the-abuse> (accessed Apr. 25, 2017).

¹⁵⁸ See comments of the American Immigration Lawyers Association submitted to USCIS, EB-5 Immigrant Investor Regional Center Program, Advance Notice of Proposed Rulemaking, 82 Fed. Reg. 3211 (Jan. 11, 2017), DHS Docket No. USCIS-2016-0008; <https://www.regulations.gov/document?D=USCIS-2016-0008-0010> (accessed Apr. 25, 2017); “Letter to Members of Congress from the EB-5 Industry” (July 5, 2016); <https://iuisa.org/blog/wp-content/uploads/2016/07/EB-5-Joint-Industry-Letter-7-5FINAL.pdf> (accessed Apr. 25, 2017).

¹⁵⁹ U.S. House Judiciary Committee, Press Release, “Hearing Wrap Up; Proposed Reforms to Investor Visa Program” (Mar. 8, 2017); <https://judiciary.house.gov/press-release/hearing-wrap-proposed-reforms-investor-visa-program/> (accessed May 10, 2017); see also “The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse” *before the U.S. Senate Committee on the Judiciary*, 114th Cong. 2nd Sess. (Apr. 13, 2016); <https://www.judiciary.senate.gov/hearings/watch?hearingid=CC12FBAE-5056-A066-60F3-01AABA023C38> (accessed May 10, 2017); “The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?” *before the U.S. Senate Committee on the Judiciary*, 114th Cong. 2nd Sess. (Feb. 2, 2016); <https://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed> (accessed Apr. 25, 2017).

¹⁶⁰ See GAO Report, “Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits,” GAO-15-696 (Aug. 2015); <http://www.gao.gov/assets/680/671940.pdf> (accessed Apr. 25, 2017). In one example, in April 2016, the SEC announced fraud charges and an asset freeze against Vermont-based ski resort, Jay Peak Inc., and related businesses for allegedly misusing millions of dollars solicited through the EB-5 program. The SEC alleged that Jay Peak operators made false statements and omitted key information while raising more than \$350 million from investors to construct ski resort facilities and a biomedical research facility in Vermont. In April 2017, the brokerage firm that facilitated investments concluded a non-admission settlement of \$150 million dollars. See Terry Hellenbeck, “Raymond James Firm to Pay \$145.5 Million to Settle Vermont EB-5 Suit,” *Seven Days* (Apr. 13, 2017); <http://www.sevendaysvt.com/OffMessage/archives/2017/04/13/raymond-james-firm-to-pay-1455-million-to-settle-eb-5-suit> (accessed Apr. 25, 2017); U.S. Securities and Exchange Commission Press Release, “SEC Case Freezes Assets of Ski Resort Steeped in Fraudulent EB-5 Offerings” (Apr. 14, 2015); <https://www.sec.gov/news/pressrelease/2016-69.html> (accessed Apr. 25, 2017). In another example, in 2013 the SEC charged the owner of the Chicago Convention Center LLC EB-5 Regional Center with defrauding 290 investors of approximately \$145 million. See Stephen L. Cohen, Associate Director, Division of Enforcement, SEC *before the Senate Committee on the Judiciary*, “Testimony on the EB-5 Immigrant Investor Program” (Feb. 2, 2016); <https://www.sec.gov/news/testimony/cohen-testimony-02022016.html> (accessed May 18, 2017).

¹⁶¹ See Remarks by IPO Chief Nicholas Colucci, *supra* note 157.

¹⁶² Letter from Jeh Johnson, Secretary, Department of Homeland Security to Senators Grassley and Leahy (Apr. 27, 2015); http://eb5arnstein.com/wp-content/uploads/2015/05/Homeland-Security-Jeh-Johnson_EB-5-Letter_4-27-15.pdf (accessed Apr. 25, 2017).

¹⁶³ See *e.g.* Remarks by IPO Chief Nicholas Colucci, *supra* note 157.

¹⁶⁴ USCIS Webpage, “EB-5 Immigrant Investor Program” (Mar. 17, 2017); <https://www.uscis.gov/outreach/eb-5-immigrant-investor-program-0> (accessed Apr. 25, 2017).

¹⁶⁵ USCIS Policy Manual, Pt. G, Ch. 1; <https://www.uscis.gov/policymanual/HTML/PolicyManual.html> (accessed Apr. 25, 2017); see also USCIS Policy Alert, “Employment-Based Fifth Preference Immigrants: Investors” (Nov. 30, 2016); <https://www.uscis.gov/policymanual/Updates/20161130-Investors.pdf> (accessed Apr. 25, 2017).

and aligned the agency's regulations, decisional law, policies, and procedures with enabling statutes. Given the complexity of the EB-5 Program, the creation of this comprehensive and authoritative resource has been well received by EB-5 stakeholders.

Ongoing Concerns

Short-Term Regional Center Reauthorizations.

Legislative efforts to reform the EB-5 program have stalled over numerous issues, including the methodology for determining TEAs, the two-tiered investment framework, and effective dates for any new provisions.¹⁶⁶

In the meantime, Congress has reauthorized the Regional Center program in a series of short-term extensions.¹⁶⁷ These short-term extensions trigger filing surges by investors seeking to secure a place in the queue before the minimum investment amount is increased or changes are made to other provisions. They also contributed to delays in updating EB-5 regulations as the agency yielded to signals from Congress that it intended to make statutory changes to the program. As this report was being finalized,

¹⁶⁶ The following EB-5 reform proposals were introduced in the 114th Congress: S. 1501, introduced by Sens. Charles Grassley and Patrick Leahy on June 3, 2015; H.R. 3370, introduced by Rep. Zoe Lofgren and Luis Gutierrez on July 29, 2015; S. 2415, introduced by Sens. Jeff Flake, John Cornyn, and Charles Schumer on December 23, 2015; and H.R. 5992, introduced by Reps. Robert Goodlatte and John Conyers on Sep. 12, 2016. Additionally, EB-5 oversight hearings were held before the House and the Senate. See "The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?" before the U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. (Feb. 2, 2016); Judiciary Committee on Feb. 10, 2016; <https://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed> (accessed Apr. 25, 2017); "Is the Investor Visa program an Underperforming Asset," before the U.S. House Judiciary Committee, 114th Cong. 2nd Sess. (Feb. 11, 2016); <https://judiciary.house.gov/hearing/is-the-investor-visa-program-an-underperforming-asset/> (accessed May 17, 2017). As the 115th Congress commenced, a hearing regarding the EB-5 program was held before the House Judiciary Committee on March 8, 2017. See U.S. House Judiciary Committee, Press Release, "Hearing Wrap Up: Proposed Reforms to Investor Visa Program," 115th Cong. 1st Sess. (Mar. 8, 2017); <https://judiciary.house.gov/press-release/hearing-wrap-proposed-reforms-investor-visa-program/> (accessed Apr. 25, 2017).

¹⁶⁷ Pub. L. 112-176, 126 Stat. 1325 (extending the program to September 30, 2015); Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2242 (Dec. 18, 2015) (extending the program to December 9, 2016); Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Pub. L. 114-223, 130 Stat. 857 (Sept. 29, 2016) (extending the program to April 28, 2017); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. 114-254, 130 Stat. 1005 (Dec. 10, 2016) (extending the program to May 5, 2017); Making Further Continuing Appropriations for Fiscal Year 2017, and for Other Purposes, Pub. L. 115-30 (Apr. 28, 2017) (extending the program to May 5, 2017); Consolidated Appropriations Act, 2017, Pub. L. 115-31 (May 10, 2017) (extending the program to September 30, 2017).

the Regional Center Program was extended to September 30, 2017, without change.¹⁶⁸

Regulatory Reform. In late 2016 and early 2017, USCIS advanced two EB-5 regulatory proposals that would: (1) adjust the minimum qualifying threshold investment amount for inflation from \$1 million to \$1.8 million; (2) increase the investment threshold for TEAs from \$500,000 to \$1.35 million; and (3) reform the TEA designation process to prevent abuse.¹⁶⁹ Members of Congress and stakeholders have expressed concern that the current regulations unfairly allow some Regional Centers to qualify their projects for the reduced EB-5 threshold investments in an otherwise low employment area.¹⁷⁰

EB-5 Backlogs. The EB-5 program continues to attract high net-worth foreigners on a worldwide basis, and disproportionately from China. As a result, processing times are long and are getting longer, currently at 16 months for Form I-526, *Immigrant Petition by Alien Entrepreneur* and 27 months for Form I-829, *Petition by Entrepreneur to Remove Conditions on Permanent Resident Status*. As of September 30, 2016, DOS reported there are just over 10,000 approved investor petitions awaiting an immediately available immigrant visa.¹⁷¹ The IPO also reported it received 4,395 Forms I-526 in the first quarter of FY 2017,¹⁷² and attributed this surge to the then-looming sunset of the Regional Center program scheduled for December 5, 2016. However, the oversubscription of the EB-5 category by Chinese nationals specifically is significantly larger than it appears. Historical data reveal that, on average, two dependents accompany each principal EB-5 investor to the United States.¹⁷³ As such, the roughly 10,000 approved EB-5 petitions represent approximately 30,000 foreign nationals (including spouses and qualified dependents) currently awaiting immigrant visa issuance.

Additional examination of Form I-526 data reveals that as of September 30, 2016, USCIS had a pending inventory of 20,804 petitions.¹⁷⁴ With an 81 percent petition approval

¹⁶⁸ Consolidated Appropriations Act, 2017, Pub. L. 115-31 (May 10, 2017).

¹⁶⁹ EB-5 Immigrant Investor Regional Center Program: Advance Notice of Proposed Rulemaking, 82 Fed. Reg. 3211 (Jan. 11, 2017); EB-5 Immigrant Investor Program Modernization, 82 Fed. Reg. 4738 (Jan. 13, 2017).

¹⁷⁰ *Id.*

¹⁷¹ Information provided by DOS (Mar. 22, 2017).

¹⁷² See GAO Report, "Immigrant Investor Program, Proposed Project Investments in Targeted Employment Areas," *supra* note 153.

¹⁷³ Information provided by DOS (Mar. 22, 2017).

¹⁷⁴ USCIS Webpage, "Number of I-526 Immigrant Petitions by Alien Entrepreneurs by Fiscal Year, Quarter, and Case Status 2008–2016," https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr4.pdf (accessed Apr. 25, 2017).

rate in the first quarter of FY 2017, using the ratio of three immigrant visas for every I-526 petition approved, the oversubscription of the EB-5 category grows even larger, adding another 58,043 eligible investor immigrants in USCIS' current pending inventory.¹⁷⁵ Taking together the 30,000 likely immigrants currently awaiting immigrant visas with DOS¹⁷⁶ and the pending petitions at USCIS, there are now approximately 88,000 intending EB-5 investor immigrants worldwide—far in excess of the maximum annual statutory allocation of 10,000 immigrant visas to this employment preference category. EB-5 immigrant visas remain immediately available to nationals of all countries except China, whose nationals will likely wait 10 years or longer for their EB-5 immigrant visas due to oversubscription, absent an increase in or recalculation of the annual quota.

The Ombudsman will continue to examine the EB-5 program, engaging USCIS and stakeholders as the agency implements any statutory changes, considers regulatory changes, and expands its compliance activities.

The AC21 Regulation

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

Key Facts and Findings

- In November 2016, USCIS published a long-awaited final regulation, often referred to as “AC21,” intended to improve and modernize several employment-based immigrant and nonimmigrant programs—with the end-goal of increasing flexibility, transparency, and certainty for foreign workers and U.S. employers.
- The rule centralized many of USCIS' long-standing policies for the H-1B Specialty Occupation and employment-based immigrant visa programs.
- DHS received 27,979 comments offering a wide variety of opinions and recommendations on the proposed rule and related forms¹⁷⁷ from stakeholders, particularly foreign workers, voicing concerns over the following areas:

¹⁷⁵ *Id.*

¹⁷⁶ Report of the Visa Office 2016, Statistical Tables, Table V (Part 3), *supra* note 152.

¹⁷⁷ Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82412 (Nov. 18, 2016) (AC21 rule).

- USCIS' elimination of the 90-day regulatory processing requirement for initial work authorization applications;
 - Limited portability options for individuals from countries with oversubscribed visa queues, namely China and India; and
 - No guidance on legal standing for a beneficiary of an approved Form I-140, *Petition for Alien Worker*.
- While it is too early to determine the full effect of the new rule, the Ombudsman will continue to track these changes and their impact on stakeholders.

Background

Statutory Framework. Nearly 20 years ago, two laws were enacted to regulate employment of high-skilled foreign nationals. The first, the American Competitiveness and Workforce Improvement Act of 1998¹⁷⁸ (ACWIA), increased the annual allotment of H-1B nonimmigrant visas and introduced new fees dedicated to re-training the U.S. workforce and conducting fraud investigations to better ensure the integrity of the program.¹⁷⁹ The second law, the American Competitiveness in the Twenty-first Century Act of 2000¹⁸⁰ (AC21), added new enforcement measures, along with provisions that helped foreign nationals remain working in the United States while waiting for an available immigrant visa.¹⁸¹ AC21 also increased the fiscal year allotment of H-1B visas temporarily to 195,000 starting in 2001, and then reduced the cap to 85,000 H-1B visas, with 20,000 being set aside for beneficiaries with a master's or higher degree from an accredited U.S. institution.¹⁸²

¹⁷⁸ American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. No. 105-277, 112 Stat. 2681; as codified in scattered sections of the U.S. Code (1998).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. 106-313, 114 Stat. 1251 (2000); as codified in scattered sections of the U.S. Code (2000).

¹⁸² Consolidated Appropriations Act, 2005, Title IV, L-1 Visa and H-1B Visa Reform Act of 2004, Pub. L. 108-447, 118 Stat. 3351, 3356 (Dec. 8, 2004); as codified in scattered sections of the U.S. Code (2005); *see also* INA § 214(g)(5), 8 U.S.C. § 1184(g)(5).

USCIS published several policy memoranda over the years to implement this legislation, but until November 2016, had never issued regulations.¹⁸³ In the intervening years, stakeholders voiced concerns, confusion, and at times took legal action in response to USCIS' policy interpretations of both statutes.

Key Provisions of the New AC21 Rule. Effective January 17, 2017, the AC21 regulation codifies many of the agency's longstanding policies and practices for employment-based programs.¹⁸⁴ Specifically, the rule:

- Expands job portability for beneficiaries of approved Form I-140 employment-based petitions by maintaining petition validity, under certain circumstances, despite an employer's withdrawal of the approved petition or the termination of the employer's business;¹⁸⁵
- Formalizes the process for notifying USCIS of a job change, through the creation of Form I-485 Supplement J, *Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)* (Supplement J),¹⁸⁶ and

¹⁸³ See, e.g., USCIS Interoffice Memorandum, "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" (May 12, 2005); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm051205.pdf (accessed May 16, 2017); USCIS Interoffice Memorandum, "Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" (Dec. 27, 2005); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm122705.pdf (accessed May 16, 2017); USCIS Memorandum, "Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277" (May 30, 2008); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/ac21_30may08.pdf (accessed May 16, 2017); USCIS Policy Memorandum, "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); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/Final_Same_or_Similar_Policy_Final_Memorandum_3-18-16.pdf (accessed May 16, 2017).

¹⁸⁴ AC21 Rule, 81 Fed. Reg. at 82399.

¹⁸⁵ 8 C.F.R. § 205.1(a)(3)(iii)(C)-(D). The petition must remain pending for 180 days before the employee may change employers or the withdrawal of the petition.

¹⁸⁶ See USCIS Webpage, "I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)" (Jan. 17, 2017); <https://www.uscis.gov/i-485supj> (accessed May 10, 2017).

- Provides for employment authorization for nonimmigrants with an approved immigrant petition who face "compelling circumstances" and cannot obtain an immigrant visa due to statutory numerical restrictions.¹⁸⁷

The rule expanded the H-1B extension and renewal policy for certain professions requiring a license.¹⁸⁸ The rule clarifies how the agency counts the time in H-1B status remaining from time spent on a previous cap-subject H-1B visa.¹⁸⁹ The regulation also expanded the use of the longstanding 10-day grace period before and after the validity period of certain nonimmigrant statuses. Finally, the rule establishes a 60-day grace period for individuals whose jobs are terminated (and whose status is tied to that job).¹⁹⁰ While employment is not authorized during these grace periods, eligible beneficiaries will be able to use the new 60-day grace period to transition to their home countries or to find subsequent employment in the United States for which they can be sponsored.¹⁹¹

The regulation eliminates the 90-day processing time requirement for EAD applications. The new regulation provides no mandatory processing time for initial employment applications.¹⁹² However, it allows for continuing employment authorization for certain timely-filed renewals for up to 180 days after the expiration of the existing employment authorization.¹⁹³

Ongoing Concerns

The regulations are a consolidation of the many policy memoranda and practices cobbled together in the years after the passage of both Acts.

Employment Authorization for Nationals of Oversubscribed Countries. Foreign workers, primarily Indian and Chinese nationals in H-1B status, have expressed concern that the regulations did not allow for

¹⁸⁷ 8 C.F.R. § 204.5(p). See also USCIS Webpage, "Employment Authorization in Compelling Circumstances" (Apr. 4, 2017); <https://www.uscis.gov/working-united-states/employment-authorization-compelling-circumstances> (accessed May 10, 2017).

¹⁸⁸ 8 C.F.R. § 214.2(h)(4)(v)(C).

¹⁸⁹ 8 C.F.R. § 214.2(h)(13)(iii)(C).

¹⁹⁰ 8 C.F.R. § 214.1(l)(2). Qualifying nonimmigrant programs include: E-1, E-2, E-3, H-1B, H-1B1, L-1 or TN status.

¹⁹¹ 8 C.F.R. § 214.1(l)(2)-(3).

¹⁹² Work authorizations filed under 8 CFR § 274a.12(c)(8) remain under the guidance set forth in 8 CFR § 208.7.

¹⁹³ 8 C.F.R. § 274a.13(d). The 180-day automatic extension appears in the renewal application subsection of the regulation and applies to the previously issued work authorization. This provision omits certain categories, such as spouses of G visa holders, from receiving the automatic extension.

work authorization for the beneficiary of an approved Form I-140 employment-based petition who is not yet able to file Form I-485, *Application to Register Permanent Residence or Adjust Status*. Certain categories of employment-based immigrant visas are “oversubscribed” (with more beneficiaries from certain countries who qualify for these visas than there are visas available annually), which leads to long visa queues. For example, there are an estimated 370,000 Indian nationals waiting for an available third preference immigrant visa, which translates to wait times of up to 70 years.¹⁹⁴ In response to this critique, the agency stated that the best available solution was to provide employment authorization in “compelling circumstances.”¹⁹⁵ Specifically, this section of the rule allows for limited work authorization for those who have not yet reached the adjustment stage, but places the burden on the foreign worker to show such compelling circumstances.¹⁹⁶

¹⁹⁴ Information provided by DOS (May 3, 2017). See also Cato Institute, “No One Knows How Long Legal Immigrants Will Have to Wait” (Jul. 28, 2016); <https://www.cato.org/blog/no-one-knows-how-long-legal-immigrants-will-have-wait> (accessed Apr. 13, 2017); National Foundation for American Policy (NAFP), “Still Waiting: Green Card Problems Persist for High Skill Immigrants” (June 2012); http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2012/06/nfap_immigration_brief.pdf (accessed May 2, 2017) (NFAP 2011 data analysis projected waits for Indians of 8 years or more in the EB-2 preference category and up to 70 years for EB-3 preference category. The same report projected Chinese nationals in the EB-3 category could wait 20 years).

¹⁹⁵ AC21 Rule, 81 Fed. Reg. at 82424. In the preamble, DHS went into detail on explaining how it selected “compelling circumstances” as a standard. It provided four examples of situations that may be considered compelling and justify an EAD: (1) serious illness or disability faced by the nonimmigrant worker or his or her dependent; (2) employer retaliation against the nonimmigrant worker; (3) other substantial harm to the applicant; and (4) significant disruption to the employer.

¹⁹⁶ 8 C.F.R. § 204.5(p).

Employment Authorization Processing Delays.

Employers and foreign workers are concerned with elimination of the 90-day regulatory processing time requirement for employment authorization.¹⁹⁷ In spite of this change, USCIS stated it will continue to accept case inquiries at day 75 for employment authorization applications, and the Ombudsman also will continue to assist individuals with applications pending 75 days or more.

The Ombudsman will continue to evaluate the impact of the AC21 rule through both individual requests for case assistance and stakeholder engagement.

¹⁹⁷ See generally Cyrus Mehta, “Analysis of Key Provisions of the High Skilled Worker Final Rule” (Nov. 21, 2016); <http://blog.cyrusmehta.com/2016/11/analysis-of-key-provisions-of-the-high-skilled-worker-final-rule.html> (accessed May 9, 2017). The prior regulations stated: “*Interim employment authorization*. USCIS will adjudicate the application within 90 days from the date of receipt of the application . . . Failure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days.” 8 C.F.R. § 274a.13(d)(2016).



Humanitarian

U.S. immigration law provides humanitarian relief for immigrant victims of crime, persecution, and abuse. Despite efforts by USCIS to address the increasing number of asylum requests, applicants are experiencing longer delays—interview wait times exceed 5 years in some locations. Due to a statutory cap and agency processing delays, U visa applicants must wait years; agency initiatives could shorten the wait and the burden.



Delays in Asylum Processing

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

Key Facts and Findings

- A confluence of factors, including a spike in applications, has led to a significant backlog of affirmative asylum cases pending before USCIS. Interview wait times exceed 5 years in some locations, despite statutory processing times.
- USCIS has taken steps to address the asylum backlog, including expanding the asylum officer corps and opening satellite asylum offices. However, these efforts, coupled with those implemented in previous years, have not yet significantly reduced the asylum backlog.
- A large volume of credible and reasonable fear cases with prioritized processing timeframes continues to limit the Asylum Division's capacity to direct its resources to the adjudication of pending affirmative asylum cases.

Background

By the end of 2016, 223,433 affirmative asylum cases were awaiting adjudication by USCIS.¹⁹⁸ This high number resulted from both a significant existing backlog and a 35 percent increase in new affirmative asylum cases over the previous calendar year.¹⁹⁹ Interview wait times at asylum offices ranged from 2 to over 5 years,²⁰⁰ far outside the statutory processing times.²⁰¹ As a result of this growing backlog, asylum seekers and their family members face continuing uncertainty. The large number of asylum seekers present in the United States for periods that far

¹⁹⁸ See USCIS Webpage, "Asylum Office Workload, December 2016" (Jan. 24, 2017); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_2016_12AsylumStats.pdf (accessed Feb. 23, 2017).

¹⁹⁹ See USCIS Asylum Division Quarterly Stakeholder Meeting, "Questions and Answers," p. 3 (Nov. 4, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsyllumQuarterlyEngagementQA11042016.pdf (accessed Apr. 18, 2017).

²⁰⁰ See USCIS Webpage, "Affirmative Asylum Scheduling Bulletin" (Apr. 21, 2017); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin> (accessed Apr. 27, 2017).

²⁰¹ See INA § 208(d)(5)(A)(ii); 8 U.S.C. § 1158(d)(5)(A)(ii) ("in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed"); information provided by USCIS (May 4, 2017).

exceed the 180-day adjudication time frame²⁰² has also raised concerns regarding asylum fraud.²⁰³ It is therefore critical for both the government and asylum seekers that the backlog be addressed.

A number of factors have contributed to the backlog. Among them are: (1) significant increases of requests for credible and reasonable fear determinations;²⁰⁴ (2) a consistently large volume of new affirmative asylum applications;²⁰⁵ (3) steady but high numbers of asylum applications filed with USCIS by Unaccompanied Alien Children (UACs) in removal proceedings;²⁰⁶ (4) the temporary reassignment in 2016 of 200 asylum officers to the Refugee Affairs Division—the equivalent of the annual

workload of 60 to 65 full-time officers;²⁰⁷ and (5) persistent turnover rates among asylum officers.²⁰⁸

While USCIS has taken many steps in the past few years to address the growing backlog, there has been no real reduction in the number of pending cases.²⁰⁹ Correspondingly, stakeholders continue to voice concerns about related delays such as adjudication of EAD applications.

New Affirmative Asylum Claims. USCIS received more than 124,000 new or reopened affirmative asylum applications in 2016, bringing the total number of pending cases to 223,433 as of December 31, 2016.²¹⁰ These numbers have steadily increased in the last few years. For example, USCIS received 44,278 new or reopened cases in 2012 and had only 18,966 pending affirmative cases at the close of that year.²¹¹ This represents nearly a 181 percent increase in new receipts in 2016 from 2012, with the number of pending cases increasing by nearly 1,078 percent. Additionally, USCIS reports that 20 percent of affirmative asylum applications filed in 2016 were from people who indicated on their applications that they

²⁰² See INA § 208(d)(5)(A)(iii); 8 U.S.C. § 1158(d)(5)(A)(iii) (“in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed”).

²⁰³ See GAO Report, “Asylum: Additional Actions Needed to Assess and Address Fraud Risks,” GAO-16-50 at 1-2 (Dec. 2, 2015); <http://www.gao.gov/products/GAO-16-50> (accessed May 3, 2017) (“Granting asylum to an applicant with a genuine claim protects the asylee from being returned to a country where he or she has been or could in the future be persecuted. On the other hand, granting asylum to an individual with a fraudulent claim jeopardizes the integrity of the asylum system by enabling the individual to remain in the United States, apply for certain federal benefits, and pursue a path to citizenship.”). See also Saucedo, J. and Rodriguez, D., Penn State Dickinson School of Law Center for Immigrants’ Rights for American Immigration Council’s Legal Action Center, “Up Against the Clock: Fixing the Broken Employment Authorization Asylum Clock,” pp. 5–8 (provides historic context for the 1996 changes in asylum law which led to the creation of the 180-day adjudicatory and employment authorization time periods); https://pennstatelaw.psu.edu/_file/Immigrants/Asylum_Clock_Paper.pdf (accessed May 3, 2017).

²⁰⁴ See, e.g., information provided by USCIS at the Sixth Annual Ombudsman’s Conference (Dec. 6, 2016), “Humanitarian Hot Topics Panel,” USCIS Webpage, “Credible Fear Workload Report Summary, FY 2016 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf (accessed Mar. 8, 2017) and USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” p. 11 (Nov. 4, 2016) (approximately 40% of the Asylum Division workforce is dedicated to credible and reasonable fear cases over the course of the year).

²⁰⁵ See, e.g., USCIS Webpage, “Asylum Office Workload, September 2016” (Oct. 19, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsSeptember2016.pdf (accessed Mar. 8, 2017); USCIS Webpage, “Asylum Office Workload, December 2016,” *supra* note 198.

²⁰⁶ See USCIS Webpage, “MPA and PRL Report 10/01/15-9/30/16” (Oct. 3, 2016); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_MPA_PRL_ReportOct2015_Sep2016.pdf (accessed Mar. 22, 2017); USCIS Webpage, “MPA and PRL Report 10/01/16-12/31/2016” (Jan. 17, 2017); USCIS Webpage, “MPA and PRL Report 10/01/14-9/30/15” (Oct. 1, 2015); https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Minors_FY15.pdf (accessed Mar. 23, 2017). See also Ombudsman’s Annual Report 2016, p. 14; Ombudsman’s Annual Report 2015, pp. 59–60.

²⁰⁷ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 11. (approximately 60–65 full-time asylum officers were allocated to refugee details during 2016). At the May 2, 2017, Asylum Division Quarterly Stakeholder Meeting, USCIS stated that since early January 2017, asylum officers have not been detailed to the Refugee Affairs Division (RAD), although approximately 40 asylum officers were detailed to RAD during the first quarter of FY 2017.

²⁰⁸ See Ombudsman’s Annual Report 2016, p. 14; information provided by USCIS (Apr. 12, 2017); information provided during public USCIS Asylum Division Quarterly Stakeholder Meeting (May 2, 2017) (currently has 15 asylum officers onboard, down from 527 as of February 2017).

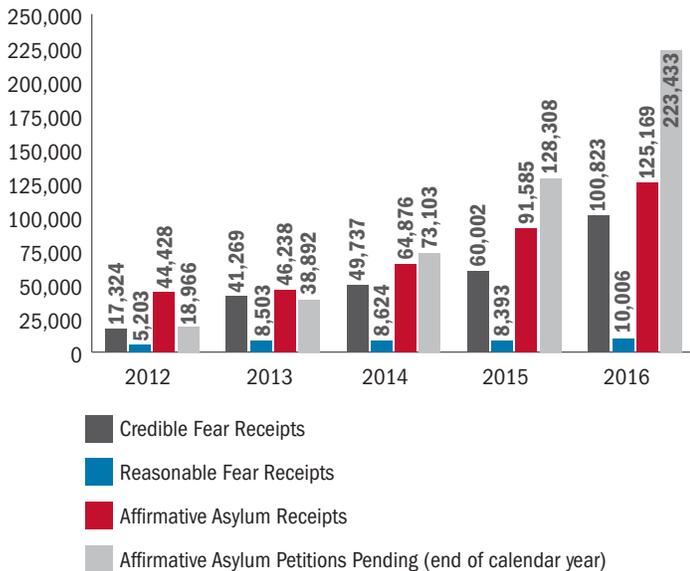
²⁰⁹ See generally Ombudsman’s Annual Report 2016, pp. 13–17; Ombudsman’s Annual Report 2015, pp. 59–62; and Ombudsman’s Annual Report 2014, pp. 37–41.

²¹⁰ See USCIS Webpage, “Asylum Office Workload, December 2016” *supra* note 198. (2016 new receipts and reopened asylum cases are the highest numbers since the 118,195 applications filed or reopened in FY 1996, the year following the implementation of the asylum reform regulations); see “1999 Statistical Yearbook of the Immigration and Naturalization Service,” DOJ Immigration and Naturalization Service, at Table 25 (March 2002); https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1999.pdf (accessed Apr. 11, 2017). See also information provided by USCIS (Apr. 12, 2017) (as of April 12, 2017, the affirmative pending caseload was 249,395 with projected new affirmative applications filings reaching 135,550 in FY 2017), and USCIS Asylum Division Quarterly Stakeholder Meeting (May 2, 2017) (the program stated that they received 16,500 new filings in March 2017, the highest receipts since the mid-1990s).

²¹¹ USCIS Webpage, “Notes from Previous Engagements—Asylum Division Quarterly Stakeholder Meeting,” [https://www.uscis.gov/outreach/notes-previous-engagements?topic_id=9213&field_release_date_value\[value\]\[month\]=&field_release_date_value_1\[value\]\[year\]=&multiple=&items_per_page=10](https://www.uscis.gov/outreach/notes-previous-engagements?topic_id=9213&field_release_date_value[value][month]=&field_release_date_value_1[value][year]=&multiple=&items_per_page=10) (accessed May 19, 2017) (individual Asylum Division Quarterly Stakeholder Meeting Notes and statistics available from 2010 to the present); and information provided by USCIS (May 4, 2017) (assorted asylum statistics not posted with Asylum Division Quarterly Stakeholder Meetings in 2012, 2013, and 2014).

had been in the United States 10 years or longer, raising concerns that some of these applications were being filed as a means to access removal proceedings in order to pursue cancellation of removal.²¹² See Figure 4.1, *Asylum Division Totals*.

Figure 4.1: Asylum Division Totals²¹³



Source: Information provided by USCIS (May 4, 2017).

²¹² See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 3. (USCIS also stated that “[t]he overwhelming majority of these cases ... appear to be applying simply to get work authorization and placement into removal proceedings in order to seek cancellation of removal. Frankly, this is an abuse of the U.S. Asylum Program’s mission of humanitarian protection.” See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 11. However, stakeholders argue there is no other process or way for applicants to voluntarily place themselves into removal proceedings. See Ombudsman Recommendation 58, “Improving Quality and Consistency in Notices to Appear” (June 11, 2014), pp. 11–12; https://www.dhs.gov/sites/default/files/publications/cisomb-nta-recommendation-2014_0.pdf (accessed Mar 9, 2017). Prior to 1996, applicants could request to be placed in proceedings. This changed under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (1996). See Sixth Annual Ombudsman’s Conference (Dec. 6, 2016), “Humanitarian Hot Topics Panel.” The Asylum Division indicates that, in addition to these applications significantly contributing to the backlog, cancellation of removal was never intended to be an affirmative filing process. *Id.*

²¹³ USCIS Webpage, “Notes from Previous Engagements—Asylum Division Quarterly Stakeholder Meeting,” *supra* note 211; information provided by USCIS (May 4, 2017).

Credible and Reasonable Fear Claims. The number of new credible fear cases received by USCIS in 2016 reached a record high of 100,823 as compared to the 60,022 cases received in 2015, nearly a 68 percent increase.²¹⁴ In addition, reasonable fear cases have also grown at record rates, increasing from 8,393 cases in calendar year 2015 to 10,006 in calendar year 2016.²¹⁵ This large volume of detained credible and reasonable fear cases with prioritized processing timeframes continues to limit the Asylum Division’s capacity to direct its resources to the adjudication of pending affirmative asylum applications.²¹⁶

New UAC Claims. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) specifies UACs in immigration proceedings first file asylum applications affirmatively with the USCIS Asylum Division, which must prioritize them for interviews before other categories of asylum applicants.²¹⁷ This impacts other applicants in the affirmative asylum backlog, as their cases are prioritized after Credible Fear, Reasonable Fear and UAC adjudications.²¹⁸ The Ombudsman’s 2016 Annual Report noted the significant increase in the number of new UAC cases, from 718 in FY 2013 to 14,218 in FY 2015.²¹⁹ The number of applications filed in FY 2016 increased slightly to 14,711, with 4,330 filed in the last 3 months of

²¹⁴ See Ombudsman’s Annual Report 2016, p. 13, and Ombudsman’s Annual Report 2015, p. 59. See also USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 3; (fiscal year credible fear and reasonable fear receipts in 2016 doubled from those received in 2015); Ombudsman’s Sixth Annual Conference, “Humanitarian Hot Topics Panel,” *supra* note 204.

²¹⁵ Ombudsman’s Sixth Annual Conference, “Humanitarian Hot Topics Panel,” *supra* note 204.

²¹⁶ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 3 (“Because we were staffing the credible fear/reasonable fear workload and overseas refugee details in support of the Refugee Affairs Division, two major Departmental priorities, there were once again insufficient resources available to allocate to the affirmative asylum workload.”).

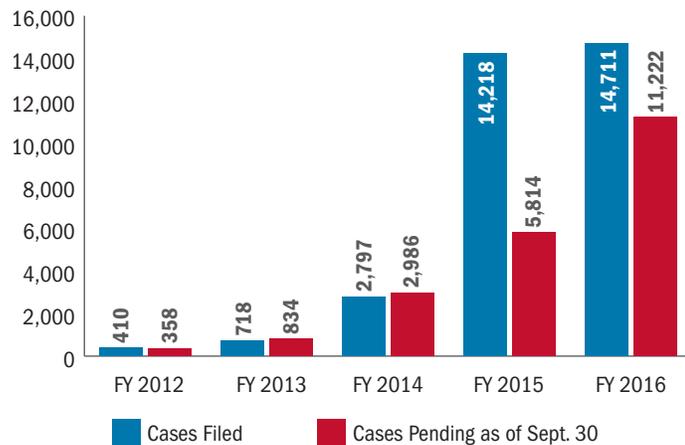
²¹⁷ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008); INA § 208(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C); USCIS Webpage, “Affirmative Asylum Scheduling Bulletin” (Apr. 21, 2017); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin> (accessed Apr. 27, 2017) (applications filed by children are the second priority for interview scheduling).

²¹⁸ See Ombudsman’s Annual Report 2015, p. 60, and Ombudsman’s Annual Report 2013, pp. 13–14 for a general description of UACs. See also USCIS Webpage, “Affirmative Asylum Scheduling Bulletin” (Apr. 21, 2017); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin> (accessed Apr. 27, 2017) (“On December 26, 2014, the USCIS Asylum Division began prioritizing asylum applications for interview scheduling as follows: ... 3) All other pending affirmative asylum applications in the order they were received, with oldest cases scheduled first.”).

²¹⁹ See Ombudsman’s Annual Report 2016, p. 14.

calendar year 2016.²²⁰ See Figure 4.2, *Unaccompanied Alien Child Asylum Applications*. As of December 31, 2016, 13,520 UAC cases remained pending with USCIS.²²¹ As a result of these increases, affirmative asylum applications filed by non-UAC applicants were pushed further down the queue.

Figure 4.2: Unaccompanied Alien Child Asylum Applications²²²



Source: Information provided by USCIS (May 4, 2017).

Asylum Officers Temporarily Assigned to the Refugee Affairs Division. The annual U.S. Refugee Admissions Program cap has steadily increased in the past 3 years from 70,000 in FY 2015 to 85,000 in FY 2016²²³ and was

set to increase in FY 2017 to 110,000.²²⁴ In response to these increased numbers, the Asylum Division detailed an estimated 200 asylum officers for short periods of time to the Refugee Affairs Division.²²⁵

Impact of the Backlog. As the backlog grows, the length of time applicants must maintain work authorization also grows. USCIS cannot approve the initial application for employment authorization until the asylum application has been pending for 180 days; USCIS also has a 30-day period to adjudicate initial EADs.²²⁶ Stakeholders report that asylum seekers commonly wait longer than the 30-day regulatory period for adjudication of their initial EADs.²²⁷ Further, while an asylum applicant applying for work authorization for the first time pays no fee, renewal applications require a \$410 filing fee, unless the individual applies and qualifies for a fee waiver.²²⁸

Efforts to Reduce the Backlog. Asylum Division staffing has almost doubled, from 272 officers in 2013 to 527 as of January 1, 2017.²²⁹ In addition, the Asylum Division increased the frequency with which it offers training, in particular the Combined Training and Asylum Division Officer Training Course, so that new officers are able to complete the multi-week, residential training requirement as soon as possible.²³⁰ The Asylum Division also expanded physically and geographically, opening sub-offices in Boston, New Orleans, and Arlington, VA.

USCIS made two recent positive changes to asylum-based EADs, which help mitigate harm stemming from the backlog. To address difficulties related to obtaining and maintaining employment authorization while awaiting final adjudication of an asylum application, on October 5, 2016, USCIS doubled the EAD validity period from 1

²²⁰ See USCIS Webpage, “Notes from Previous Engagements—Asylum Division Quarterly Stakeholder Meeting,” *supra* note 211.

²²¹ USCIS Webpage, “MPA and PRL Report 10/01/16-12/31/2016” (Jan. 17, 2017); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_UACandMinorPrincipalApplicantReportFY17Q1.pdf (accessed Mar. 22, 2017).

²²² See USCIS Webpage, “Notes from Previous Engagements—Asylum Division Quarterly Stakeholder Meeting,” *supra* note 211; and information provided by USCIS (May 4, 2017) (assorted asylum statistics not posted with Asylum Division Quarterly Stakeholder Meetings in 2012, 2013 and 2014).

²²³ DOS Webpage, “Proposed Refugee Admissions for Fiscal Year 2016” (Oct. 1, 2015); <http://www.state.gov/j/prm/releases/docsforcongress/247770.htm> (accessed Feb. 29, 2016) (“On the occasion of World Refugee Day, June 20, President Obama re-affirmed our nation’s commitment to helping refugees and our leading role in providing safe haven. This commitment comes at a time when the global community faces an unprecedented crisis of displacement. There are currently more refugees, asylum-seekers, and internally displaced persons—nearly 60 million—than at any time since World War II. The United States leads the world in providing humanitarian aid to crises from which innocent people flee and also is the top destination for refugees recommended for resettlement by the UN refugee agency.”).

²²⁴ See Presidential Determination No. 2016–13 of September 28, 2016, Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 FR 70315-70316 (Oct. 11, 2016); <https://www.gpo.gov/fdsys/pkg/FR-2016-10-11/pdf/2016-24736.pdf> (accessed Mar. 23, 2017).

²²⁵ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 11.

²²⁶ INA § 208(d)(2); 8 U.S.C § 1158(d)(2); 8 C.F.R. § 208.7.

²²⁷ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” pp. 5–6 (Aug. 2, 2016); <https://www.uscis.gov/outreach/asylum-division-quarterly-stakeholder-meeting-4> (accessed Apr. 19, 2017) (stakeholders report wait times of up to 9 months); and USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” pp. 4–5 (Nov. 4, 2016).

²²⁸ See USCIS Form I-765, *Application for Employment Authorization, Instructions*, p. 15 (Jan. 1, 2017 edition); <https://www.uscis.gov/i-765> (accessed Apr. 17, 2017).

²²⁹ Information Provided by USCIS (Apr. 12, 2017); see also Ombudsman’s Sixth Annual Conference, “Humanitarian Hot Topics Panel,” *supra* note 204.

²³⁰ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 227 at 1 (reflects two simultaneous trainings scheduled for new asylum officers).

to 2 years for both initial and renewal documents.²³¹ In addition, a recent regulatory change automatically extends employment authorization for those who timely file renewal applications.²³²

Credible and Reasonable Fear Claims.²³³ Large numbers of credible and reasonable fear claims continue to be major contributors to the affirmative asylum backlog. Asylum officers are responsible for conducting protection screening interviews of individuals who indicate a fear of return to their countries of origin. These individuals may raise these fears to CBP or ICE personnel when seeking to enter the United States at a port of entry, or when apprehended within 14 days of entering and within 100 miles of the border.²³⁴ Credible fear and reasonable fear screenings identify potentially meritorious asylum claims to be adjudicated by an immigration judge.²³⁵ In FY 2016,

40 percent of the Asylum Division’s workforce time was devoted to processing credible and reasonable fear cases.²³⁶

In an effort to accelerate credible and reasonable fear processing, the Asylum Division has launched a number of initiatives since 2014. Asylum officers now use checklists rather than producing written assessments for these claims. Additionally, asylum officers may conduct telephonic interviews, allowing the adjudication of claims by staff located remotely.²³⁷ Asylum Division Fraud Detection and National Security officers monitor fraud issues and asylum officers continue to conduct security checks for this caseload; the program has recently enhanced the technology it uses for these security checks.²³⁸ In addition to these measures, in mid-2014 the Asylum Division eliminated the requirement that all negative credible fear determinations receive headquarters quality assurance review in favor of a process in which both positive and negative determinations are randomly selected for headquarters review.²³⁹ It also eliminated the requirement that reasonable fear interviews

²³¹ See USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 4–5.

²³² See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers: Final Rule, 81 Fed. Reg. 82398, 82455 (Nov. 18, 2016).

²³³ The Ombudsman’s Annual Report 2014, pp. 37–38, provides a statutory and regulatory overview of the credible fear and reasonable fear claims process. These protection processes were established as part of the expedited removal provisions enacted in 1996 under HIRAIRA; INA §§ 235(b), 238(b), 241; 8 U.S.C. §§ 1225(b), 1228(b), and 1231(b). In addition to the asylum, refugee and withholding of removal provisions, the credible fear and reasonable fear provisions form part of the protection obligations of the United States pursuant to its accession in 1968 to the 1967 United Nations Protocol Relating to the Status of Refugees that adopted Articles 2–34 of the 1951 United Nations Convention Relating to the Status of Refugees, and provisions as part of its ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT) as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. Law No. 105-277, 112 Stat. 2681, 2681-821.

²³⁴ INA § 235(b)(1)(A) and (B); 8 U.S.C. § 1225(b)(1)(A) and (B); and 8 C.F.R. §§ 208.30 and 208.31; *see also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48881 (Aug. 11, 2004).

²³⁵ See INA § 235(b)(1)(A) and (B); 8 U.S.C. 1225(b)(1)(A) and (B); and 8 C.F.R. §§ 208.30 and 208.31; *see also* U.S. Commission on International Religious Freedom, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal,” p. 34 (Aug. 2, 2016); <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> (accessed Apr. 12, 2017). *See also* U.S. Senate, “Proceedings and Debates of the 104th Cong., 2d Sess.,” 142 Cong. Rec. S11491-92 (Sept. 27, 1996) (Statement of Senator Orrin Hatch, Chairman, Senate Judiciary Committee); <https://www.congress.gov/crec/1996/09/27/CREC-1996-09-27-pt1-PgS11491-2.pdf> (accessed May 10, 2017) (“[t]he [credible fear] standard ... is intended to be a low screening standard for admission into the usual full asylum process.”).

²³⁶ See USCIS, Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 11; information provided by USCIS (Apr. 12, 2017) (As of December 31, 2016, approximately 145 Asylum officers adjudicated credible fear cases and 27 officers adjudicated reasonable fear cases. Asylum officers may adjudicate several case types in the same day.) Note: expansion of expedited removal to the U.S. interior in 2017 may entail an even higher allocation of asylum officer time to handle any increase in caseload, thereby impacting other humanitarian cases handled by the Asylum Division. *See* DHS Secretary Kelly, “Memorandum Implementing the President’s Border Security and Immigration Enforcement Improvements Policies,” Sections G, H, I, J and L, pp. 5–9 and 10–11 (Feb. 20, 2017); https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (accessed May 19, 2017) (describing changes to the expedited removal system that include requirements relating to the eligibility for a foreign national’s release from detention; expanding expedited removal pursuant to section 235(b)(1)(A)(iii)(I) of the INA to the interior of the United States upon publication of a notice in the Federal Register; requiring that asylum officers will make credible fear findings only after considering all relevant evidence and determining, based on this credible evidence, that the applicant has met the statutory criteria; and requiring that the Director of USCIS will increase the operational capacity of the Fraud Detection and National Security Directorate and continue to strengthen the integration of its operations to support all divisions within USCIS to detect and prevent fraud in the asylum and benefits adjudication processes, and in consultation with the USCIS Office of Policy and Strategy as operationally appropriate).

²³⁷ Information provided by USCIS (Apr. 12, 2017).

²³⁸ Information provided by USCIS (Apr. 12, 2017 and May 2, 2017). (enhancements include automating the Defense Department Automated Biometric Identification System check).

²³⁹ Information provided by USCIS (Apr. 12, 2017).

be recorded in sworn statement format and read back to the applicants.²⁴⁰

USCIS initiatives intended to streamline processing led stakeholders to voice concerns that the credible fear and reasonable fear interviews have in some instances become too lengthy and re-traumatize those seeking humanitarian protection.²⁴¹ In response to concerns regarding the length of interviews, the Asylum Division indicated that the length of an interview depends on many factors. These factors include the number of family members associated with a case, whether an applicant is represented, the quality of and need for interpretation, the officer conducting the interview, and the nature of the applicant's testimony and other evidence.²⁴²

Expedite Requests. Asylum offices grant a limited number of expedited interview requests on a case-by-case basis.²⁴³ Each asylum office has a process for adjudicating expedited interview requests that generally involves drafting a written request to the asylum office.²⁴⁴ Stakeholders report the process for requesting an expedited interview lacks consistency among the various asylum offices and the basis for granting expedites also varies.²⁴⁵ Apart from the expedite process, many offices also maintain some version of a “short-list” or standby list where applicants can request to be put on a list to be called for an interview if there are last-minute cancellations.²⁴⁶

²⁴⁰ *Id.*

²⁴¹ Some stakeholders reported credible fear interviews lasting more than 4 hours. Information provided by stakeholders (Jan. 24, 2017).

²⁴² Information provided by USCIS (Apr. 12, 2017) (note the response addressed interviews generally, not specifically credible and reasonable fear interviews).

²⁴³ USCIS Asylum Division Affirmative Asylum Procedures Manual “Expeditious Processing Required” (Ch. III, section III.B.7); <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf> (accessed Apr. 18, 2017); *see also* USCIS Webpage, “Affirmative Asylum Scheduling Bulletin” (Apr. 21, 2017); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin> (accessed Apr. 27, 2016); and Information provided by USCIS (Apr. 12, 2017).

²⁴⁴ *See* USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” Notes, p. 4 (Feb. 7, 2017) https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsylumQuarterlyEngagementQA02072017.pdf (accessed Mar. 9, 2017); *see* Ombudsman's Sixth Annual Conference, “Humanitarian Hot Topics Panel,” *supra* note 204. USCIS Webpage, “Affirmative Asylum Scheduling Bulletin” (Apr. 21, 2017); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin> (accessed Apr. 27, 2017); information provided by USCIS (Apr. 12, 2017) (factors that offices consider include, but are not limited to, emergent medical circumstances or severe illness and severe humanitarian concerns, including continuing and immediate serious harm to family members outside of the United States).

²⁴⁵ *See* USCIS Asylum Division Quarterly Stakeholder Meeting, “Questions and Answers,” *supra* note 199 at 3.

²⁴⁶ *Id.* at 4.

The impact of recent changes affecting the affirmative asylum adjudication process, such as the 2017 changes to the credible fear and reasonable fear lesson plans, is unknown at this time. The Ombudsman continues to monitor and review concerns raised by stakeholders and will consider solutions for addressing the backlog, such as staffing enhancements and methods for streamlining the affirmative asylum adjudication process that both preserve enhanced vetting and security and ensure the protection of asylum applicants' rights.

U Visa Backlogs

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

Key Facts and Findings

- Due to high demand and processing delays, petitioners and their family members wait nearly 3 years before placement on the U visa waiting list if deemed approvable, pending an available visa.
- Correspondingly, individuals and their family members seeking U visas must wait years before they receive employment authorization; they may be living in the United States and subject to removal, or residing abroad in vulnerable situations.
- USCIS has taken steps to accelerate nonimmigrant U visa processing, most notably by establishing an agreement between the Vermont Service Center (VSC), which has traditionally housed the unit that conducts humanitarian benefits adjudications, and the Nebraska Service Center (NSC) to share the adjudication of U nonimmigrant status petitions and accompanying forms.
- Stakeholders would benefit from greater transparency regarding the backlog, including a clearer breakdown of U nonimmigrant petitions that are pending adjudication before placement on the waiting list and the number of cases on the waiting list.

Background

The U visa provides immigration relief and a pathway to lawful permanent residence to petitioners who are victims of serious crimes committed in the United States.²⁴⁷ To be eligible, the petitioner must: (1) be the victim of qualifying criminal activity, (2) have suffered substantial physical or mental harm, and (3) have been helpful, be helpful, or be helpful in the future in the investigation or prosecution of that criminal activity.²⁴⁸ An individual may apply for U nonimmigrant status by filing Form I-918, *Petition for U Nonimmigrant Status* with USCIS, together with Form I-918, Supplement B, *U Nonimmigrant Status Certification*.²⁴⁹ Petitioners with qualifying family members may also submit Form I-918, Supplement A, *Petition for Qualifying Family Member of U-1 Recipient*.²⁵⁰

The U visa program has an annual cap of 10,000.²⁵¹ When visas are unavailable due to the cap, petitioners and qualifying family members who are eligible for U nonimmigrant status are placed on a “waiting list.”²⁵² Pursuant to regulation, once on the waiting list, petitioners and qualifying family members are eligible for deferred action or parole. Those living in the United States are eligible for employment authorization.²⁵³

“ I wanted to thank you and let you ... know we truly appreciate all that you’ve done to help us in this unexpected tragic time in our life ... thank you for all that you do and we are grateful to know that there is a[n] agency out there that understands. ”

Each year since 2009, USCIS has approved the statutorily authorized 10,000 U visa petitions.²⁵⁴ During this span of time, the number of pending petitions for U nonimmigrant status has increased exponentially, with the total number of pending cases reaching 150,604 in September 2016.²⁵⁵

As the number of pending cases grows, the time USCIS takes to determine eligibility has grown to almost 3 years.²⁵⁶ As a result, many petitioners remain without resolution and often without status for a lengthy period of time due to processing delays.²⁵⁷

²⁴⁷ The U visa was created by Congress through provisions of the Battered Immigrant Women Protection Act of 2000 in the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386; 114 Stat. 1464 (2000) (codified in scattered sections of 8 and 22 U.S.C.). The criminal activity must have “occurred in the United States (including Indian country and U.S. military installations) or in the territories and possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.” 8 C.F.R. § 214.14(b)(4). See INA § 101(a)(15)(U)(IV); 8 U.S.C. § 1101(a)(15)(U)(IV).

²⁴⁸ INA § 101(a)(15)(U)(i)(I)-(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(I)-(IV).

²⁴⁹ See USCIS Webpage, “Victims of Criminal Activity: U Nonimmigrant Status” (July 28, 2016); <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (accessed Apr. 4, 2017).

²⁵⁰ *Id.*

²⁵¹ See INA § 214(p)(2)(A); 8 U.S.C. § 1184(p)(2)(A) (“... individuals who may be “issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) of this title in any fiscal year shall not exceed 10,000”).

²⁵² 8 C.F.R. § 214.14(d)(2) (“All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement”); see also USCIS Webpage, “Victims of Criminal Activity: U Nonimmigrant Status,” *supra* note 249 (the waiting list is available to “any eligible principal or derivative petitioners that are awaiting a final decision and a U visa”).

²⁵³ See 8 C.F.R. § 214.14(d)(2); see also USCIS Webpage, “Victims of Criminal Activity: U Nonimmigrant Status,” *supra* note 249.

²⁵⁴ USCIS Webpage, “USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year” (Dec. 29, 2015); <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year> (accessed May 5, 2017). See generally INA § 214(p)(2)(A); 8 U.S.C. § 1184(p)(2)(A) (individuals who may be “issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) . . . shall not exceed 10,000”); INA § 214(p)(2)(B); 8 U.S.C. § 1184(p)(2)(B) (derivative family members are not subject to the cap). An individual may apply to adjust status to lawful permanent residence after 3 years of continuous physical presence in the United States after the grant of U nonimmigrant status if certain requirements are met. INA § 245(m)(1)(A); 8 U.S.C. § 1255(m)(1)(A).

²⁵⁵ USCIS Webpage, “Number of I-918 Petitions for U Nonimmigrant Status (Victims of Certain Criminal Activities and Family Members) by Fiscal Year, Quarter, and Case Status 2009–2016” (Dec. 23, 2016); https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf (accessed May 11, 2017) (providing data regarding Form I-918 petitions including the total number of petitioners and family members pending at the end of each fiscal year beginning in 2009; compare FY 2009 (21,138 total petitions pending) with FY 2016 (150,604 total petitions pending)).

²⁵⁶ USCIS Webpage, “USCIS Processing Time Information for the Vermont Service Center” (Apr. 18, 2017); <https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=abctrJTgHsdH64cxGFqSv> (indicating that the VSC is currently processing I-918, Petitions for U Nonimmigrant Status filed on June 9, 2014) (accessed May 3, 2017).

²⁵⁷ See Pub. L. No. 110-457 (Dec. 23, 2008) (section 201 of the TVPRA states, “[t]he Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

Ongoing Concerns

Impact of Growing Demand on U Petition Processing.

In 2016, the Ombudsman received 109 requests for case assistance relating to U nonimmigrant petitions. The cases largely involved petitioners and qualifying family members who are still waiting for adjudication or are having difficulties in obtaining a status update from USCIS.

USCIS Efforts to Address U Petition Processing Delays.

To address the growing backlog, VSC transferred 3,000 cases to NSC in July, 2016.²⁵⁸ See Figure 4.3: *VSC and NSC U Petition Adjudications—Calendar Year 2016*. Subsequently, NSC began to regularly assist VSC with the adjudication of U nonimmigrant petitions and accompanying forms in September 2016.²⁵⁹ As of early February 2017, NSC had 26,000 pending U petitions, including 7,000 principal petitioners.²⁶⁰ At NSC, derivative beneficiary files are being kept with the principal's file, and adjudicators have a goal of completing one "packet" (principal petition and derivatives) every 2 hours.²⁶¹ U visa

denials are being reviewed by supervisors before they are issued by NSC, though RFEs are not.²⁶²

To help manage the extra caseload, VSC and NSC have taken several steps. VSC personnel provided training to NSC personnel in August and September 2016,²⁶³ and service centers are using the same training materials. Since July 2016, NSC and VSC have had weekly management meetings. Moreover, VSC continues to handle all inquiries regarding cases handled at NSC. NSC personnel will be trained by VSC personnel in FY 2017, so NSC can directly respond to inquiries in the future.²⁶⁴

According to USCIS, with the addition of NSC officers, 60 full-time adjudicators are now assigned to the U visa program.²⁶⁵ Nevertheless, demand for the U visa continues to increase the backlog. USCIS expects to receive 35,000 U visa petitions in FY 2017²⁶⁶ and estimates that the additional officers are insufficient to reduce the backlog.

²⁵⁸ Information provided by USCIS (Feb. 8, 2017); See Figure 4.3 with adjudications statistics for NSC and VSC in calendar year 2016.

²⁵⁹ Information provided by USCIS (Apr. 11, 2017).

²⁶⁰ Information provided by USCIS (Feb. 8, 2017).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Information provided by USCIS (Apr. 12, 2017).

²⁶⁴ Information provided by USCIS (Apr. 11, 2017).

²⁶⁵ *Id.*

²⁶⁶ Information provided by USCIS (Feb. 8 and Apr. 11, 2017).

Figure 4.3: VSC and NSC U Petition Adjudications—Calendar Year 2016

Form I-918, Petition for U Nonimmigrant Status		
USCIS Action Taken	Nebraska Service Center	Vermont Service Center
Approved	0	3,061
Denied	17	1,953
Request for Evidence	873	2,038
Notice of Intent to Deny	13	98
Waitlist	2,641	6,318

Form I-918A, Petition for Qualifying Family Member of U-1 Recipient		
USCIS Action Taken	Nebraska Service Center	Vermont Service Center
Approved	1	3,538
Denied	13	1,312
Request for Evidence	428	1,077
Notice of Intent to Deny	23	56
Waitlist	1,549	4,351

Source: Information provided by USCIS.



Interagency, Customer Service, and Process Integrity

Applicants and petitioners continue to experience delays in receiving their immigration benefits. Substantial fee increases in 2016 were not accompanied by increases in service or reduction of processing times. In this Annual Report, the Ombudsman continues to focus on efforts in implementing Transformation, USCIS' processing times, and problems in the delivery of USCIS notices and documents.



The Escalating Cost of Immigration Services

Responsible USCIS Offices: Office of the Chief Financial Officer; Service Center Operations and Field Operations Directorates

Key Facts and Findings

- USCIS case processing and services are almost entirely funded by application and petition fees paid by applicants and petitioners, rather than by Congressional appropriations.
- USCIS regularly assesses its fee structure to reflect the actual cost of processing benefits and services. The most recent fee rule, published on October 24, 2016 and effective December 23, 2016, raised fees by a weighted average of 21 percent. This increase follows fee rules published in 2007 and 2010 that raised fees by weighted averages of 86 and 10 percent, respectively.

- When announcing the 2016 fee increases, USCIS committed to timely processing of applications and petitions, but has been unsuccessful in achieving its processing goals.
- Processing delays at the agency are largely due to fluctuations in filing levels, the lag time between fee increases and the onboarding of new staff, the complexity of case review, enhanced fraud detection, and new security check requirements.

Background

USCIS operations are almost entirely funded by the fees paid by applicants and petitioners for immigration benefits and services.²⁶⁷ USCIS fees must be sufficient “to recover the full cost of services provided by USCIS [including] the costs associated with fraud detection and national security, customer service and case processing, and

²⁶⁷ INA § 286(m); 8 U.S.C. § 1356. In accordance with the Chief Financial Officers Act of 1990, 31 U.S.C. §§ 901-03, and Office of Management and Budget (OMB) Circular A-25, “User Charges,” 58 Fed. Reg. 38142 (July 15, 1993), USCIS may review its fees biennially and propose needed adjustments to ensure recovery of the full cost of its activities.

providing services without charge to refugee and asylum applicants and to other customers eligible for fee waivers or exemptions.²⁶⁸ A biennial fee review is based on historical data and future receipt projections, and allows USCIS to assess its resource allocations and performance measures.²⁶⁹

Historically, USCIS has coupled increases in filing fees with commitments to reduce processing times. In 2007, nearly a decade after the previous immigration fee review, USCIS increased its fees by a weighted average of 86 percent. The agency justified the increase as the only way “to afford sufficient capacity to process incoming applications and petitions” and avoid backlogs.²⁷⁰ In the 2007 Fee Rule, the agency “committed to a 20 percent average reduction in case processing times by the end of FY 2009.”²⁷¹ This was to be the result of an estimated 4 percent productivity increase in processing of adjustment of status applications and 2 percent increase for all other product lines.

Indeed, USCIS processing times improved. The 2007 fee increase enabled USCIS to hire more than 1,000 additional adjudications officers.²⁷² According to USCIS, “the FY 2007 and FY 2008 backlogs were mitigated through a combination of factors including increasing management focus and attention on case processing, which impacted officer productivity, providing increased human and budgetary resources, and experiencing a relative stable external environment that afforded time to process the pending workloads.”²⁷³ Thus, despite a surge in adjustment of status and naturalization applications in FY 2007, by the end of FY 2009, USCIS saw a “near elimination” of its backlog.²⁷⁴

In 2010, USCIS increased fees by a weighted average of 10 percent.²⁷⁵ Anticipating Congressional appropriations

for USCIS Refugee, Asylum, and International Operations (RAIO), Systematic Alien Verification for Entitlements (SAVE), and the Office of Citizenship, USCIS removed a surcharge imposed on other applications and petitions to recover costs related to these programs. Again, in its 2010 fee rule, USCIS committed to better adjudications service and increased accountability and efficiency, including expanded electronic processing.²⁷⁶ However, the anticipated congressional funding was not granted, and USCIS was forced to use existing fee revenue to cover the costs of RAIO, SAVE, and the Office of Citizenship.²⁷⁷

In 2016, USCIS again increased its fees, this time by a weighted average of 21 percent.²⁷⁸ USCIS stated that the most recent fee increases recover more completely the full cost of otherwise unfunded activities, including RAIO adjudications, the SAVE database and the Office of Citizenship, “thereby increasing the resources available to fund additional personnel needed to improve case processing, reduce backlogs, and to move toward processing times that are in line with the commitments in the FY 2007 Fee Rule.” While some fees were raised only slightly, many increased considerably and far outpaced the rate of inflation. For example:

- Form N-400, *Application for Naturalization*, increased incrementally from \$595 to \$640²⁷⁹
- Form N-600, *Application for Certificate of Citizenship*, nearly doubled from \$600 to \$1,170²⁸⁰
- Form I-924, *Application for Regional Center Designation under the Immigrant Investor Program*, nearly tripled from \$6,230 to \$17,795, in addition to a new \$3,035 fee for the annual regional center certification²⁸¹

²⁶⁸ USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees” (Oct. 24, 2016); <https://www.uscis.gov/news/news-releases/uscis-announces-final-rule-adjusting-immigration-benefit-application-and-petition-fees> (accessed on Mar. 22, 2017); DHS USCIS, “FY 2016/2017 Immigration Examination Fee Account Fee Review Supporting Documentation with Addendum (FY 2016/2017 Immigration Examination Fee)”, pp. 6–8 (Oct. 2016); <https://www.federalregister.gov/documents/2016/05/04/2016-10297/us-citizenship-and-immigration-services-fee-schedule> (accessed May 15, 2017) (contained in Regulations.gov docket “USCIS-2016-0001.”).

²⁶⁹ FY 2016/2017 Immigration Examination Fee, p. 8.

²⁷⁰ U.S. Citizenship and Immigration Services Fee Schedule: Final Rule (2007 Fee Rule), 72 Fed. Reg. 29851, 29857 (May 30, 2007); *see also* information provided by USCIS (Apr. 5, 2017).

²⁷¹ 2007 Fee Rule, 72 Fed. Reg. at 29859.

²⁷² Information provided by USCIS (Apr. 5, 2017).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ U.S. Citizenship and Immigration Services Fee Schedule, Proposed Rule, 75 Fed. Reg. 33445, 33446 (June 11, 2010).

²⁷⁶ FY 2016/2017 Immigration Examination Fee, p. 10.

²⁷⁷ U.S. Citizenship and Immigration Services Fee Schedule: Final Rule (2016 Fee Rule), 81 Fed. Reg. 73292, 73308 (Oct. 24, 2016); information provided by USCIS (Apr. 5, 2017).

²⁷⁸ 2016 Fee Rule, 81 Fed. Reg. at 73293 n.4; *see also* U.S. Citizenship and Immigration Services Fee Schedule: Proposed Rule (2016 NPRM), 81 FR 26904, 26905 (May 4, 2016); USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees,” *supra* note 268.

²⁷⁹ 2016 Fee Rule, 81 Fed. Reg. at 73294-95; *see also* 2016 NPRM, 81 Fed. Reg. at 26927; USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees,” *supra* note 268.

²⁸⁰ 2016 Fee Rule, 81 Fed. Reg. at 73294-95; *see also* 2016 NPRM, 81 Fed. Reg. at 26927; USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees,” *supra* note 268.

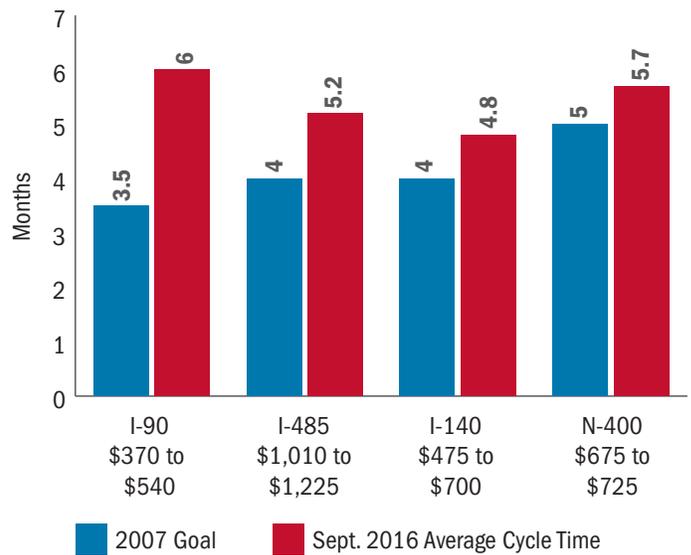
²⁸¹ 2016 Fee Rule, 81 Fed. Reg. at 73295; *see also* 2016 NPRM, 81 Fed. Reg. at 26927; USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees,” *supra* note 268.

■ Form I-526, *Immigrant Petition by Alien Entrepreneur*, is now subject to a \$3,675 fee, up from \$1,500²⁸²

USCIS Customer Service and Public Engagement Directorate has received an increasing number of case inquiries for processing delays in the last 4 years. In FY 2016 alone, USCIS received 349,452 inquiries relating to cases pending outside processing times, amounting to over 20 percent of total customer service inquiries.²⁸³ The majority of requests for case assistance received by the Ombudsman also involved processing delays.²⁸⁴ In 2016, the Ombudsman received 8,146 requests for case assistance involving filings pending past posted processing times, almost 70 percent of the total requests for case assistance received. Customer-reported adjudication delays, coupled with the agency’s 1.5 million case backlog, reflect that USCIS is currently unable to meet its processing time goals, and unlikely to do so in the near future.²⁸⁵

Although USCIS re-committed to meeting the 2007 Fee Rule processing time goals in its 2016 Fee Rule, backlogs in the last 4 years have only increased. Since at least 2012, USCIS has been unable to acquire and maintain sufficient adjudication capacity to ensure timely processing of its workload in accordance with its stated processing goals.²⁸⁶ As reflected in Figure 5.1, *2007 USCIS Processing Goals and 2016 USCIS Average Cycle Times*, despite fee increases, USCIS has been unable to reach its stated processing time goals for key benefits such as Form I-90, *Application to Replace Permanent Resident Card*; Form I-485, *Application to Register Permanent Residence or Adjust Status*; Form I-140, *Immigrant Petition for Alien Worker*; and Form N-400, *Application for Naturalization*.²⁸⁷

Figure 5.1: 2007 USCIS Processing Goals and 2016 USCIS Average Cycle Times



Source: Information provided by USCIS.

USCIS’ challenges in meeting processing time goals include resources diverted to unanticipated initiatives such as Deferred Action for Childhood Arrivals (DACA), which generated more than 570,000 new filings within the first year.²⁸⁸ Temporary Protected Status (TPS) related filings have also increased, with the designation of new countries including Nepal²⁸⁹ and Yemen.²⁹⁰

Additionally, processing times have been impacted by the introduction of the Quality Workplace Initiative, which de-emphasized quantitative productivity measures in favor of quality.²⁹¹ The increased complexity of case review and enhanced fraud detection and security checks also placed even greater demands on the agency.²⁹² The overall increase in applications and petitions received, as well as the reassignment of asylum officers to handle the increase in credible and reasonable fear screenings, has also contributed to the growing inventories across product lines.²⁹³

²⁸² 2016 Fee Rule, 81 Fed. Reg. at 73294-95; *see also* 2016 NPRM, 81 Fed. Reg. at 26927; USCIS Webpage, “USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees,” *supra* note 268.

²⁸³ Information provided by USCIS (Mar. 24, 2017).

²⁸⁴ Requests for case assistance involving filings beyond posted processing times accounted for nearly 70 percent of the requests received by the Ombudsman in 2016, up from 61 percent of the total requests in 2015, and 58 percent in 2014.

²⁸⁵ Information provided by USCIS (Apr. 5, 2017).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Designation of Nepal for Temporary Protected Status, 80 Fed. Reg. 36346 (June 24, 2015).

²⁹⁰ Designation of the Republic of Yemen for Temporary Protected Status, 80 Fed. Reg. 53319 (Sep. 3, 2015).

²⁹¹ Information provided by USCIS (Apr. 5, 2017).

²⁹² *Id.*

²⁹³ *Id.*

USCIS acknowledges that “[t]here is not an easy or quick fix for reducing the current net backlog.”²⁹⁴ USCIS plans to rework its adjudicator performance appraisal system to return some emphasis on “quantity” along with quality of adjudications.²⁹⁵ Also, USCIS intends to recruit additional personnel to address the increasing complexity of its cases and any new or emerging initiatives and requirements.²⁹⁶ USCIS recognizes it will need a comprehensive strategy to enhance productivity, reduce backlogs, and achieve its targeted processing goals.²⁹⁷

Ongoing Concerns

USCIS stakeholders are required to pay increasingly more for submitting applications that will not be adjudicated in a timely manner, despite commitments to decrease processing times. The agency’s current fee structure—including recent increases—barely cover its operating costs and are unlikely to lead to a meaningful reduction in processing times. In fact, USCIS has indicated that processing times will get worse before they get better, reporting to the Ombudsman that the agency “is not staffed to meet its cycle time goals based on the current levels of productivity.”²⁹⁸

The backlog of applications and petitions fell from 3.8 million cases in January 2004 to less than 10,000 in 2007 (before increasing again), and the processing time for nearly all product lines was 6 months or less.²⁹⁹ This was due in large part to Congressional appropriations specifically directed to backlog reduction, and an agency backlog elimination strategy.³⁰⁰ Congressional funding for backlog elimination ended in FY 2006.³⁰¹ USCIS does not intend to request appropriations for RAI0, SAVE, the Office of Citizenship, or other initiatives for which resources might be anticipated.³⁰² Today, with no appropriated funds for backlog elimination, USCIS is facing additional resource needs, such as enhanced security checks, social media vetting, and additional fraud detection audits and site visits.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ 2007 Fee Rule, 72 Fed. Reg. at 29857.

³⁰⁰ See USCIS Webpage, “Backlog Elimination” (Mar. 4, 2010); <https://www.uscis.gov/tools/reports-studies/backlog-elimination> (accessed Apr. 20, 2017).

³⁰¹ “USCIS Production Update, Fiscal Year 2009 report to Congress, 1st Quarter,” p. 2 (April 20, 2009).

³⁰² Information provided by USCIS (Apr. 5, 2017).

USCIS’ fee review process does not provide for sufficient flexibility to account for unexpected changes that can significantly affect the number of incoming filings. For example, USCIS received 972,151 naturalization applications in FY 2016, nearly 200,000 more than the 774,634 it projected.³⁰³ Likewise, since 2012, over one million applications have been submitted under the DACA program.³⁰⁴ Unpredictable fluctuations in case receipts, and the ensuing reallocation of staff and resources, require a more dynamic fee review process, one that recognizes the potential need for additional resources to respond to changing circumstances.

USCIS’ premium processing service may also be contributing to growing backlogs and adjudication delays. Since 2001, USCIS has accepted certain employment-based petitions for premium processing where, for an additional fee (currently \$1,225), it will grant, deny, or issue an RFE within 15 days.³⁰⁵ The revenue generated by the premium processing fee was initially earmarked for the hiring of additional adjudicators and customer service representatives, as well as infrastructure improvements.³⁰⁶ However, most premium processing revenue has been used to fund Transformation,³⁰⁷ while non-premium processing times generally have increased or not reached the agency’s goals. The U.S. Department of Justice Office of the Inspector General noted as far back as 2003 that premium processing may divert resources from other product lines

³⁰³ Information provided by USCIS (Mar. 24, 2017).

³⁰⁴ See Janet Napolitano, Secretary of Homeland Security, Memorandum, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (June 15, 2012); <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (accessed May 15, 2017); DHS Press Release, “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities” (June 15, 2012); <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> (accessed March 23, 2017); USCIS Webpage, “Data Set: Form I-821D Deferred Action for Childhood Arrivals” (Dec. 23, 2016); <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals> (accessed Mar. 23, 2017).

³⁰⁵ See USCIS Webpage “How Do I Use the Premium Processing Service?” (Mar. 9, 2017); <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service> (accessed Mar. 22, 2017). Petitions that are eligible for premium processing include nonimmigrant treaty traders and investors (E-1 and E-2), aliens in specialty occupations (H-1B), temporary workers (H-2B), and intracompany transferees (L-1 and L-2), as well as certain employment-based immigrant petitions.

³⁰⁶ Establishing Premium Processing Service for Employment-Based Petitions and Applications; Interim Rule, 66 Fed. Reg. 29682, 29683 (June 1, 2001).

³⁰⁷ GAO Report, “Immigration Benefits: Consistent Adherence to DHS’s Acquisition Policy Could Help Improve Transformation Program Outcomes,” GAO-12-66 (Nov. 22, 2011); <https://www.gao.gov/assets/590/586461.html> (accessed May 22, 2017).

and further exacerbate backlogs.³⁰⁸ Noting that the 2016 fee increase is not expected to generate sufficient revenue to support its staffing needs, USCIS plans to partially address its staffing shortfall by seeking approval from Congress to use premium processing fee revenue to fund additional adjudicator positions.³⁰⁹

While the agency continues to raise fees, it has been unable to reduce or even maintain processing times. It remains to be seen if, without appropriated funding, USCIS can make a meaningful impact on its growing backlog by relying solely on increased user fees. The Ombudsman will continue to hold USCIS accountable for its commitments made as a part of fee increases by monitoring processing times, and identifying and recommending ways to minimize the impacts of adjudication delays.

The Continuing Challenge of Transformation

Responsible USCIS Offices: Transformation Delivery Division; Office of Information Technology

Key Facts and Findings

- USCIS is in the midst of a troubled, years-long modernization effort, referred to as “Transformation,” to move from paper-based to electronic filing, adjudication, and case management across approximately 90 immigration benefit product lines.
- After more than 10 years of work, at the end of 2016, USCIS stakeholders were only able to consistently file online for two immigration benefits via ELIS, the Transformation platform.
- Internal use of ELIS did advance with USCIS now adjudicating five forms through ELIS by the end of 2016.
- Despite substantial planning and training, USCIS’ major internal launch of Form N-400 in ELIS

experienced significant technical problems that forced the agency to temporarily halt ELIS naturalization adjudications and delayed the launch of other product lines.

- The slow development of Transformation and challenges in ELIS operations are being closely scrutinized by the OIG, the Government Accountability Office (GAO), Congress, and the media. Both the OIG and GAO reviewed the program in 2016 and expressed concern with the progress and problems that continue to plague the project. Transformation has been identified by the GAO as one of ten high-risk federal investments.

Background

Since 2006, USCIS has expended significant time, money, and effort to replace its paper-based systems with electronic filing, receipting, handling, adjudication, and storage of the millions of petitions and applications it receives annually.³¹⁰ When fully implemented, the agency expects the \$3.1 billion Transformation project to improve service, operational efficiency, and security.³¹¹ However, the decade-long effort to accomplish this initiative has thus far yielded minimal positive impact to applicants, who can now fully perform just two functions online in ELIS, accounting for less than ten percent of the agency’s workload: filing Form I-90, *Application to Replace Permanent Resident Card*, and paying the Immigrant Fee associated with entry and LPR card production after consular processing.³¹² During 2016, the Ombudsman received 2,263 case assistance requests involving ELIS-processed filings that stakeholders reported they were unable to resolve with the agency.

³⁰⁸ U.S. Department of Justice, Office of the Inspector General, “Immigration and Naturalization Service’s Premium Processing Program,” OIG 03-14 at 19 (Feb. 2003); <https://oig.justice.gov/reports/INS/a0314/final.pdf> (accessed Mar. 23, 2017) (explaining that “premium cases further prolong[] processing times for routine cases because staffing and resources must be pulled from the general adjudication areas to meet the demands of Premium Processing”).

³⁰⁹ Information provided by USCIS (Apr. 5, 2017).

³¹⁰ Transformation is expected to integrate all filing, managing, and adjudication functions. This includes hosting supporting evidence, conducting background checks and fraud or risk investigations, transmitting notice, and updating systems with final adjudication decisions in an electronic environment. ELIS systems are distinct from the earlier system of electronic filing, which only provided for initial form filings and payments on-line but required the separate submission of any supporting evidence by mail.

³¹¹ “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the* Subcommittee on Oversight and Management Efficiency of the U.S. House Homeland Security Committee, 2017, 115th Cong. 1st Sess., 1–2 (Mar. 16, 2017) (written statement of Lori Scialabba, Acting USCIS Director); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed May 15, 2017).

³¹² OIG Audit, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” OIG-16-48 (Mar. 9, 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed May 10, 2017).

Transformation Timeline. USCIS previously committed to complete the Transformation project by 2013; that date was then extended to 2016, and is now slated for March 2019.³¹³ After planned rollouts did not meet their designated milestones in 2016, and USCIS imposed a “strategic pause” on form and case processing development,³¹⁴ it is likely the Transformation completion date will be postponed again. In Congressional testimony in early 2017, the DHS Inspector General observed, “[w]e do not have confidence in USCIS’ estimates for completion, given past experience.”³¹⁵

ELIS in 2016: Several Milestones, Many Challenges.

USCIS made progress in Transformation in 2016. The forms being adjudicated in ELIS as of January 2017 are:

- Form I-90, *Application to Replace Permanent Resident Card*
- Submission/processing of the Immigrant Fee
- Form I-821, *Application for Temporary Protected Status*
- Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*
- Form N-400, *Application for Naturalization*
- Form N-336, *Request for Hearing on a Decision in Naturalization Proceedings*
- Form N-565, *Application for Replacement Naturalization/Citizenship Document*³¹⁶

ELIS platform functionality now includes internal case processing and management functions such as the ability to schedule biometric appointments and interviews, interface with external systems for background checks, manage

scanned documents and case evidence, and produce LPR cards.³¹⁷

At the same time, with the expansion of ELIS in 2016, new challenges emerged. The rollout of the N-400, a major undertaking for the agency, was fraught with technical and logistical difficulties. At the end of 2016, USCIS placed development of all other product lines in what is described as a “strategic pause” to conduct technical remediation and re-align project management milestones.³¹⁸

During 2016, USCIS began adjudicating (but not accepting online) Form I-821, *Application for Temporary Protected Status*, and Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*.³¹⁹ Applicants continued to mail paper forms, which the agency scanned into ELIS. However, as with other product lines in ELIS, USCIS did not inform the affected community or their legal representatives that it would use ELIS to adjudicate these filings. They learned their applications were entered into ELIS by USCIS when they were provided receipt numbers that began with “IOE” (Integrated Operating Environment). Both forms suffered data coordination challenges, which led to delays in issuance of associated EADs.

Also in 2016, USCIS began adjudicating naturalization applications in ELIS, a new level of form complexity and processing for the agency, which required significant training and an adjustment period.³²⁰ The initial implementation—done at a time of increasing N-400 receipts—revealed sluggish system performance and frequent outages. Paper files were still being used by adjudicators alongside ELIS during interviews as they became accustomed to the new processes and as a back-up to the frequent outages. Redundancies in personnel and costs, as well as problems with security vetting, mounted before the agency stopped scanning new paper N-400 applications into ELIS. At the end of 2016, more than 185,000 naturalization applications were pending

³¹³ *Id.* at 8 (“USCIS estimates that it will take three more years—over four years longer than estimated—and an additional \$1 billion to automate all benefit types as expected”).

³¹⁴ Information provided by USCIS (Apr. 19, 2017).

³¹⁵ *See generally* “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems” *before the Subcommittee on Oversight and Management Efficiency of the U.S. House Homeland Security Committee*, 2017, 115th Cong. 1st Sess. (Mar. 16, 2017) (written statement of John Roth, DHS Inspector General); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-RothJ-20170316.pdf> (accessed May 15, 2017).

³¹⁶ Information provided by USCIS (Apr. 19, 2017). The N-565 is being processed in ELIS “in a limited manner.”

³¹⁷ Information provided by USCIS (Apr. 19, 2017).

³¹⁸ *Id.*

³¹⁹ GAO Report, “Immigration Benefits System: Significant Risks in USCIS’ Efforts to Develop its Adjudication and Case Management System,” GAO-17-486T (Mar. 16, 2017); <https://www.gao.gov/products/GAO-17-486T> (accessed May 17, 2017); information provided by USCIS (May 2016).

³²⁰ For a more complete discussion of the rollout of Form N-400 in ELIS, *see* “The Perfect Storm: Fee Increases, Call to Citizenship, and ELIS,” *infra* at 9–14.

adjudication in ELIS.³²¹ Widespread electronic filing for Form N-400 has been delayed indefinitely.

The scheduled implementation of three additional forms in ELIS was also halted due to system glitches and development delays. These glitches included network outages, internal data-merging errors, and printing delays, errors, and duplications. Form I-485, *Application to Register Permanent Residence or Adjust Status*, Form N-600, *Application for Certificate of Citizenship*, and the military naturalization portal rollouts were delayed past their original 2016 implementation milestones; USCIS does not currently have a timeline for the integration of these forms into ELIS.

Request for Case Assistance

An individual who filed Form I-821D and an application for employment authorization in May 2016 was issued a new EAD in October 2016, but did not receive a decision on the underlying I-821D filing. The lack of an approval notice is significant, as it serves as the only evidence of approval of Deferred Action for Childhood Arrivals (DACA). The individual called the USCIS call center several times for assistance without success before contacting the Ombudsman. Upon review, the Ombudsman determined that the applicant's A-file had been sent to storage at the National Records Center without issuance of a decision on the I-821D. USCIS headquarters assisted in resolving this case, noting that ELIS was experiencing systemic problems in generating Forms I-797, *Notice of Decision*. Within two weeks of the Ombudsman's inquiry, the applicant received the approval notice.

ELIS Immigrant Fee Processing. In prior Annual Reports, the Ombudsman reviewed problems with payment of the Immigrant Fee via ELIS, including extended processing times, administrative errors, and card delivery problems.³²² In 2016, the agency refined online stakeholder accounts for new immigrants paying the Immigrant Fee so

they may track their progress.³²³ The agency also started using an online identity verification process to remotely validate an applicant's identity.³²⁴

Stakeholder Engagement. Stakeholders have experienced frustrations with ELIS-processed applications and petitions, as well as a lack of stakeholder engagement. While USCIS created a help desk within its National Customer Service Center to serve electronic filers, it is only able to assist with technical filing issues.³²⁵ Applicants being introduced to ELIS filings complained they did not receive meaningful assistance with ELIS processing problems through service requests, many of which were closed without resolution. After months of delays and confusion about who could assist with DACA processing issues, for example, applicants often sought assistance from the Ombudsman.

Oversight of ELIS. As of January 2017, the OIG has issued six full reports and one management communication to USCIS expressing specific concerns with Transformation.³²⁶ The GAO has issued six audit

³²³ USCIS Webpage, "File Online," <https://www.uscis.gov/file-online> (accessed Apr. 1, 2017).

³²⁴ Information provided by USCIS (Oct. 13, 2016).

³²⁵ USCIS Webpage, "Experiencing Technical Difficulty with Electronic Immigration System (ELIS)," https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Custom%20Service%20Reference%20Guide/ELIS_Technical_Difficulty.pdf (accessed June 22, 2017).

³²⁶ OIG, "Management Alert—U.S. Citizenship and Immigration Services' Use of the Electronic Immigration System for Naturalization Benefits Processing," OIG-17-26-MA (Jan. 19, 2017); <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA.pdf> (accessed May 22, 2017); "USCIS Automation of Immigration Benefits Processing Remains Ineffective," OIG 16-48 (Mar. 9, 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed May 1, 2017); "USCIS Information Technology Management Processes and Challenges," OIG-14-112 (July 3, 2014); https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-112_Jul14.pdf (accessed June 22, 2017); "U.S. Citizenship and Immigration Services' Progress in Transformation," OIG-12-12 (Nov. 2011); "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-09-90 (July 13, 2009); https://www.oig.dhs.gov/assets/Mgmt/OIG_09-90_Jul09.pdf (accessed June 22, 2017); "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-07-11 (Nov. 30, 2006); https://www.oig.dhs.gov/assets/Mgmt/OIG_07-11_Nov06.pdf (accessed June 22, 2017); "USCIS Faces Challenges in Modernizing Technology," OIG-05-41 (Sep. 2005); https://www.oig.dhs.gov/assets/Mgmt/OIG_05-41_Sep05.pdf (accessed June 22, 2017).

³²¹ "Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems" before the Subcommittee on Oversight and Management Efficiency of the U.S. House Homeland Security Committee, 2017, 115th Cong., 1st Sess. (Mar. 16, 2017) (statement of John Roth, DHS Inspector General); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-RothJ-20170316.pdf> (accessed May 10, 2017).

³²² Ombudsman Annual Reports, 2016, pp. 41–42, and 2015, pp. 86–88.

reports regarding Transformation as well, the latest in March 2017.³²⁷

In July 2016, the GAO released findings that Transformation continued to suffer management and development challenges hindering its performance.³²⁸ These findings were the latest conclusions in a series of studies, at least six reports, and 30 recommendations issued since 2006 concerning Transformation management, acquisitions, development, and operations. As of March, 2017, the GAO found that USCIS had “fully addressed” 17 out of their 30 recommendations and that 13 remained open.³²⁹ One completed task included overhauling Transformation management by eliminating the Office of Transformation Coordination and moving the newly designated Transformation Delivery Division under the USCIS Office of Information Technology.³³⁰

³²⁷ GAO Report, “Immigration Benefits System: Significant Risks in USCIS’ Efforts to Develop its Adjudication and Case Management System,” GAO-17-486T (Mar. 16, 2017); <https://www.gao.gov/products/GAO-17-486T> (accessed May 17, 2017); GAO Report, “Immigration Benefits System: U.S. Citizenship and Immigration Services Can Improve Program Management,” GAO-16-467 (Jul. 7, 2016); <http://www.gao.gov/assets/680/678266.pdf> (accessed May 10, 2017); GAO Report, “Immigration Benefits System: Better Informed Decision Making Needed on Transformation Program,” GAO-15-415 (pub. May 2015, released June 2015); <https://www.gao.gov/products/GAO-15-415> (accessed May 17, 2017); GAO Report, “Immigration Benefits: Consistent Adherence to DHS’s Acquisition Policy Could Help Improve Transformation Program Outcomes,” GAO-12-66 (Nov. 22, 2011); <http://www.gao.gov/products/GAO-12-66> (accessed May 17, 2017); GAO Report, “USCIS Transformation: Improvements to Performance, Human Capital, and Information Technology Management Needed as Modernization Proceeds,” GAO-07-1013R (July 17, 2007); <http://www.gao.gov/products/GAO-07-1013R> (accessed May 17, 2017); GAO Report, “Information Technology: Near-Term Effort to Automate Paper-Based Immigration Files Needs Planning Improvements,” GAO-06-375 (Mar. 31, 2006); <http://www.gao.gov/products/GAO-06-375> (accessed June 23, 2017).

³²⁸ See generally GAO, “Immigration Benefits System: U.S. Citizenship and Immigration Services Can Improve Program Management,” GAO-16-467 (July 7, 2016); <http://www.gao.gov/assets/680/678266.pdf> (accessed May 10, 2017).

³²⁹ “Immigration Benefits System: Significant Risks in USCIS’ Efforts to Develop its Adjudication and Case Management System,” *before the Subcommittee on Oversight and Management Efficiency of the U.S. House Homeland Security Committee*, 115th Cong. 1st Sess. 2 (Mar. 16, 2017) (statement of Carol C. Harris, GAO Director Information Technology Acquisition Issues); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-HarrisC-20170316.pdf> (accessed May 10, 2017).

³³⁰ “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Subcommittee on Oversight and Management Efficiency of the U.S. House Homeland Security Committee*, 2017, 115th Cong. 1st Sess. 1 (Mar. 16, 2017) (written statement of Lori Scialabba, Acting USCIS Director); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed May 15, 2017); and information provided by USCIS (Apr. 12, 2017).

In November 2016, the OIG issued additional findings on system challenges, both from a customer service and a security standpoint.³³¹ The OIG found that 19,001 LPR cards had been issued with incorrect information, including some being sent to incorrect addresses. Most of these errors were identified as being the result of “design and functionality problems in ELIS.”³³² The OIG referenced specifically ELIS functionality or legacy data migration problems that allowed 750 duplicate LPR cards to be issued in 2016 alone.³³³ The OIG concluded that “USCIS efforts to address the errors have been inadequate.”³³⁴ USCIS has had no choice but to turn to technology workarounds, including modernization of its antiquated, DOS-based CLAIMS 3 system to ensure that legacy systems are “maintainable and supportable” for up to 10 years.³³⁵

Use of Local Systems for Temporary Fixes. Among the many benefits intended to be delivered by Transformation were efficiencies from the heightened coordination of information and business processes. The delays that continue in the initiative have hampered the agency in realizing these benefits. As the GAO recently noted, the program’s “delays in delivering system functionality have limited USCIS’ ability to realize its planned cost savings and operational improvements.”³³⁶ In particular, systems and databases within the agency experienced integration issues, requiring adjudicators to continue to employ old methods and keep legacy systems online.³³⁷

The delays and challenges of Transformation and, in particular with ELIS, have led some USCIS offices to search for temporary fixes. Increasingly, USCIS components are seeking to resolve issues through the use of local and potentially incompatible systems, and purchasing “off-the-shelf” solutions for information management.³³⁸ Many offices are using interim systems to manage correspondence

³³¹ OIG Audit, “Better Safeguards are Needed in USCIS Green Card Issuance,” OIG-17-11 at 5 (Nov. 16, 2016); <https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-11-Nov16.pdf> (accessed May 10, 2017).

³³² *Id.*

³³³ *Id.* at 8.

³³⁴ *Id.* at 5.

³³⁵ USCIS noted that this expense “is not part of the agency’s overall Transformation effort. The CLAIMS 3 modernization is being undertaken now to assure that the system remains available to USCIS for case management purposes over the next 5 to 10 years.” Information provided by USCIS (Apr. 12, 2017).

³³⁶ GAO, “Immigration Benefits System: Significant Risks in USCIS’ Efforts to Develop its Adjudication and Case Management System,” *supra* note 327 at 10.

³³⁷ *Id.*

³³⁸ Information provided by USCIS (Mar. 16, 2017).

and applicant inquiries.³³⁹ These are not permanent solutions because they do not interface with other USCIS systems as envisioned by Transformation.

Ongoing Concerns

Transformation remains hampered by process re-engineering, security concerns, and increasing internal and external frustration with communication and problem resolution. Implementation in 2016 revealed significant problems with the adjudication of both simple and complex form types, gaps in service for cases received electronically, and a lack of outreach to the affected community. Despite these significant challenges, ELIS holds substantial potential for adjudicators and applicants alike.

To improve ELIS system rollouts and usability, USCIS should continue to include, and expand the participation of, line adjudicators and local office managers in case management process development. USCIS also needs to engage more with external stakeholders. Testing should be expanded to provide stakeholders the opportunity to experience the electronic filing environment, and to enable the agency to properly identify and correct issues in real time and across the spectrum of user capability. In addition, engaging directly with private-sector representatives who develop and use case management software will help ensure usability and process integrity. The Ombudsman will continue to monitor Transformation impacts on immigration benefits processing.

USCIS Processing Times: Improved Accuracy Needed

Responsible USCIS Offices: Office of Performance and Quality; Customer Service and Public Engagement Directorate

Key Facts and Findings

- USCIS posts processing times to set the public's expectations regarding how long the agency is taking to adjudicate immigration applications and petitions.³⁴⁰ However, USCIS' current approach to reporting processing times often does not accurately convey the actual time it is likely to take to adjudicate cases.

³³⁹ *Id.*

³⁴⁰ See USCIS Webpage, "USCIS Processing Time Information;" <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (accessed Mar. 7, 2017).

- Posted processing times have cascading impacts. They dictate when a stakeholder can submit a service request for a case that is outside of processing times through the USCIS National Customer Service Center (NCSC).
- Lack of transparency in processing times diminishes trust in the agency and hinders stakeholders' ability to make informed decisions impacting their professional and personal lives.
- Processing times are fundamental to holding USCIS accountable for timely services, yet currently posted processing times do not include the agency's processing time goals.

Background

For many years, the Ombudsman has urged USCIS to explore new ways to improve its calculation of case processing times.³⁴¹ USCIS has acknowledged that its methods of calculating and posting processing times need improvement, and is working to implement a new methodology that will enable the agency to display processing time data that is more accurate and timely.³⁴²

The processing times that USCIS posts publicly are used for multiple purposes. For individuals and employers, processing times are an essential tool for planning their futures. For USCIS, these processing times dictate, among other things, when an applicant or petitioner can inquire about a pending case.³⁴³ In addition, the Ombudsman asks individuals and employers to wait 60 days past the posted processing time before seeking case assistance, absent emergency circumstances.

On January 5, 2017, USCIS announced that it would post processing times using a specific date format rather than reporting weeks or months. The agency stated that this is the "first step in providing processing times that are timelier

³⁴¹ Ombudsman's Annual Report 2016, pp. 31-35; Ombudsman's Annual Report 2015, pp. 84-86; Ombudsman's Annual Report 2014, pp. 48-51.

³⁴² U.S. Citizenship and Immigration Services Fee Schedule: Final Rule (2016 Fee Rule), 81 Fed. Reg. 73292, 73308 (Oct. 24, 2016); see also USCIS 2015 Annual Report Response, p. 40 (June 30, 2016).

³⁴³ See USCIS Webpage, "Outside Normal Processing Time;" <https://egov.uscis.gov/e-request/displayONPTForm.do?entryPoint=init&sroPageType=onpt> (accessed May 11, 2017) ("For most applications, you can send [USCIS] an inquiry if your case has been pending longer than the processing time posted on our website"). In Fiscal Year 2016, USCIS received 349,181 Service Request Management Tool (SRMT) inquiries related to cases pending outside normal processing times. Information provided by USCIS (Mar. 24, 2017).

“Thanks and I do appreciate your response to my request for help. What you do is always give any petitioner like me a hope when we need it.”

and easier to understand.”³⁴⁴ On February 15, 2017, USCIS held a public engagement on processing times, seeking feedback from its stakeholders both during and after this call on how to improve processing time accuracy, clarity, and transparency.³⁴⁵

USCIS calculates processing times using the number of active pending cases in the responsible office against the monthly completion rate.³⁴⁶ Prior to adopting its new processing time format, USCIS displayed charts with the processing time goal (e.g., 5 months for N-400, *Application for Naturalization*³⁴⁷) if the field office or service center was meeting the processing time goal.³⁴⁸ If the office had fallen behind its processing time goal, the chart listed “the actual receipt date of the application or petition currently being processed” in the respective office or service center.³⁴⁹

Although RFEs and NOIDs are removed from the active pending case total, the posted processing times do not include the extra time this adds to processing.³⁵⁰ USCIS also does not factor in processing time delays on account of file transfers. Stakeholders have been advised to reference

³⁴⁴ USCIS email to stakeholders, “USCIS Now Uses Specific Dates to Show Case Processing Times” (Jan. 5, 2017).

³⁴⁵ USCIS email to stakeholders, “USCIS Invitation: Online Processing Times, 02/15/2017.” (sent Feb. 9, 2017); see also “USCIS Online Processing Times Feedback Questionnaire” (Feb. 15, 2017); https://content.govdelivery.com/attachments/USDHSCISINVITE/2017/02/15/file_attachments/771487/Processing%2BTimes%2BQuestions%2B-%2BFeb%2B2017.pdf (accessed Mar. 7, 2017); “USCIS Idea Community, Promoting Change through Online Collaboration” (Feb. 2, 2017); <https://www.uscis.gov/outreach/uscis-idea-community> (accessed May 11, 2017).

³⁴⁶ Ombudsman’s Annual Report 2015, pp. 84–86; information provided by USCIS (Apr. 11, 2017).

³⁴⁷ Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule: Final Rule, 72 Fed. Reg. 29851, 29858–59 (May 30, 2007).

³⁴⁸ Ombudsman Teleconference, “Processing Times” (Apr. 27, 2016); <https://www.dhs.gov/uscis-processing-times-teleconference-recap#> (accessed Mar. 7, 2017).

³⁴⁹ *Id.*

³⁵⁰ Cases that cannot be adjudicated due to reasons beyond USCIS’ control are deducted from the active pending case total. This includes cases pending a response to an RFE or Notice of Intent to Deny, naturalization applications pending re-examination, applications impacted by visa retrogression, and petitions where a visa is not immediately available. Cases pending FBI name checks are included within the active pending case total. See Ombudsman Teleconference, “Processing Times,” *supra* note 348.

the posted processing times for the office to which their files have been transferred.³⁵¹

As of January 4, 2017, USCIS posts all processing times using a specific date format rather than weeks or months.³⁵² For form types outside of the processing time goals, the chart continues to reflect the receipt date of the most recent case that the office completed at the time of reporting. If a field office or service center is meeting the processing time goal, the specific date posted now reflects that processing time goal in a date format (for N-400 applications, the date displayed on the processing time chart will be 5 months prior to the reporting date). See Figure 5.2, *Sample Current USCIS Processing Chart, Annotated*.

If the date posted falls *after* the date listed on the receipt notice, the application or petition is outside of the posted processing time. USCIS states that applicants should expect agency action (e.g., issuance of a decision, interview notice, RFE, etc.) within 30 days from the date their cases fall outside of the posted processing times.³⁵³

While the new approach to posting processing times is an improvement, the revised processing times do not provide clarity into how the agency processes certain filings, such as concurrent filings and oversubscribed visas. For example, when Form I-140, *Immigrant Petition for Alien Worker*, is filed concurrently with Form I-485, *Application to Register Permanent Residence or Adjust Status*, the processing time for each form type must be combined to calculate the true anticipated processing time.³⁵⁴ In contrast, stakeholders who file Form I-130, *Petition for Alien Relative*, concurrently with Form I-485 are not subject to aggregate processing times. The processing time for concurrently filed Forms I-130 and I-485 is reflected by the posted processing time for the I-485 at the respective field office.³⁵⁵ For Form I-918, *Petition for U Nonimmigrant Status*, the posted processing time does not reflect the time it takes for completion of the adjudication; rather, these dates reflect the time it takes to place self-petitioners on the waiting list for U visas.³⁵⁶

USCIS indicated that it is considering various methods for revamping the methodology for calculating and

³⁵¹ See Ombudsman Teleconference, “Processing Times,” *supra* note 348.

³⁵² USCIS email to stakeholders, “USCIS Now Uses Specific Dates to Show Case Processing Times,” *supra* note 344.

³⁵³ *Id.*

³⁵⁴ Ombudsman Teleconference, “Processing Times,” *supra* note 348; see also Ombudsman’s Annual Report 2015, pp. 85–86.

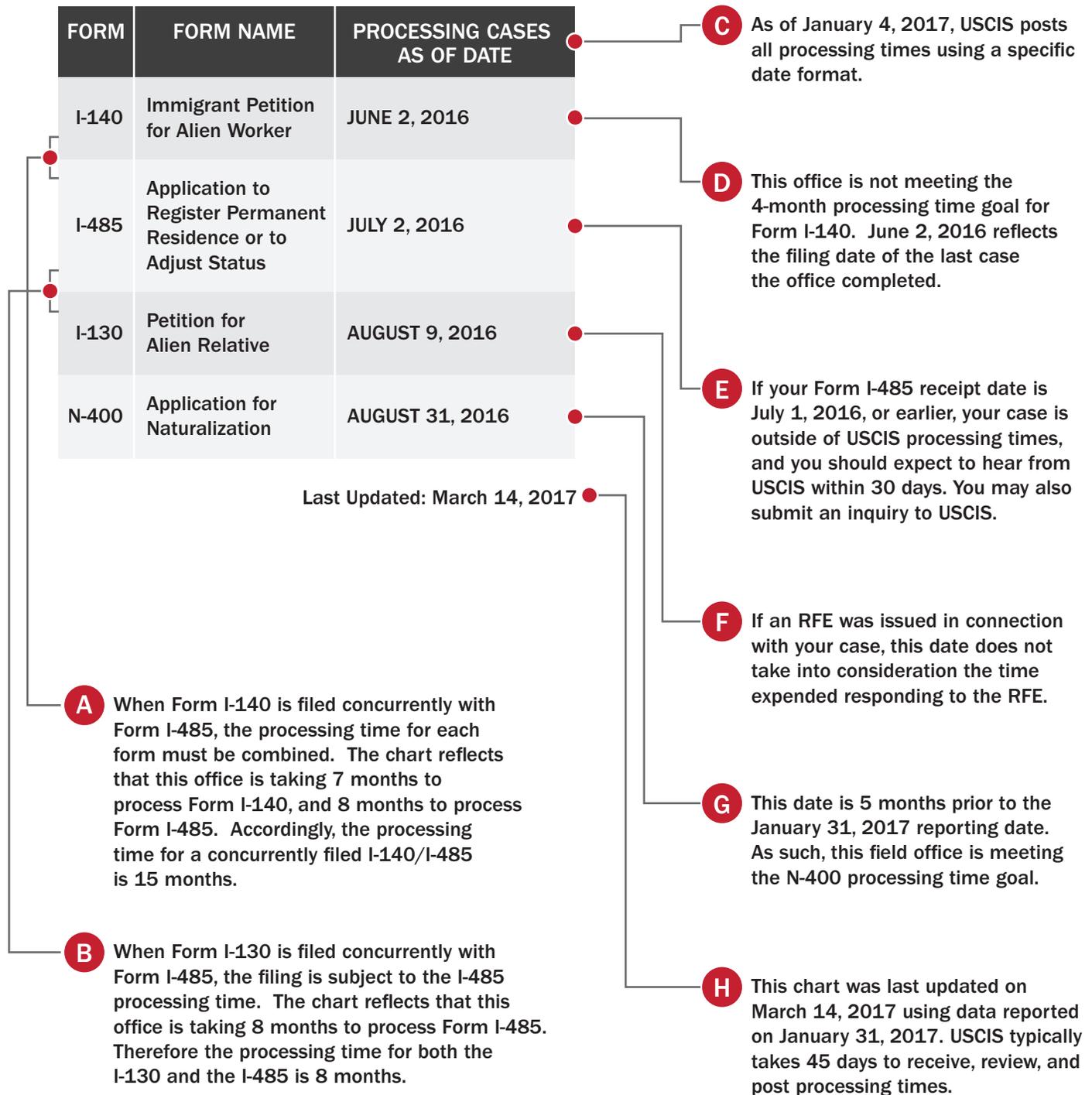
³⁵⁵ Information provided by USCIS (Apr. 11, 2017).

³⁵⁶ See 8 CFR § 214.14(d)(2); see also “U Visa Backlogs” in this Report *supra* at 42–45; information provided by USCIS (May 9, 2017).

Figure 5.2: Sample Current USCIS Processing Chart, Annotated

Field Office Processing Dates as of: January 31, 2017

The chart reflects processing times this Field Office reported as of January 31, 2017.



Source: USCIS Webpage, "USCIS Processing Time Information" (March 14, 2017)

posting processing time information. In its response to the Ombudsman’s 2015 Annual Report, USCIS stated it was working toward developing statistically-based methods for calculating processing times to account for deviations, and the intended outcome was to provide the filing community with a time range for the processing of their forms.³⁵⁷ USCIS echoed this in its 2016 Fee Rule, indicating that it was considering publishing processing times using a range rather than a specific date.³⁵⁸ In February 2017, USCIS requested feedback from stakeholders concerning the following ways it is considering presenting case processing times: (1) time to complete a specific percentage of cases; (2) time range for completing most cases; and (3) average time to complete a case.³⁵⁹

USCIS is also attempting to change the way it gathers processing time data from field offices and service centers. Due to the amount of time it currently takes USCIS to compile and process a responsible office’s statistics—typically 45 days—posted processing times are always based on outdated data.³⁶⁰ Rather than having these facilities self-report data, USCIS is experimenting with using data generated directly from case management systems, which will improve the timeliness and frequency of posting processing times on its website.³⁶¹

Ongoing Concerns

USCIS has experienced substantial challenges to developing a more timely and accurate methodology for calculating processing times. Field offices and service centers use multiple case management systems, and older systems do not capture all of the data points needed to perform accurate calculations. Also, the USCIS Office of Performance and Quality, tasked with calculating processing times, does not have access to these local systems, and must rely on offices to submit data.³⁶²

USCIS conducts production planning, staffing analysis, and resource allocation through carefully tracking the receipt, progress, and inventory of cases, but these reports and data are not the same as the publicly available processing

time calculations.³⁶³ USCIS already relies upon this information to determine the resources necessary for the timely processing of petitions and applications, and should consider using it as part of its processing time calculations.

More accurate and transparent processing times will assist in setting more realistic expectations for individuals and employers, preventing unnecessary customer service calls and requests, and measuring the agency’s success in meeting its processing goals.

Mailing Issues

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

Key Facts and Findings

- USCIS sends millions of notices and documents by mail every year. Despite recent improvements to USCIS mailing protocols, thousands of pieces of mail are not received as intended, returned as undeliverable, or delivered to someone other than the addressee.
- When notices and documents do not reach their intended recipient, applicants and petitioners miss important appointments, deadlines, and documents. They may consequently fall out of status or be left without evidence of legal status or employment authorization—at times causing significant adverse consequences.
- Improper delivery of notices and documents creates security vulnerabilities, including the potential for misuse of secure documents such as LPR cards or EADs.

³⁶³ See “Oversight of U.S. Citizenship and Immigration Services: Ensuring Agency Priorities Comply with the Law” *before the* Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest, 114th Cong. 1st Sess. 9 (Mar. 3, 2015) (joint written testimony of Joseph Moore, Senior Financial Official, USCIS; Donald Neufeld, Associate Director, Service Center Operations, USCIS; and Daniel Renaud, Associate Director, Field Operations, USCIS); <https://www.uscis.gov/tools/resources-congress/presentations-and-reports/oversight-us-citizenship-and-immigration-services-ensuring-agency-priorities-comply-law-senate-committee-judiciary-subcommittee-immigration-and-national-interest-march-2015> (accessed Mar. 8, 2017); *see also* USCIS Webpage, “Workload Transfer Updates,” <https://www.uscis.gov/workload-transfers> (“On occasion, we transfer cases between our five service centers in order to balance our workload and promote timely processing”) (accessed May 1, 2017).

³⁵⁷ USCIS 2015 Annual Report Response, p. 40 (June 30, 2016).

³⁵⁸ 2016 Fee Rule, 81 Fed. Reg. at 73308.

³⁵⁹ “USCIS Online Processing Times Feedback Questionnaire,” *supra* note 345.

³⁶⁰ Ombudsman Teleconference, “Processing Times,” *supra* note 348.

³⁶¹ 2016 Fee Rule, 81 Fed. Reg. at 73308; *see also* information provided by USCIS (Apr. 11, 2017).

³⁶² Information provided by USCIS (Apr. 11, 2017).

- USCIS should consider additional options for the delivery of notices and documents, including requiring a signature for secure documents, launching its planned “hold for pickup” pilot, and expanding use of pre-paid courier service mailing labels.

Background

Mailing issues continue to be a source of USCIS stakeholder frustration.³⁶⁴ More than half of the stakeholder service requests received by USCIS in FY 2016 related to changes of address or the delivery of notices or documents.³⁶⁵ USCIS reports that in FY 2016, 43,516 LPR cards, 12,794 EADs, and 1,680 other documents were returned by the U.S. Postal Service (USPS) to USCIS as undeliverable.³⁶⁶ While a total of 57,990 lost documents is a small percentage of the yearly volume of millions of documents that successfully reach their intended recipients, it remains a significant number. In 2016, as in previous years, the Ombudsman received a number of requests for case assistance relating to mailing issues, many involving claims of missing documents.

The regulations require that USCIS deliver “by ordinary mail” routine “notices, decisions, and other papers” to the applicant’s or petitioner’s “last known address.”³⁶⁷ In some cases, USCIS may deliver notices and decisions “by certified or registered mail, return receipt requested.”³⁶⁸ Notably, the regulations also authorize USCIS to send notices and decisions, upon the stakeholder’s request, “by [email or by] posting the decision to the [applicant’s] USCIS account.”³⁶⁹

Most non-U.S. citizens who are present in the United States must notify USCIS of any change of address within 10 days of moving.³⁷⁰ Such notification can be accomplished by submitting Form AR-11, *Alien’s Change of Address*, by mail or through the USCIS website. *See*

³⁶⁴ See Ombudsman’s Annual Report 2016, p. 40 and Ombudsman’s Annual Report 2015, pp. 81–82.

³⁶⁵ Information provided by USCIS (Mar. 24, 2017).

³⁶⁶ *Id.*

³⁶⁷ 8 C.F.R. § 103.8(a)(1)(i).

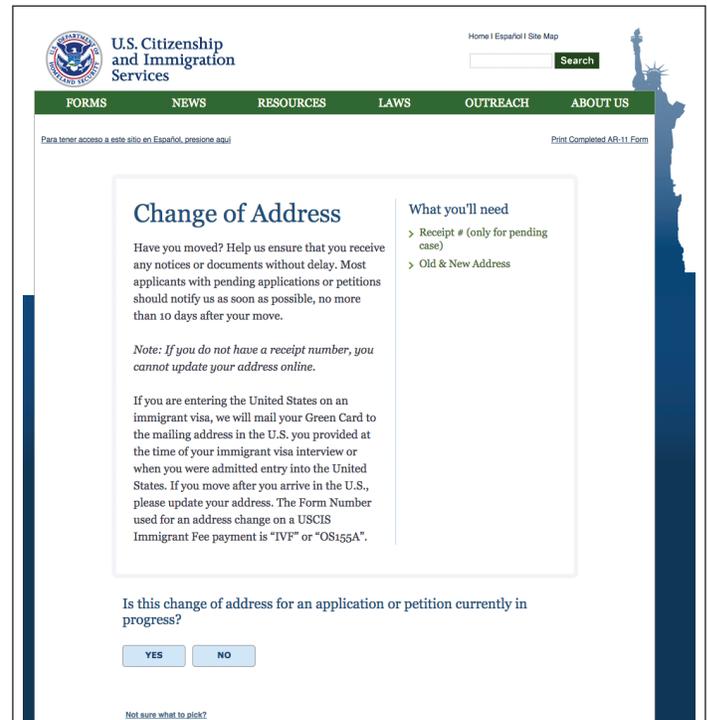
³⁶⁸ 8 C.F.R. § 103.8(a)(2)(iv).

³⁶⁹ 8 C.F.R. § 103.8(a)(2)(v).

³⁷⁰ INA §§ 265 and 266, 8 U.S.C. §§ 1305 and 1306; 8 C.F.R. § 265.

Figure 5.3, *USCIS Change of Address Webpage*.³⁷¹ Filing the Form AR-11, however, does not update mailing addresses for any pending or recently approved applications or petitions. In fact, the individuals must submit through a separate process any updates to the mailing address associated with pending applications or petitions.³⁷² Stakeholders are required to call the USCIS NCSC³⁷³ or, if applicable, update their address through a USCIS ELIS account online.³⁷⁴

Figure 5.3: USCIS Change of Address Webpage



Source: USCIS Webpage, “Change of Address.”

³⁷¹ USCIS Webpage, “Change of Address Information” (Feb. 23, 2017); <http://www.uscis.gov/addresschange> (accessed Mar. 13, 2017). Service Requests for a change of address can be initiated by either calling the NCSC or completing a request on USCIS’ webpage at <http://www.uscis.gov/addresschange>. Service Requests are sent through USCIS’ Service Request Management Tool and routed to the USCIS office of jurisdiction.

³⁷² Information provided by USCIS (May 8, 2017); *see also* USCIS Webpage, “Change of Address Information,” *supra* note 371. Service Requests for a change of address can be initiated by either calling the NCSC or completing a request on USCIS’ webpage at <http://www.uscis.gov/addresschange>.

³⁷³ USCIS reports receiving 501,672 service requests relating to change of address issues in FY 2016, which represented about 34% percent of the total service requests received. Information provided by USCIS (Mar. 24, 2017).

³⁷⁴ Information provided by USCIS (May 8, 2017) (explaining that “calling the NCSC will only update the mailing address for pending applications, and submitting a paper Form AR-11 will only update the residential address [to] satisfy statutory requirements”); *see also* USCIS Webpage, “Change of Address;” <https://egov.uscis.gov/coa/displayCOAForm.do> (accessed Mar. 13, 2017).



USCIS considers any document or notice not returned by USPS as having been properly delivered, regardless of whether there was an address change.³⁷⁵ Therefore, it becomes incumbent upon the petitioner or applicant to obtain from USPS proof of non-receipt. Absent proof that the document was improperly delivered, USCIS requires that the applicant file a new application—with filing fee—in order to obtain a replacement. Applicants must then wait for the new application to be adjudicated, which often takes several months.

Since 2011, USCIS has delivered immigration documents, such as LPR cards and EADs, via USPS Priority Mail with Delivery Confirmation.³⁷⁶ This allows stakeholders to obtain a tracking number from USCIS and ascertain delivery status via the USPS website. USPS records and website, however, only show delivery confirmation to a city, state, and zip code, and not to a specific address.

Pre-paid Courier Service Mailing Labels. USCIS began accepting some pre-paid courier service mailing labels with

envelopes submitted with certain filings in late 2014.³⁷⁷ USCIS does not accept pre-paid mailers for LPR cards or EADs, as the cards are almost always produced at a different facility from the offices where the applications are adjudicated. However, service centers may accept pre-paid mailers for mailing final decisions, including approval notices.³⁷⁸

“Hold for Pickup” Pilot. In 2014, USCIS announced plans to launch a “hold for pickup” pilot allowing applicants to pick up LPR cards and EADs at their local U.S. Post Office.³⁷⁹ Under this pilot, USCIS would notify participating applicants via email that their cards are available for pickup. As of April 2017, USCIS did not have a start date for this pilot.³⁸⁰ The Ombudsman encourages USCIS to accelerate the launch of this pilot program, believing it will offer a welcome opportunity for exploring alternatives to the current process.

³⁷⁵ Information provided by USCIS in response to requests for case assistance.

³⁷⁶ USCIS Webpage, “USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative” (May 2, 2011); <http://www.uscis.gov/news/uscis-improves-delivery-immigration-documents-through-secure-mail-initiative> (accessed Mar. 13, 2017).

³⁷⁷ See USCIS Webpage, “Clarification: USCIS Customers Can Select Delivery Service to Receive Certain Documents” (Aug. 20, 2014); <http://www.uscis.gov/news/alerts/clarification-uscis-customers-can-select-delivery-service-receive-certain-documents> (accessed Mar. 13, 2017); USCIS Webpage, “USCIS Service and Office Locator: Use of a Courier Service to Receive Certain Notices, Decisions or Travel Documents”; https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=SC (accessed Mar. 13, 2017).

³⁷⁸ Information provided by USCIS (Apr. 12, 2017) (noting further that pre-paid courier mailing labels for travel authorization documents were accepted when adjudication of the applications and production of the documents were co-located, but this practice will be discontinued once production of these documents shifts to the production facility).

³⁷⁹ Ombudsman’s Annual Report 2016, p. 40.

³⁸⁰ Information provided by USCIS (Apr. 12, 2017).

Address Changes in ELIS. As noted in previous reports, the anticipated benefits of electronic processing in ELIS, including the ability to maintain accurate change of address information, have been undermined by a myriad of technological problems and implementation delays.³⁸¹ In its March 2016 report, the OIG found that since ELIS was deployed in 2012, USCIS had delivered “potentially hundreds” of LPR cards to the wrong addresses.³⁸² The OIG concluded that a system limitation in ELIS prevented the timely updating of address changes.³⁸³ According to the OIG, “[e]ven in cases where customers requested address changes, adjudicators were unable to update the system.”³⁸⁴ In its November 2016 report, the OIG noted that ELIS “did not always accurately display address information, often eliminating or cutting off critical elements such as apartment numbers.”³⁸⁵ The OIG found that the number of LPR cards sent to the wrong addresses had “incrementally increased since 2013 due in part to complex processes for updating addresses, ELIS limitations, and factors beyond the agency’s control.”³⁸⁶ USCIS recently implemented a system correction in ELIS to enable applicants to change their address online and prevent the mailing of the LPR cards to a previous address.³⁸⁷

Request for Case Assistance

An applicant contacted the Ombudsman because he did not receive his LPR card. Although he called the NCSC to submit a change of address prior to his card being mailed, USCIS mailed the LPR card to his old address. In response to the Ombudsman’s inquiry, USCIS stated that because USPS did not return the card to USCIS as undeliverable and because the address change was received after USCIS sent the card to production, the applicant would be required to file Form I-90, *Application to Replace Permanent Resident Card*, with the required \$540 filing fee to obtain a replacement card.³⁸⁸ This applicant was forced to wait months to obtain evidence of LPR status, and pay an additional \$540 filing fee, simply because he sought to change his address during the window of time between the approval of his application and the mailing of his card. Additionally, an LPR card with his personal information was issued and never returned to USCIS, leaving him vulnerable to identity theft and raising fraud and security concerns.

Proposed Legislation to Mitigate Mailing Issues.

Congress took up legislation in 2016 to address USCIS mailing issues. H.R. 4712 would have required USCIS to offer delivery with signature at the expense of the USCIS stakeholder.³⁸⁹ It passed the House on a voice vote, but went no further. Requiring a signature for delivery would help ensure that secure documents are delivered to their rightful recipients.

Ongoing Concerns

Requests for case assistance regarding mailing problems are sometimes the result of USCIS error in entering the address, agency failure to timely record a change of address across its various systems, or technical errors such as incomplete addresses and mailing label printing errors. Regardless of the nature of the error, at times neither USCIS nor USPS are able to account for the document. While USPS may return a notice or document as undeliverable to USCIS, it may also improperly deliver it, leaving USCIS with no record of a mis-delivered document.

Notice and document delivery problems are exacerbated by USCIS change of address procedures. The submission of Form AR-11 does not automatically update all USCIS

³⁸¹ See *The Continuing Challenge of Transformation* in this Report *supra* at 51–55; see also 2016 Annual Report, p. 41.

³⁸² OIG Audit, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” OIG-16-48 at 28 (Mar. 9, 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Mar. 13, 2017) (explaining that personnel at the Texas Service Center handling the correction of the erroneous deliveries were reported as saying “their only option for addressing the problem of incorrect addresses was to manually send out notices [to the erroneous addresses] with instructions on how to mail the cards back, but this was not effective”). See also OIG Audit, “Better Safeguards Are Needed in USCIS Green Card Issuance,” OIG-17-11 at 4 (Nov. 16, 2016); <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-11-Nov16.pdf> (accessed June 21, 2017).

³⁸³ OIG Audit, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” *supra* note 382 at 28. See also “The Continuing Challenge of Transformation” in this Report *supra* at 51–55.

³⁸⁴ *Id.*

³⁸⁵ OIG Audit, “Better Safeguards Are Needed in USCIS Green Card Issuance,” *supra* note 382 at 17.

³⁸⁶ *Id.* at 15.

³⁸⁷ “Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems,” *before the Subcommittee on Oversight and Management Efficiency of the House Committee on Homeland Security*, 115th Cong. 1st Sess. 4 (2017) (Written testimony of Lori Scialabba, Acting USCIS Director); <http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf> (accessed May 10, 2017).

³⁸⁸ Information provided by USCIS in response to request for case assistance.

³⁸⁹ H.R. 4712, 114th Cong. 2nd Sess. 3 (2016).

systems where there are pending applications or petitions, and changes of address requests submitted by mail “may take 3 to 7 days to process.”³⁹⁰ Due to system limitations, USCIS is not able to change the mailing address once a card or document goes into production.³⁹¹ Further, there is no process for staff at card production facilities to verify that a document is being mailed to the correct address.³⁹² As such, USCIS applicants who move while a case is pending may wish to ask their local post office to hold their mail. Change of address requests should be fully incorporated and linked to cases in process, including even after a card or document goes into production. USCIS also needs to rectify lingering ELIS issues that prevent systems from properly and timely recording changes of address.

As in years past, the Ombudsman again encourages USCIS to consider alternative mailing options, including mailing secure documents with signature required for delivery to allow for more accurate tracking, implementing electronic delivery or online posting of notices and decisions, implementation of the proposed pilot program,

and expanded use of pre-paid couriers across offices and product lines.³⁹³ Additionally, the Ombudsman recommends USCIS advise the public that it will take up to 5 days to record a change of address; notify stakeholders promptly when their notices or documents are returned as undeliverable; and provide notice that the agency is currently unable to change mailing addresses once a card or document is sent to the production facility. To address both applicant frustration and security vulnerabilities, USCIS should continue to work closely with USPS to test improved protocols for delivering secure documents.³⁹⁴

³⁹⁰ Information provided by USCIS (May 8, 2017).

³⁹¹ *Id.* But see OIG Audit, “Better Safeguards Are Needed in USCIS Green Card Issuance,” *supra* note 382 at 17 (noting that “[a]fter a card enters production, an address update can sometimes be accomplished during the 72-hour hold before printing and mailing, but only by certain individuals with the appropriate case access level”).

³⁹² OIG Audit, “Better Safeguards Are Needed in USCIS Green Card Issuance,” *supra* note 382 at 10–11.

³⁹³ See Ombudsman’s Annual Report 2016, p. 40. See also Ombudsman’s Annual Report 2015, p. 83.

³⁹⁴ The Ombudsman is encouraged by USCIS’ concurrence in the recommendations of the OIG regarding its card recovery plan. The agency engaged in a review of processes for card recovery efforts and lessons learned in order to develop a Standard Operating Procedure for these efforts. See OIG Audit, “Better Safeguards Are Needed in USCIS Green Card Issuance,” *supra* note 382 at 27.

Appendices

Ombudsman Recommendation Retrospective: A Review of Ombudsman Recommendations Issued in the Last 5 Years

In conformity with statutory requirements, the Ombudsman makes formal recommendations to the USCIS Director. The agency has 3 months to respond in writing. This chart represents the Ombudsman's recommendations issued since the last major review of recommendations in 2012, including the USCIS response and the current status. All of the Ombudsman's recommendations and the USCIS responses can be found on the Office of the CIS Ombudsman's website at <https://www.dhs.gov/recommendations>.

Recommendation Date Issued: September 20, 2012	USCIS Response	Implemented	Active	Declined	Closed
54: Ensuring a Fair and Effective Asylum Process for Unaccompanied Children (UACs)	April 18, 2013				
1. Accept jurisdiction of UAC cases referred by EOIR.	Concurs in principle	x			x
2. Accept jurisdiction of cases filed by children in federal custody under HHS.	Concurs in principle	x			x
3. Follow established UAC-specific procedures, expand implementation of certain best practices, and enlist experts for quality assurance and training.	Concurs in principle	x	x		
4. Limit Headquarters review to a process that can be managed within 30 days.	Concur	Implemented through case consolidation at the National Benefits Center.			
5. Issue as soon as possible regulations regarding the UAC asylum process.	Concur	As of May 2017, regulations have not been issued but remain on the Federal Register Unified Agenda and Regulatory Plan.	x		

Recommendation Date Issued: November 26, 2012	USCIS Response	Implemented	Active	Declined	Closed
55: Adjudication of Applications and Petitions Under INA Section 204(I)	July 8, 2013				
1. Conduct rulemaking to create or designate a standard form, establish a receipt protocol and describe an adjudication process consistent with the plain language of INA section 204(I).	Non-concur			x	
2. Train USCIS staff to interpret and apply properly INA section 204(I) and stop regarding survivor benefit requests as a form of discretionary reinstatement.	Non-concur	USCIS stated it would send a reminder to officers on applying section 204(I) consistent with policy.		x	
3. Publish instructions for applicants and petitioners as to the nature and extent of INA section 204(I) coverage and related benefit request processes.	Concur		x		
4. Track and monitor the processing of survivor benefit requests.	Concur	As of May 2017, no public tracking.	x		

Recommendation					
Date Issued: February 28, 2013	USCIS Response	Implemented	Active	Declined	Closed
56: Improving the Process for Removal of Conditions on Residence for Spouses and Children					
July 10, 2013					
1. Provide timely, effective and accurate notice to petitioners and their attorneys or accredited representatives on I-751 receipt, processing and adjudication requirements and decisions.	Partially Concur	USCIS committed to: (1) extracting the address from the AR-11 change of address information system; (2) updating the tracking system to give copies of notices to the petitioner and attorney of record; (3) providing additional guidance if an officer's RFE is not clear; and (4) making processing improvements via Transformation. As of this time the I-751 is not being processed via ELIS (Transformation).	x		
2. Ensure USCIS Adjudicator Field Manual (AFM) Chapter 25 is updated, accurate and complete, or create a superseding source of consolidated information for I-751 adjudications.	Concur	The Policy Manual has not yet been updated for family-based conditional permanent residents.			
3. Train USCIS staff to apply the updated AFM or superseding guidance with emphasis on waiver standards and procedures.	Concur	Updates to the Policy Manual have yet to be finalized.			

Recommendation					
Date Issued: March 24, 2014	USCIS Response	Implemented	Active	Declined	Closed
57: Employment Eligibility for Derivatives of Conrad State 30 Physician Program					
July 14, 2014					
1. Publish regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program waiver to change to other employment-authorized nonimmigrant classifications.	Concur	There has been no regulatory movement on this issue, nor has it been added to the Unified Regulatory Agenda.	x		
2. Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.	Non-concur			x	

Recommendation					
Date Issued: June 11, 2014	USCIS Response	Implemented	Active	Declined	Closed
58: Improving Quality and Consistency in Notices to Appear (NTAs)					
October 6, 2014					
1. Provide additional guidance for NTA issuance with input from ICE and EOIR.	Concur	USCIS sought input from ICE as it reviewed and updated its agency guidance for NTA issuance. This guidance remains under DHS review. USCIS updated the NTA section of the Consolidated Handbook of Adjudications Procedures to clarify NTA issuance to P.O. Boxes.	x		
2. Require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training.	Partially Concur	USCIS did not concur with the recommendation to have USCIS attorneys review all NTAs prior to issuance, but did concur on legal training.		x	
3. Create a working group with representation from ICE and EOIR to improve tracking, information-sharing, and coordination of NTA issuance.	Concur				x

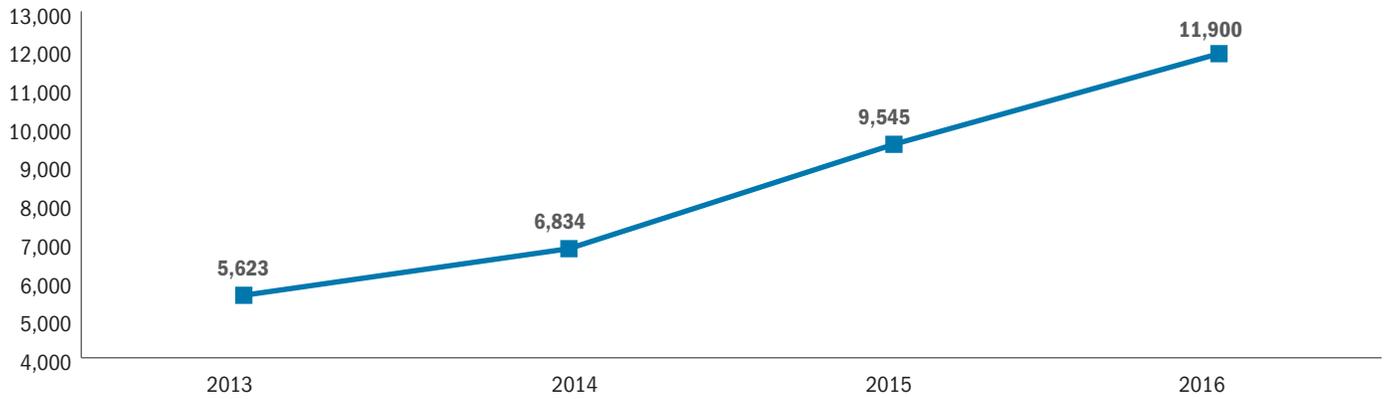
Recommendation					
Date Issued: December 11, 2015	USCIS Response	Implemented	Active	Declined	Closed
59: Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications					
September 28, 2016					
1. Centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations.	Concur	Starting November 1, 2016, USCIS centralized processing of SIJ petitions and SIJ-based adjustment of status applications at the NBC.			x
2. Take into account the best interests of the child when applying criteria for interview waivers.	Partially Concur	USCIS stated that referrals for interviews would occur only when necessary to secure information through an in-person assessment and sought input on interview waiver criteria from agency components.			x
3. Issue final SIJ regulations that fully incorporate all statutory amendments.	Partially Concur	USCIS stated it would continue the rulemaking process, and update the USCIS Policy Manual in the interim.	x		
4. Interpret the consent function consistently with the statute by according greater deference to State court findings.	Non-concur	USCIS stated it “will generally defer to State court orders that (1) have been properly issued under State law; and (2) include or are supplemented by a reasonable factual basis that establishes the court order was sought for relief from abuse, neglect abandonment or a similar basis under State law, and not solely or primarily to obtain an immigration benefit.”		x	

Recommendation					
Date Issued: June 16, 2016	USCIS Response	Implemented	Active	Declined	Closed
60: Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad		September 29, 2016			
1. USCIS should afford parole to eligible U visa petitioners on the waiting list and qualifying derivative family members who reside abroad by creating a policy to facilitate entry into the United States while waiting for a visa to become available.	Concur	Although USCIS initially agreed with this recommendation, as of April 11, 2017, USCIS stated that it no longer plans to implement a parole process for principal and derivative petitioners residing abroad.		x	
2. Allow for concurrent filings of the U visa petitions and requests for parole.	See #1			x	
3. Cases should be adjudicated at the VSC to ensure consistent and effective adjudication.	See #1			x	

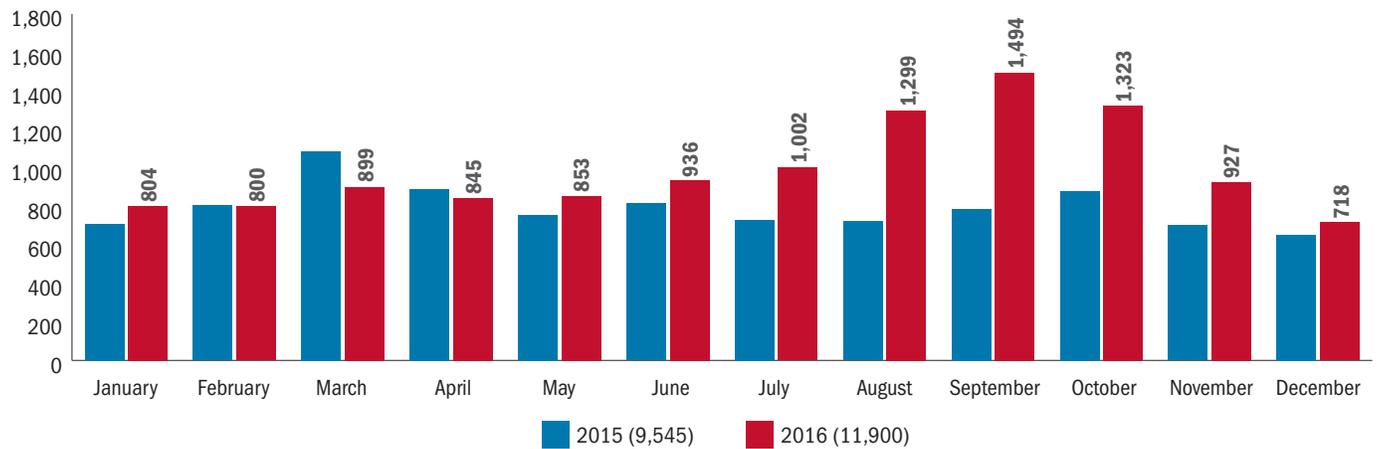
Recommendation					
Date Issued: December 12, 2016	USCIS Response	Implemented	Active	Declined	Closed
61: Recommendation on the Central American Minors (CAM) Refugee/Parole Program		Pending (due March 21, 2017)			
1. USCIS, in coordination with DOS, should increase the volume of interviews and associated Refugee Access Verification Unit processing of CAM cases.					
2. USCIS should permit access to counsel in CAM interviews.					
3. USCIS, in coordination with DOS, should create a plain language, comprehensive CAM "Information Guide."					
4. USCIS, in coordination with DOS, should publish and regularly update CAM case processing times.					

The Ombudsman by the Numbers

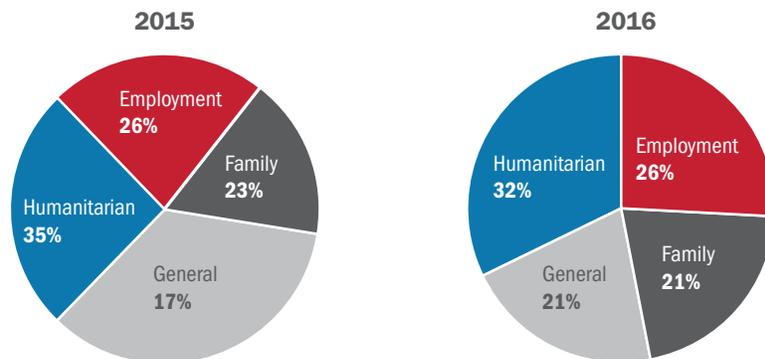
Requests for Ombudsman Case Assistance Received by Year



Requests for Ombudsman Case Assistance Received by Month for 2015 and 2016



Requests for Ombudsman Case Assistance—Submission by Category



General form types include Form N-400, Form I-90, Form I-131, Form AR-11, Form N-600, and Form G-639.

Top Primary Form Types	# Received	% Increase from 2015
I-821D, Consideration of Deferred Action for Childhood Arrivals	2,042	21%
I-765, Application for Employment Authorization	1,832	135%
N-400, Application for Naturalization	1,294	198%
I-130, Petition for Alien Relative	1,103	31%
I-485 (Other Classification), Application to Register Permanent Residence or Adjust Status (Other Classification)	745	21%
I-485 (Based on an I-130), Application to Register Permanent Residence or Adjust Status (Family-Based)	651	22%
I-485 (Based on an I-140), Application to Register Permanent Residence or Adjust Status (Employment-Based)	650	14%
I-140, Immigrant Petition for Alien Worker	285	18%
I-131, Application for Travel Document	248	23%
I-751, Petition to Remove the Conditions of Residence	245	31%

Top Five States Where Customers Reside and the Top Five Primary Form Types

California		
Requests Received: 1,987		
Top Primary Form Types:	Count	% of Total
I-821D, Consideration of Deferred Action for Childhood Arrivals	590	30%
I-485, Application to Register Permanent Residence or Adjust Status	289	15%
I-765, Application for Employment Authorization	239	12%
N-400, Application for Naturalization	158	8%
I-130, Petition for Alien Relative	109	5%

Illinois		
Requests Received: 774		
Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	188	24%
I-130, Petition for Alien Relative	137	18%
I-765, Application for Employment Authorization	120	16%
I-821D, Consideration of Deferred Action for Childhood Arrivals	97	13%
N-400, Application for Naturalization	81	10%

Texas		
Requests Received: 1,254		
Top Primary Form Types:	Count	% of Total
I-821D, Consideration of Deferred Action for Childhood Arrivals	289	23%
I-485, Application to Register Permanent Residence or Adjust Status	248	20%
N-400, Application for Naturalization	155	12%
I-765, Application for Employment Authorization	155	12%
I-130, Petition for Alien Relative	101	8%

Florida		
Requests Received: 607		
Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	104	17%
I-821D, Consideration of Deferred Action for Childhood Arrivals	83	14%
N-400, Application for Naturalization	82	14%
I-765, Application for Employment Authorization	79	13%
I-130, Petition for Alien Relative	66	11%

New York		
Requests Received: 1,214		
Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	264	22%
I-765, Application for Employment Authorization	193	16%
I-130, Petition for Alien Relative	96	8%
N-400, Application for Naturalization	58	5%
I-821D, Consideration of Deferred Action for Childhood Arrivals	57	5%

Delegation of Authorities

Department of Homeland Security

DHS Delegation Number: 22000

Revision Number: 01

Issue Date: 5/23/2016

DELEGATION TO CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN

I. Purpose

This is a delegation of authority to the Citizenship and Immigration Services Ombudsman, head of an independent, impartial, and confidential Support Component within the Department.

II. Delegation

Subject to my oversight, direction and guidance, and limited to the extent necessary to carry out the mission of the Office of the Citizenship and Immigration Services Ombudsman as established by 6 U.S.C. Section 272, I delegate to the Citizenship and Immigration Services Ombudsman the authority to:

- A. Obtain access to USCIS facilities, data, documents, case management and other electronic systems, case files, and other information for the provision of assistance in case resolution, analysis of systemic issues, and development of recommendations regarding the administration of immigration benefits by USCIS.
- B. Assist individuals and employers in resolving problems with their immigration benefits applications and petitions by consulting directly with appropriate personnel in USCIS headquarters, field offices, service centers, and other offices, and providing impartial and independent recommendations to USCIS for remedial action.
- C. Enter into Memoranda of Understanding between the Ombudsman and federal agencies, or between the Ombudsman and other Department of Homeland Security Components, in addition to USCIS, to achieve the Ombudsman's statutory mission.

III. Re-delegation

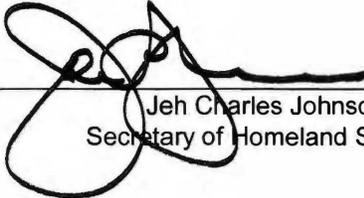
This authority may be re-delegated, in writing, to an appropriate subordinate official.

IV. Authorities

- A. Title 6, United States Code (U.S.C.), Section 112, "Secretary; functions"
- B. Title 6, U.S.C., Section 272, "Citizenship and Immigration Services Ombudsman"

V. Offices of Primary Interest

The Office of the Citizenship and Immigration Services Ombudsman and USCIS have the primary interest in this delegation.



Jeh Charles Johnson
Secretary of Homeland Security

May 23, 2016
Date

Homeland Security Act— Section 452—Citizenship and Immigration Services Ombudsman

SEC. 452. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN.

(a) **IN GENERAL**—Within the Department, there shall be a position of Citizenship and Immigration Services Ombudsman (in this section referred to as the ‘Ombudsman’). The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law.

(b) **FUNCTIONS**—It shall be the function of the Ombudsman—

- 1) To assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services;
- 2) To identify areas in which individuals and employers have problems in dealing with the Bureau of Citizenship and Immigration Services; and
- 3) To the extent possible, to propose changes in the administrative practices of the Bureau of Citizenship and Immigration Services to mitigate problems identified under paragraph (2).

(c) **ANNUAL REPORTS**—

1) **OBJECTIVES**—Not later than June 30 of each calendar year, the Ombudsman shall report to the Committee on the Judiciary of the House of Representatives and the Senate on the objectives of the Office of the Ombudsman for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and—

- (A) Shall identify the recommendation the Office of the Ombudsman has made on improving services and responsiveness of the Bureau of Citizenship and Immigration Services;
- (B) Shall contain a summary of the most pervasive and serious problems encountered by individuals and employers, including a description of the nature of such problems;

- (C) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action has been taken and the result of such action;
- (D) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action remains to be completed and the period during which each item has remained on such inventory;
- (E) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and shall identify any official of the Bureau of Citizenship and Immigration Services who is responsible for such inaction;
- (F) Shall contain recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers, including problems created by excessive backlogs in the adjudication and processing of immigration benefit petitions and applications; and
- (G) Shall include such other information as the Ombudsman may deem advisable.

2) **REPORT TO BE SUBMITTED DIRECTLY**—Each report required under this subsection shall be provided directly to the committees described in paragraph (1) without any prior comment or amendment from the Secretary, Deputy Secretary, Director of the Bureau of Citizenship and Immigration Services, or any other officer or employee of the Department or the Office of Management and Budget.

(d) **OTHER RESPONSIBILITIES**—The Ombudsman—

- 1) shall monitor the coverage and geographic allocation of local offices of the Ombudsman;
- 2) shall develop guidance to be distributed to all officers and employees of the Bureau of Citizenship and Immigration Services outlining the criteria for referral of inquiries to local offices of the Ombudsman;
- 3) shall ensure that the local telephone number for each local office of the Ombudsman is published and available to individuals and employers served by the office; and
- 4) shall meet regularly with the Director of the Bureau of Citizenship and Immigration Services to identify serious service problems and to present recommendations

for such administrative action as may be appropriate to resolve problems encountered by individuals and employers.

(e) PERSONNEL ACTIONS—

1) IN GENERAL—The Ombudsman shall have the responsibility and authority—

(A) To appoint local ombudsmen and make available at least 1 such ombudsman for each State; and

(B) To evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of the Ombudsman.

2) CONSULTATION—The Ombudsman may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services in carrying out the Ombudsman's responsibilities under this subsection.

(f) RESPONSIBILITIES OF BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES—

The Director of the Bureau of Citizenship and Immigration Services shall establish procedures requiring a formal response to all recommendations submitted to such director by the Ombudsman within 3 months after submission to such director.

(g) OPERATION OF LOCAL OFFICES—

1) IN GENERAL—Each local ombudsman—

(A) shall report to the Ombudsman or the delegate thereof;

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

(C) shall, at the initial meeting with any individual or employer seeking the assistance of such local office, notify such individual or employer that the local offices of the Ombudsman operate independently of any other component of the Department and report directly to Congress through the Ombudsman; and

(D) at the local ombudsman's discretion, may determine not to disclose to the Bureau of Citizenship and Immigration Services contact with, or information provided by, such individual or employer.

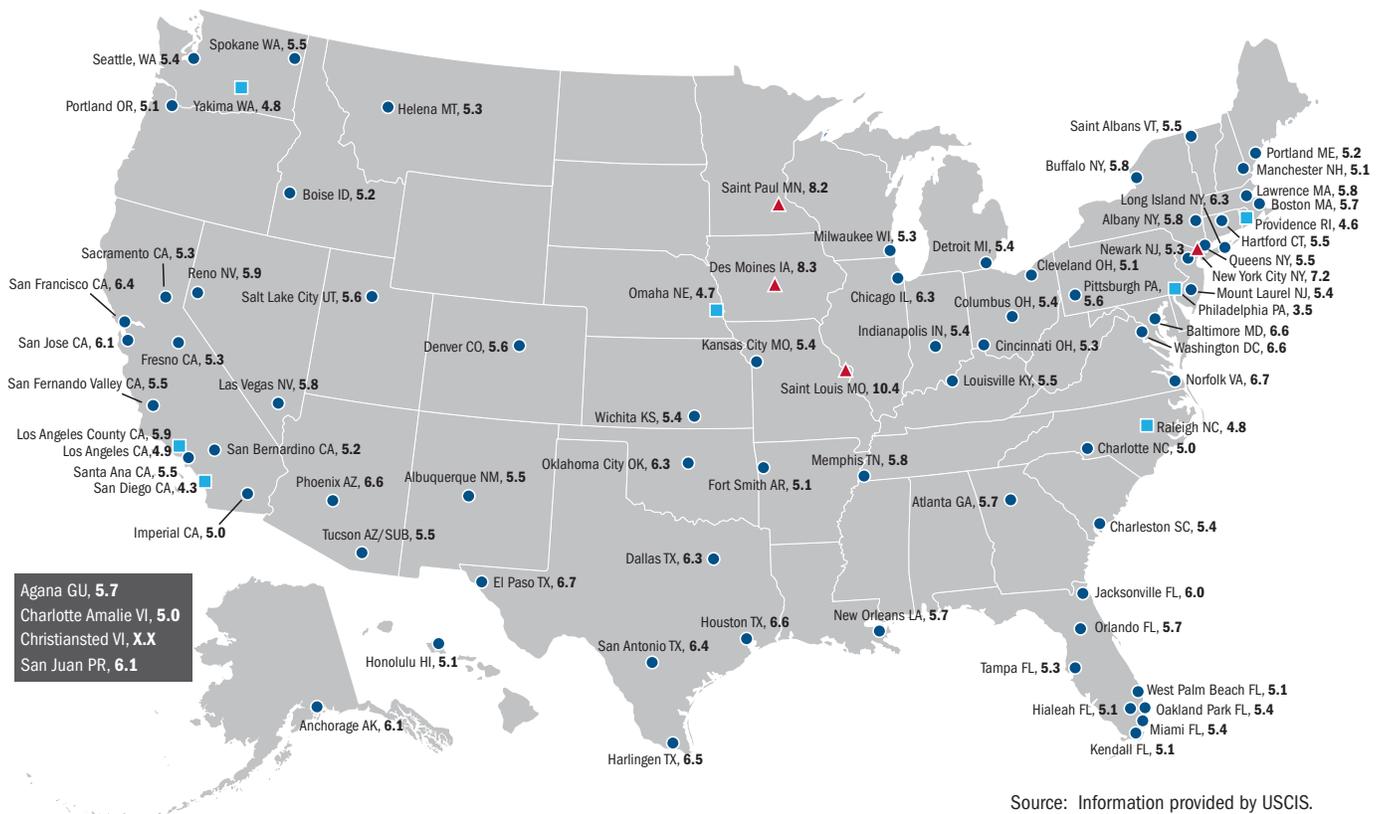
(2) MAINTENANCE OF INDEPENDENT COMMUNICATIONS—Each local office of the Ombudsman shall maintain a phone, facsimile, and other means of electronic communication access, and a post office address, that is separate from those maintained by the Bureau of Citizenship and Immigration Services, or any component of the Bureau of Citizenship and Immigration Services.

USCIS Naturalization and Adjustment of Status Processing Times

Average Processing Times for USCIS Field Offices for Forms N-400, Application for Naturalization

July-Sep. 2016 (FY 2016 4th Quarter)

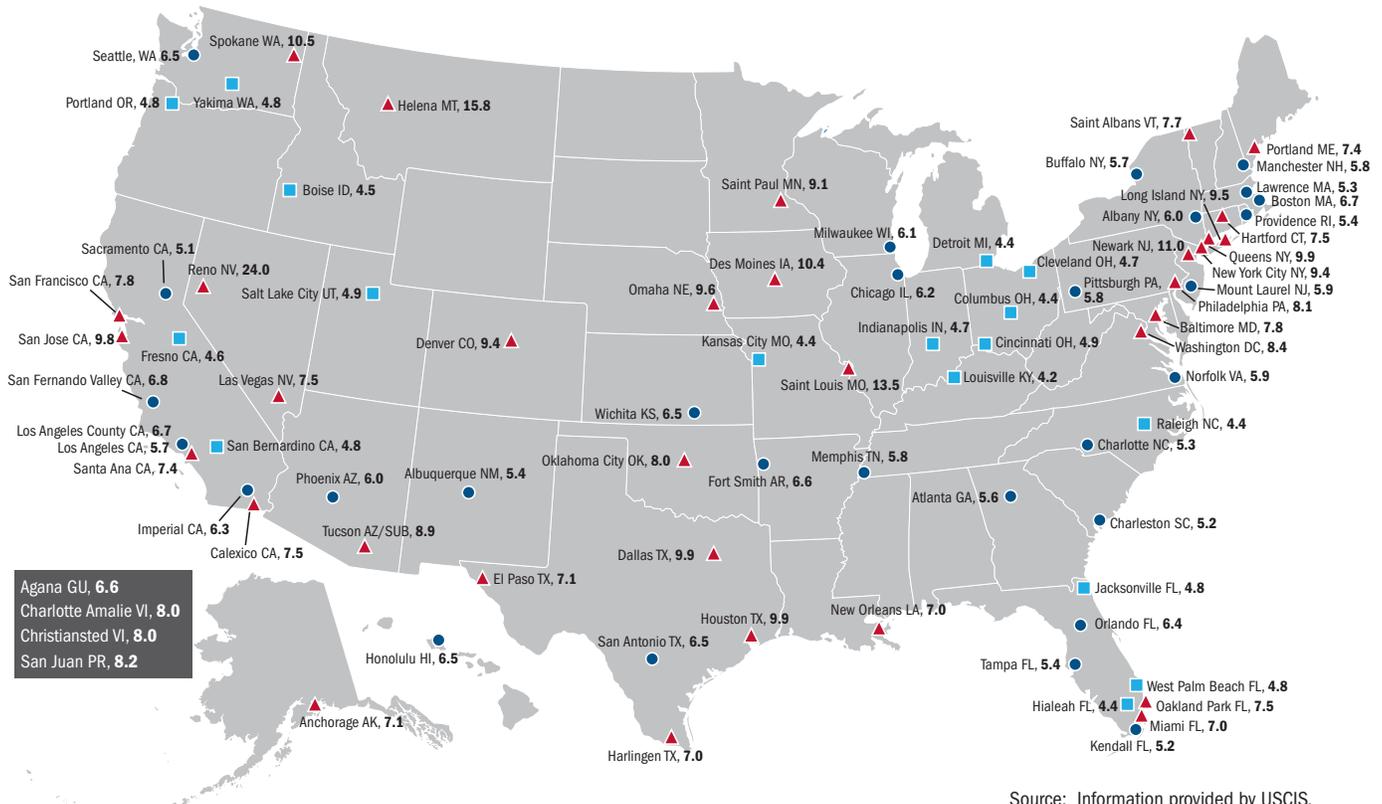
■ = 0-5 months ● = 5-7 months ▲ = 7+ months



Average Processing Times for USCIS Field Offices for Forms I-485, Application to Register Permanent Residence or Adjust Status

July-Sep. 2016 (FY 2016 4th Quarter)

■ = 0-5 months ● = 5-7 months ▲ = 7+ months

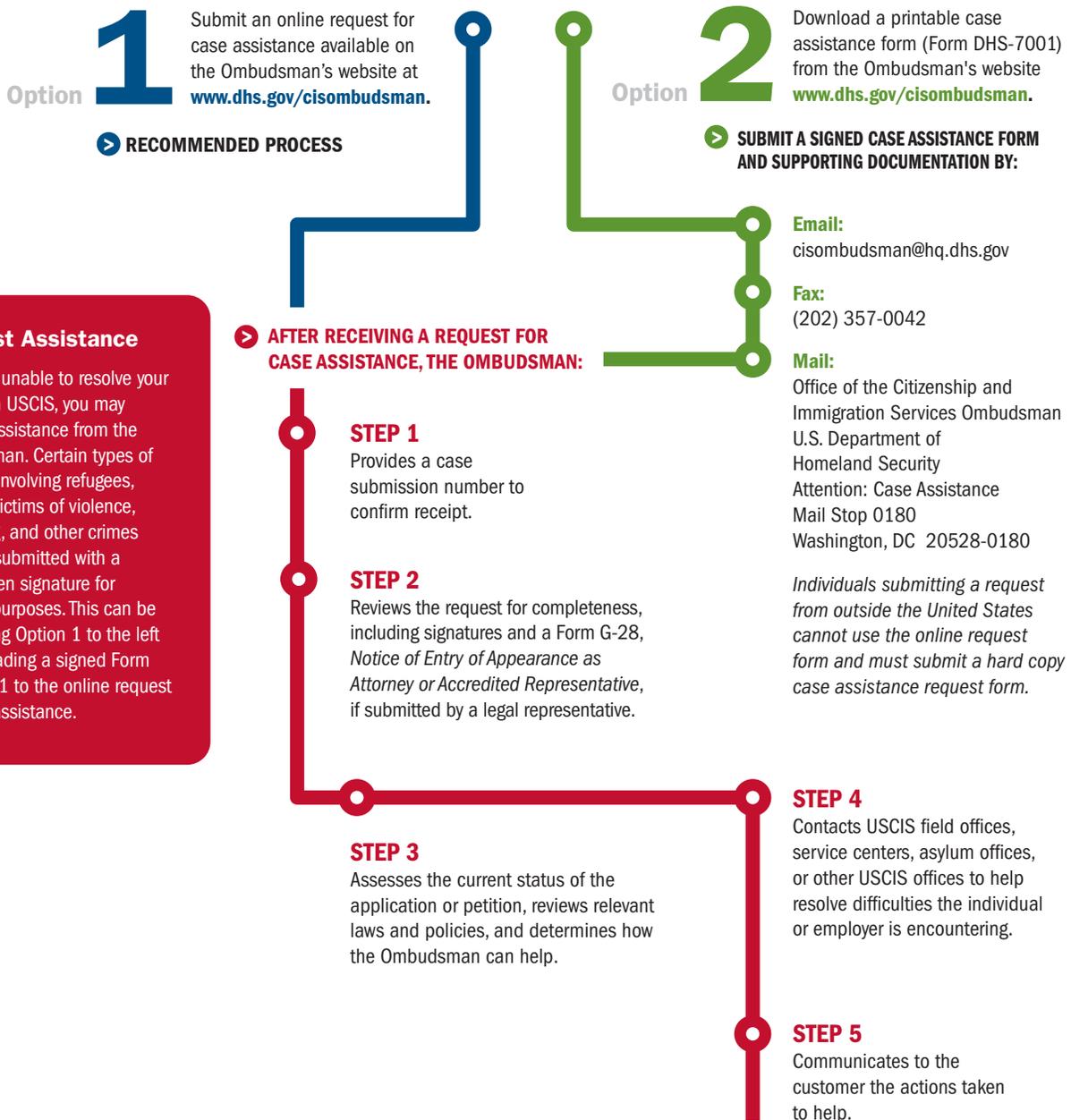


How to Request Case Assistance from the Ombudsman: Scope of Assistance Provided

Helping Individuals and Employers Resolve Problems with USCIS

Before asking the Ombudsman for help with an application or petition, try to resolve the issue with USCIS by:

- Obtaining information about the case at USCIS My Case Status at www.uscis.gov.
- Submitting an e-Request with USCIS online at <https://egov.uscis.gov/e-Request>.
- Contacting the USCIS National Customer Service Center (NCSC) for assistance at **1-800-375-5283**.
- Making an InfoPass appointment to speak directly with a USCIS Immigration Services Officer in a field office at www.infopass.uscis.gov.



Request Assistance

If you are unable to resolve your issue with USCIS, you may request assistance from the Ombudsman. Certain types of requests involving refugees, asylees, victims of violence, trafficking, and other crimes must be submitted with a handwritten signature for consent purposes. This can be done using Option 1 to the left and uploading a signed Form DHS-7001 to the online request for case assistance.

Acronyms

AAO	Administrative Appeals Office	MOU	Memorandum of Understanding
AC21	American Competitiveness in the 21st Century Act	NBC	National Benefits Center
ACWIA	American Competitiveness and Workforce Improvement Act of 1998	NCSC	National Customer Service Center
AFM	Adjudicator’s Field Manual	NOID	Notice of Intent to Deny
AIT	Advanced Individual Training	NRC	National Records Center
BIA	Board of Immigration Appeals	NSC	Nebraska Service Center
CLAIMS	Computer Linked Application Information Management System	NTA	Notice to Appear
CSC	California Service Center	NVC	National Visa Center
DACA	Deferred Action for Childhood Arrivals	OIG	Office of Inspector General
DEP	Delayed Entry Program	OPT	Optional Practical Training
DHS	U.S. Department of Homeland Security	PRA	Paperwork Reduction Act
DOD	U.S. Department of Defense	PSC	Potomac Service Center
DOL	U.S. Department of Labor	RAIO	Refugee, Asylum, and International Operations
DOJ	U.S. Department of Justice	RFE	Request for Evidence
DOS	U.S. Department of State	SAVE	Systematic Alien Verification for Entitlements
EAD	Employment Authorization Document	SMI	Secure Mail Initiative
ELIS	Electronic Immigration System	SRMT	Service Request Management Tool
EOIR	Executive Office for Immigration Review	TPS	Temporary Protected Status
FY	Fiscal Year	TSC	Texas Service Center
GAO	U.S. Government Accountability Office	TVPRA	Trafficking Victims Protection Reauthorization Act
HSA	Homeland Security Act	UAC	Unaccompanied Alien Children
ICE	U.S. Immigration and Customs Enforcement	USCIS	U.S. Citizenship and Immigration Services
INA	Immigration and Nationality Act	USPS	U.S. Postal Service
INS	Immigration and Naturalization Service	VAWA	Violence Against Women Act
MAVNI	Military Accessions Vital to the National Interest	VSC	Vermont Service Center



Homeland
Security

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

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