



Annual Report 2019

Citizenship and Immigration Services Ombudsman

July 12, 2019



Homeland
Security

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Security

*Office of the Citizenship and Immigration Services
Ombudsman*
U.S. Department of Homeland Security
Mail Stop 0180
Washington, DC 20528-0180



**Homeland
Security**

July 12, 2019

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jerry Nadler
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 Doug Collins
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 2019 Annual Report.

I am available to provide additional information upon request.

Sincerely,

A handwritten signature in cursive script that reads "Julie Kirchner".

Julie Kirchner
Citizenship and Immigration Services Ombudsman

www.dhs.gov/cisombudsman

Message from the Ombudsman



Dear Members of Congress,

I am pleased to present the Citizenship and Immigration Services Ombudsman's 2019 Annual Report to Congress.

The Office of the Citizenship and Immigration Services Ombudsman was created in 2002 through Section 452 of the Homeland Security Act. Designed as a separate agency, independent of USCIS, our mission is two-fold: (1) to help individuals and employers resolve difficulties they experience in requesting immigration benefits from USCIS, and (2) to identify and analyze agency-wide issues and trends, making recommendations when possible to improve the administration of U.S. immigration laws.

We accomplish the first part of this mission by providing case-specific assistance to individuals and employers who submit formal requests to our office. Each year, our small Case Team triages thousands of these requests, expediting those that are particularly time sensitive, but responding to all as expeditiously as possible. Over the past several years, our case work has been growing steadily, and is now double what it was only 5 years ago (2013). In CY 2018, our office received approximately 11,294 requests for assistance from members of the public, a two percent increase from CY 2017.

We fulfill the second part of our mission through public outreach and engagement, listening to stakeholders explain the challenges they encounter navigating the immigration system. In addition to meeting with stakeholders, we host teleconferences; conduct listening sessions; speak at conferences (including our own unique Annual Conference); and analyze data from our case work to spot issues and trends. These interactions result in regular discussions with USCIS, both formal and informal, about the inner-workings of the agency and the challenges it faces in administering a complex immigration benefits system, which helps us make operationally feasible recommendations for how it can improve its processes.

Finally, as required by statute, we issue a report to Congress annually. We strive to make our annual reports a useful resource to readers—a resource that not only provides a technical description of an issue, but one that offers context and data to help readers make their own informed assessments. Like all agencies, our work is limited by time and resources, and therefore we have chosen to focus our efforts on a few, select topics that are timely and impact a broad spectrum of stakeholders. This year these topics include: the H-1B Visa Program; USCIS' applicant support services; USCIS' eProcessing initiative; the new Asylum Vetting Center; and processing delays related to Employment Authorization Documents (EADs).

Of particular interest to many readers will be our analysis of EAD processing times. Requests for help related to EADs constituted the single largest source of work for the Ombudsman's Case Team in CY 2018—over a third of our total case load. In fact, during a 4-month period between December 2017 and March 2018, the number of incoming EAD cases spiked 400 percent—most related to processing delays. Our Case Team worked tirelessly to address these cases, expediting those that met the criteria and batching our inquiries to USCIS in spreadsheets to help manage the volume. Since the spike, the number of EAD cases coming into our office has dropped somewhat, but they still constitute a significant portion of the Ombudsman's overall caseload. In CY 2019, year-to-date, EAD inquiries represent about 27 percent of our total cases.

In the pages that follow, we set forth our analysis of EAD processing times in detail. Our analysis is based on a variety of sources: discussions with stakeholders; site visits to USCIS Service Centers and the National Benefits Center; data provided by USCIS; and discussions we have had with the agency, both at headquarters and out in the field. Our goal is to provide context surrounding growing EAD processing times, outline broader trends, and offer insight into challenges USCIS faces in managing this important, high-volume portion of its workload. We also make recommendations to USCIS on how to address these challenges.

Another issue we explore in depth in our 2019 Annual Report is the H-1B visa program. In 2017, President Trump signed Executive Order 13788, known as the Buy American, Hire American (BAHA) Executive Order (EO), which directs the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.” Thus, our analysis in this report focuses on the history of the H-1B program, and two specific features of the program: wages and specialty occupations. In exploring these topics, our office was especially fortunate to have the skill and expertise of multiple staff persons who have worked on these issues, either as attorneys in private practice or at the Department of Labor. I am therefore pleased to be offering readers a rich analysis, one that includes a description of how the H-1B program came into being, a history of the specialty occupation definition, and a detailed analysis of how the Department of Labor oversees the H-1B wage requirement—that is, the requirement that employers pay their H-1B workers at least the higher of the actual wage or prevailing wage. At the end, we offer recommendations on how the Department of Labor and USCIS can make changes to further implement the BAHA EO.

Before concluding, I would like to thank my staff for their tireless work in researching, drafting, and producing this report. While it is always a challenge to steer this project from beginning to end, this year our team succeeded despite losing 35 critical days during the partial government shutdown. Their commitment to our mission is extraordinary.

I would also like to thank our colleagues at USCIS, who hosted us on site visits, organized multiple briefings for our staff on numerous issues, participated in our teleconferences, spoke at our Annual Conference, and met with us on multiple occasions to discuss and answer our questions regarding the issues addressed in this report. They also provided us significant data to illustrate these issues, and turned around several requests in record time.

We hope this report will serve as an informative resource for Congress and the public at large. As always, we welcome your feedback on this and all the work we do in the Ombudsman’s Office.

Sincerely,



Julie Kirchner

Executive Summary

Office of the Citizenship and Immigration Services Ombudsman: 2018 in Review

The Office of the Citizenship and Immigration Services Ombudsman was created by statute in 2002 to serve as a neutral arbiter between immigration benefit-seekers and U.S. Citizenship and Immigration Services (USCIS), which oversees a complex system that handles millions of benefit requests annually. While USCIS timely adjudicates most filings in accordance with applicable statutes, regulations, and policy, the Ombudsman assists when something goes wrong, such as processing delays, or administrative or adjudication errors.

In Calendar Year (CY) 2018, the Ombudsman's Case Team of approximately nine analysts reviewed and worked 11,294 requests for case assistance submitted by the public, an increase of two percent from the previous year. In 2018, the Ombudsman expedited more than 23 percent (2,610) of these cases, over half of which (1,814) were related to Employment Authorization Documents (EADs), the most voluminous form type processed by USCIS.

In addition to conducting case work, the Ombudsman's other function is to identify and analyze agency-wide issues and trends in order to make recommendations, when possible, on how to improve the administration of U.S. immigration laws. The Ombudsman accomplishes this through public engagement and outreach, such as hosting public teleconferences as well as an Annual Conference, to bring stakeholders together to explore such issues. This outreach results in regular discussions between the Ombudsman and USCIS, from informal exchanges and meetings to the issuance of written recommendations and this Annual Report.

The H-1B Program: Wages and Specialty Occupations

For nearly 30 years, employers have used the H-1B visa program to employ foreign workers in the United States. The H-1B program, successor to the H-1 visa program, has evolved since its inception, and demand for these visas continues to outpace the statutory annual caps placed on new H-1B visas. Administered by three different agencies with different responsibilities, the program attempts to balance the protection of jobs, working conditions, and

wages for U.S. and foreign workers, while simultaneously responding to employer demands for foreign labor.

The *Buy American, Hire American* Executive Order, issued in 2017, directs agencies involved in administering the H-1B program with reforming aspects of the program to help ensure that H-1B visas are awarded to the most-skilled or highest-paid foreign workers. To implement this Executive Order, USCIS should consider modifications that promote greater consistency in the adjudication of H-1B petitions, focusing on refining the definition of specialty occupation to more fully implement Congressional intent.

From InfoPass to InfoMod: A Crossroads for Applicant Support Services

USCIS has sought to improve efficiencies in its provision of support services to the public, driven in part by increased demand for adjudicative services in field offices. In prior years, under the InfoPass program, field offices assigned adjudicators to take appointments with the public, on a walk-in or self-scheduled basis, as a means of providing assistance to applicants. However, as field offices saw a substantial growth in filings and an expansion of the types of benefit requests they were required to adjudicate, their workload increased, placing a premium on adjudicators' time. Compounding the difficulties, applicants often made appointments for inquiries that did not require an in-person meeting or did not appear for their appointments at all.

In 2018, USCIS made substantial changes—organizational, programmatic, and technology-based—to reform its applicant support service programs. As part of this effort, in March 2018, USCIS piloted the Information Services Modernization Program (InfoMod) at five field offices. Through InfoMod, USCIS sought to centralize requests for in-person appointments, limit appointments to applicants who truly require in-person interaction, and resolve other inquiries online or by phone. In November 2018, USCIS began replacing the InfoPass program with InfoMod on a rolling basis at all of its field offices, and plans to complete the transition by the end of FY 2019.

While the InfoMod program is already demonstrating some benefits, stakeholders have expressed concern that the changes USCIS is making will not provide the same

level of service and assistance they feel is necessary. Past reliance on InfoPass for direct applicant communication with the agency provided applicants, petitioners, and representatives with consistent agency access, but it also presented significant challenges to USCIS' ability to meet its public service and adjudication responsibilities.

Spotlight: The Asylum Vetting Center: USCIS Centralizes Asylum Screening Operations

USCIS has taken significant steps to implement the 2015 U.S. Government Accountability Office (GAO) recommendations to identify and address asylum fraud risks. To implement the GAO's specific recommendation to establish a national pre-screening program, USCIS began planning for a centralized pre-screening center for asylum adjudications in 2017. USCIS is now in the process of building out and staffing this center, called the Asylum Vetting Center (AVC).

Once the AVC is fully functional, it will serve as the location for centralized receipting and initial processing of affirmative asylum applications. The AVC will also house officers who conduct all of the pre-adjudication screening and vetting. Finally, the AVC will promote coordination and information sharing with the interagency National Vetting Center, thereby enhancing USCIS' ability to address fraud concerns that come to light after it has granted asylum to an individual.

Although operations are in their initial stages, the AVC is fulfilling a coordinated effort to address systemic fraud issues and streamline processing, moving forward cases and freeing up resources to reduce the asylum backlog. By centralizing key antifraud functions at the AVC, USCIS aims to address the concerns highlighted by the GAO report as well as Executive Order 13767 and prevent the entry of malicious actors.

Transitioning From Transformation to eProcessing

In October 2018, USCIS publicly announced its goal of providing digital intake and processing of immigration applications and petitions by December 2020. The agency plans to accomplish this goal through its eProcessing initiative, which marks a significant shift in strategy from its predecessor digitization program, commonly known as Transformation.

Through eProcessing, USCIS plans to modernize the administration of immigration benefit requests, using lessons learned alongside its current systems and technology. The eProcessing effort is not intended to retire the agency's many legacy systems and replace them with an entirely new case management system, but instead to integrate existing systems across the agency for electronic filing, adjudication, and storage of all benefit petitions and applications.

While USCIS has made significant progress during the year, more work must be done before eProcessing can be mandated. System functionality, public education, and technical support all must be robust to service the millions of applicants, petitioners, and other stakeholders.

Challenges Facing Timely Adjudication of Employment Authorization Documents

For the past several years, the EAD has constituted the largest category of filings USCIS receives annually. There are 36 different eligibility categories for EADs, most of which provide unrestricted work authorization for a certain period of time. Between FY 2010 and FY 2018, the number of EAD applications filed with USCIS has grown 63.3 percent, largely due to increases in specific categories. However, even with a decrease in applications in 2018, the EAD remains the most voluminous application filed with the agency.

Data provided by USCIS show that EAD processing times dropped in FY 2008, increased significantly between FY 2012 and FY 2013, and fluctuated thereafter, increasing over time. In January 2017, USCIS eliminated a regulatory provision that required the agency to adjudicate EAD applications within 90 days. As it did so, the agency implemented another provision that authorizes automatic 180-day extensions for EAD applicants in 16 eligibility categories who timely file to renew.

There are three factors that have converged, leading to growing EAD processing times in recent years: increased filing volume, technology challenges, and insufficient staffing. To mitigate these factors and help reduce processing times, USCIS should take certain steps, which include accelerating the use of eProcessing and increasing staffing resources.

Table of Contents

Letter to Congress iii

Message from the Ombudsman iv

Executive Summary vi

Office of the Citizenship and Immigration Services Ombudsman: 2018 in Review2

Key Developments and Areas of Focus

 The H-1B Program: Wages and Specialty Occupations 8

 From InfoPass to InfoMod: A Crossroads for Applicant Support Services44

 Spotlight: The Asylum Vetting Center: USCIS Centralizes Asylum Screening Operations56

 Transitioning from Transformation to eProcessing62

 Challenges Facing Timely Adjudication of Employment Authorization Documents70

Appendices84

 Recommendations Update84

 The Ombudsman: By the Numbers88

 Homeland Security Act Section 45292

 USCIS Naturalization and Adjustment of Status Processing Times94

 U.S. Department of Homeland Security Organization Chart95

 How to Request Assistance from the Ombudsman96

 Acronyms97

Office of the Citizenship and Immigration Services Ombudsman: 2018 in Review

Established by the Homeland Security Act of 2002, the Office of the Citizenship and Immigration Services Ombudsman is an independent, impartial, and confidential organization within the Department of Homeland Security (DHS). The Ombudsman reports directly to the Deputy Secretary of DHS, and is neither a part of, nor reports to, U.S. Citizenship and Immigration Services (USCIS).

Pursuant to statute,¹ the mission of the Ombudsman is to:

- Assist individuals and employers in resolving problems with USCIS;
- Identify areas in which individuals and employers have problems in dealing with USCIS; and
- To the extent possible, propose changes in USCIS' administrative practices to mitigate identified problems.

The Ombudsman achieves its mission by:

- Evaluating requests for assistance from individuals and employers and, where appropriate, recommending that USCIS take corrective action;
- Facilitating interagency collaboration and conducting outreach with 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.

How the Ombudsman Processes Requests for Case Assistance

Individuals, employers, and legal representatives may contact the Ombudsman for assistance with individual case problems at USCIS. However, because the Ombudsman

is a resource of last resort, individuals should attempt to resolve their concerns through USCIS' public support service channels before contacting the Ombudsman. If an individual is still unable to resolve the problem, he or she may formally request assistance from the Ombudsman by completing a Form DHS-7001, *Request for Case Assistance*, online² and submitting it electronically through the DHS website. Individuals immediately receive an email from the Ombudsman with the details of their request and their Ombudsman case number.

Pre-Assignment

Each new request for case assistance is reviewed (triaged) by one of the Ombudsman's senior immigration law experts.³ During triage, the reviewers first determine whether the Ombudsman is the appropriate office to assist. Though the Ombudsman does not have jurisdiction over issues arising solely out of actions by the Department of State (DOS), Department of Justice (DOJ), U.S. Immigration and Customs Enforcement (ICE), or U.S. Customs and Border Protection (CBP), it can assist where there are cross-cutting problems. For example, analysts regularly communicate with the DOS's National Visa Center to help with difficulties getting files moved between the Departments.

After determining the Ombudsman has jurisdiction over the case, reviewers identify the level of urgency. For emergency situations, individuals must submit documentation to evidence why an expedite request is warranted. When prioritizing requests for assistance, the Ombudsman uses the same expedite criteria as USCIS.⁴ In addition, all requests for case assistance related to

¹ Homeland Security Act of 2002 (HSA) § 452, 6 U.S.C. § 272.

² Ombudsman's Webpage, "Ombudsman—Case Assistance," <https://www.dhs.gov/case-assistance> (accessed April 16, 2019). DHS firewalls unfortunately do not allow individuals outside of the United States to complete the form online. The office also accepts requests by email, fax, or mail.

³ The Ombudsman aims to triage all new requests within 7 days.

⁴ USCIS Webpage, "Expedite Criteria," <https://www.uscis.gov/forms/expedite-criteria> (accessed Jun. 13, 2019).

Employment Authorization Documents (EADs) that are outside of USCIS' posted processing times are expedited within the Ombudsman's office. Other examples of situations where the Ombudsman expedites requests for case assistance include obtaining proof of status, travel documents, and administrative or legal errors by USCIS.

A complete Form DHS-7001 submission includes a brief summary of the issue; receipt numbers for all associated applications or petitions; evidence of previous attempts

to resolve the issue with USCIS; consent from the proper party; and copies of documents (e.g., receipts, "Requests for Evidence" (RFEs), denials). A complete DHS-7001 must also include a copy of Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, if a legal representative is making the request. If additional information or documentation is required for the Ombudsman to initiate an inquiry with USCIS, we will seek this information from the requestor.

Tips for Requesting Assistance from the Ombudsman:

- ✓ Try to resolve the problem with USCIS first. The Ombudsman is an office of last resort.
- ✓ Check USCIS' website before contacting USCIS or the Ombudsman to verify your application or petition is outside USCIS' current processing time.
- ✓ Provide only basic documentation related to your request such as receipt notices, RFEs, and denial notices. We will contact you if we need more.
- ✓ You must be the petitioner, applicant, or a legal representative to submit a request for case assistance. A beneficiary cannot submit a request for case assistance.
- ✓ Provide a clear and concise explanation of the problem, case history, and how you would like the Ombudsman to assist.
- ✓ If you are requesting expedited assistance, submit documentary evidence of the urgency or hardship (medical records, financial documents, letters from employers, etc.).
- ✓ If you are protected by certain federal confidentiality provisions, you must submit your signature on section 12 of the Form DHS-7001 as an attachment. (You may upload the document with the signature to an online filing, or fax or email it to the Ombudsman.) Although the Ombudsman can communicate via email or telephone with legal representatives who have a properly completed Form G-28 on file with USCIS and the Ombudsman, the Ombudsman can only communicate via U.S. postal mail with unrepresented individuals protected by these confidentiality provisions.
- ✓ Each applicant or petitioner requires a separate Form DHS-7001. If you need assistance for more than one family member or employment petition, please submit separate requests for case assistance. You can email the office at cisombudsman@hq.dhs.gov after you have received your case numbers to let us know that the cases are related and should be worked together.
- ✓ Because many of our requests for help relate to mailing issues, please remember to timely update your address with USCIS *for every pending application or petition*. The easiest and best way to do so is online at <https://egov.uscis.gov/coa/displayCOAForm.do>. You must also submit an updated Form AR-11, which does NOT change the address associated with any pending form but is required by law to notify the U.S. government of the change in address.
- ✓ Legal representatives must submit relevant copies of completed Forms G-28.

After reviewing the complete submission, the Ombudsman will contact the individual, employer, or legal representative by phone or email to explain if the office cannot assist.

The triage process also helps the Ombudsman identify trends in incoming requests for case assistance. For example, when staff noticed a significant, sustained increase in requests related to secure documents returned to USCIS by the U.S. Postal Service (USPS), the Ombudsman brought case examples to USCIS' attention. In response, USCIS centralized the re-mailing of EADs, travel documents, permanent resident cards, and other documents in one location. The Ombudsman began sending inquiries in weekly batches to more timely respond to requests for re-mailing from the public. During the year, the Ombudsman contacted USCIS about 504 documents which the USPS returned to USCIS. After the Ombudsman contacted USCIS, most documents were re-sent and received by the applicants within 2 to 3 weeks.

Assignment

Requests for case assistance are, with the exception of expedites, assigned and worked in the order in which they are received. Those that meet USCIS' expedite criteria are assigned by supervisors to analysts every business day and placed ahead of other work in analysts' queues.

In 2018, the Ombudsman expedited 2,610 of the total 11,294 cases received. More than half of the expedited cases (1,814) related to EADs. Other types frequently expedited include applications for adjustment of status, travel documents and petitions filed by Special Immigrant Juveniles.

The Ombudsman's team of analysts possesses a wide range of expertise derived from experience in private immigration law practice, USCIS adjudication roles, and working on immigration matters in other federal agencies such as the Departments of State, Labor, and Justice.

Analysts review the facts and law related to each request and check the case history in USCIS' databases, where the Ombudsman can learn the file location, confirm filing dates, and verify the next steps in the process.

Contacting USCIS

When the request warrants an inquiry to USCIS, the Ombudsman communicates directly with designated points of contact at USCIS field offices, service centers, and other offices. Each inquiry includes a request that the file be reviewed to ensure both law and policy have been applied properly.

When advantageous to the process, the Ombudsman will send requests to USCIS in larger batches, allowing USCIS to also respond in kind, which has improved agency efficiencies and response times.

USCIS Response

After inquiring with USCIS, the Ombudsman does not close any request for case assistance until USCIS provides a substantive response that moves the case forward. When USCIS responds to an inquiry, the analyst notifies the applicant, petitioner, or legal representative by email, telephone, or U.S. postal mail (e.g., confidential cases).

The Ombudsman advocates for a fair and consistent process, rather than for a particular outcome. A response from USCIS does not always result in an approved application or petition. It is important to note that the Ombudsman's case assistance is never a substitute for legal recourse; individuals and employers *must* timely file Motions to Reopen/Reconsider and appeals to preserve their rights, even after making a request for case assistance to the Ombudsman.⁵

Extended Review

Where USCIS does not provide a substantive response to an inquiry and the application or petition has been pending more than 6 months past USCIS' processing times, the Ombudsman will place the request for case assistance in a queue of long-pending cases, generally referred to as Extended Review. Occasionally, cases fall outside normal processing times for reasons beyond the control of USCIS, such as a background check being conducted by another agency. Whatever the reason for the delay, the Ombudsman continues to follow up regularly with USCIS until the agency takes action.

⁵ See generally 8 C.F.R. § 103.3(a) (appeals), § 103.5 (motions to reopen/reconsider).

2018 Casework in Review

In 2018, the Ombudsman's Case Team of approximately nine analysts reviewed and worked 11,294 requests for case assistance submitted by the public, an increase of two percent from the previous year. The following case examples are just a small sample of the types of requests they completed in 2018.

- **Evidence of Legal Status.** The Ombudsman assisted a 74-year old Lithuanian man who has resided in the United States for over 60 years to obtain proof of his legal status. He was brought to the United States as an orphan from a displaced persons' camp in Germany after World War II. Though he was raised by an individual who eventually became a naturalized U.S. citizen, he was never legally adopted. He remembered receiving a green card when he was in high school, but lost it in the 1960s and never replaced it.

The man discovered the need for evidence of his green card after he applied for a Social Security pension based on his more than 50 years of work history in the United States. His application was denied because he was unable to demonstrate his immigration status. He then spent years filing Freedom of Information Act (FOIA) requests and applications for replacement green cards, as well as submitting inquiries to senators and the National Archives, which were all unsuccessful because USCIS was unable to find evidence he had been admitted to the United States as a permanent resident. The Ombudsman worked with USCIS for a period of 3 years until, in 2018, USCIS found sufficient evidence to reissue his green card.

- **Erroneous Denial.** An individual contacted the Ombudsman for assistance when his Form N-400, *Application for Naturalization*, was denied for failure to respond to an RFE. The applicant's legal representative told the Ombudsman that she had properly submitted the response to USCIS in the same courier envelope as a response to another client's case. The Ombudsman shared the other case's information with the field office and requested that both files be reviewed for the documentation. When USCIS conducted this review, it found the misplaced RFE response and reopened the naturalization application.
- **Refund Request.** An employer contacted the Ombudsman when it did not receive a decision within 15 days on the H-1B, *Petition for Nonimmigrant*

Worker, that it had paid to be premium processed. Upon investigation, the Ombudsman determined that USCIS had approved the petition within the 15-day window, but found that the approval notice was not issued due to an internal system error. Since the petitioning company was not made aware of the decision until over 90 days had passed, the Ombudsman assisted in obtaining a refund of the premium processing fee.

- **Missing Documentation.** An individual contacted the Ombudsman 2 years after entering the United States as an immigrant entrepreneur. He received his green card within a month of entry, but his family never received their permanent resident documents. He and his counsel attended appointments at their local field office, only to be told that the immigrant visa packets were missing and would have to be re-created. The family submitted documentation to re-create the files, but still did not receive their green cards. Six months later, the family was contacted by the Investor Program Office (IPO), notifying them that their A-files were all lost. The family was again instructed to visit the field office to re-create the A-files. The field office then indicated that the family's files were not lost, but had never been created in the first place. The family's counsel followed up with the IPO and was referred to the Ombudsman. The Ombudsman worked with USCIS to locate and verify the existence of the A-files and obtain green cards for each member of the family.
- **Application Rejection.** An applicant for adjustment of status contacted the Ombudsman for assistance after the Lockbox rejected his application. USCIS stated that a visa was not immediately available for the applicant's priority date. The Ombudsman reviewed the application materials and Visa Bulletin and determined that the applicant's priority date was current at the time of filing. USCIS admitted its mistake and accepted the submission with the same filing date it would have had if USCIS had initially accepted the application.
- **Adjudication Error.** The Ombudsman was contacted by a man who applied to adjust status based on an approved family immigrant visa petition. However, when USCIS eventually granted him permanent resident status, it did so under an employment-based category. He contacted USCIS regarding the error and returned his green card as instructed, but did not hear anything further from USCIS. After the Ombudsman contacted USCIS on his behalf, the agency realized its

error and issued a new permanent resident card that reflected the applicant's appropriate class of admission.

- **Mistaken Identity.** An individual contacted the Ombudsman for assistance after USCIS erroneously denied his Form I-485, *Application to Register Permanent Residence or Adjust Status*. USCIS denied the application because it thought the applicant was currently in removal proceedings. The Ombudsman investigated and learned that two different A-numbers were associated with the individual's file. USCIS confused the applicant in this case (a 34-year old beneficiary of an approved employment-based petition) with a similarly-named 42-year old beneficiary of a family-based petition who was in removal proceedings. Two weeks after the Ombudsman inquired with USCIS, both individuals' files were reviewed, the A-numbers were corrected, and the adjustment application was reopened.

The Year in Outreach

The Ombudsman conducted 76 stakeholder engagements in 2018. These included meetings with and presentations to attorneys, accredited representatives, community-based organizations, employers, Congressional staffers, state and local government officials, and individual applicants. The Ombudsman also hosted nine teleconferences with stakeholders to provide information and to receive feedback on issues and policy trends:

- Annual Conference Recap (January 30)
- EAD Processing (February 27)
- USCIS Processing Times (April 5)
- USCIS Naturalization (May 15)
- H-1B Lottery (June 27)
- Removal of Conditions on Residence (July 26)
- USCIS Policy Update on RFEs and Notices of Intent to Deny (NOIDs) (September 6)
- H-1B Processing and the Suspension of Premium Processing (November 2)

Mailing and Delivery Issues Affecting Immigration Benefits (December 13)

The Ombudsman's Eighth Annual Conference

On November 16, 2018, the Ombudsman hosted its eighth Annual Conference, *Government and Stakeholders Working Together to Improve Immigration Services*. Over 450 people registered to attend. The morning plenary sessions included remarks from former USCIS Director L. Francis Cissna and a multi-agency panel on the administration of U.S. immigration laws. The panel included leadership from USCIS, CBP, the Executive Office for Immigration Review, and ICE, and discussed efforts to improve processes and policies, collaboration between the agencies, and the challenges they face in administering our complex immigration system.

Break-out sessions in the afternoon included panels on job conditions and wages for H-1B specialty occupations, federal initiatives to identify and counter immigration fraud, USCIS' eProcessing efforts, agency policies on RFEs and NOIDs, and USCIS' changes to its interactions with the public.

"We are writing to express our deepest gratitude to this office. We are aware of how vital this office is in advocating for those individuals and families that need a voice at the USCIS after all other options have failed.

"Please continue to be the office that makes a difference."

An applicant for a USCIS benefit who came to the Ombudsman for assistance



The H-1B Program: Wages and Specialty Occupations

Key Facts and Findings

- For nearly 30 years, employers have used the H-1B visa program to employ foreign workers in the United States.
- During this time, Congress has attempted to balance the protection of jobs, working conditions, and wages for U.S. and foreign workers, while still responding to employer demands for access to foreign labor.
- The program has evolved considerably since its inception, and demand for the visa continues to outpace the statutory numerical limits placed on the annual allocation of new H-1B visas.
- The *Buy American, Hire American* (BAHA) Executive Order (EO) tasks agencies that administer the H-1B program with suggesting reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid beneficiaries.
- To implement the BAHA EO, USCIS should consider certain changes that promote greater consistency in the adjudication of H-1B petitions, focusing on refining the definition of specialty occupation to more fully implement Congressional intent.

Program Overview

The H-1B visa program allows U.S. employers to hire foreign workers in specialty occupations on a temporary basis. The Immigration and Nationality Act (INA) defines the term “specialty occupation” as an occupation that requires:

(1) theoretical and practical application of a body of highly specialized knowledge, and (2) attainment of a bachelor’s degree or higher in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.⁶

Specialty occupations include, but are not limited to, physicians, architects, professors, engineers, and accountants.⁷ The visa category also includes fashion models “of distinguished merit and ability,” and Department of Defense (DOD) researchers and development project workers.⁸

The H-1B program is administered by three federal departments: the Department of Labor (DOL), the Department of Homeland Security (DHS) and the Department of State (DOS). Each reviews different parts of H-1B petitions and has differing responsibilities for protecting U.S. workers.

The INA limits the number of new (initial) H-1B visas—also referred to as “cap-subject” visas—that may be issued annually. Under existing law, 65,000 H-1B visas may be issued each fiscal year,⁹ with an additional 20,000 H-1B visas available only to qualified foreign workers who have earned a master’s degree or higher from a U.S. institution of higher education.¹⁰ However, H-1B workers employed by *bona fide* institutions of higher learning or their affiliates, certain nonprofit organizations, and government research organizations are exempt from these caps.¹¹ The INA does not limit the number of individuals permitted

to hold H-1B status in the United States at any one point in time.¹²

With limited exceptions,¹³ federal law does *not* require an employer seeking permission to hire an H-1B worker to establish that it attempted (unsuccessfully) to find a qualified and available U.S. worker for the offered position. Instead, the law only requires H-1B petitioners to attest under oath that the hiring of the sponsored foreign worker will not adversely affect the wages and working conditions of U.S. workers. Employers satisfy this attestation requirement by filing a Labor Condition Application (Form ETA-9035)(LCA) with DOL prior to filing a petition with USCIS for one or more H-1B workers.¹⁴

Once DOL has approved an LCA, the employer may file an H-1B petition with USCIS 6 months before the date it needs the worker’s services (but not sooner). If USCIS approves the petition and a visa is available, an H-1B beneficiary may work in the United States for the duration of the approval, which could be for up to 3 years.¹⁵ In addition, with some exceptions, an H-1B beneficiary may extend his or her H-1B status for up to 3 additional years, but may not work in the U.S. in excess of 6 years without first exiting and remaining outside the United States for a period of at least 1 year.¹⁶ However, as of 2000, extensions beyond 6 years are available to H-1B workers who are the beneficiaries of pending or approved employment-based immigrant visa petitions or pending or approved DOL permanent labor certifications (which are required as the initial step for most employment-based immigrant visas).¹⁷

An H-1B beneficiary who is in the United States in a different, lawful status when the H-1B petition is approved may begin working for the petitioner either immediately or upon the change of status, assuming USCIS also approves the latter. Beneficiaries who are outside the country, or

⁶ INA § 214(i)(1)(A)-(B); 8 U.S.C. § 1184(i)(1)(A)-(B).

⁷ See 8 C.F.R. § 214.2(h)(4)(ii).

⁸ See INA § 101(a)(15)(H)(i)(b); 8 U.S.C. § 1101(a)(15)(H)(i)(b). See also USCIS Webpage, “H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models” (Apr. 3, 2017) <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (accessed Mar. 11, 2019).

⁹ INA § 214(g)(1)(A)(vii); 8 U.S.C. § 1184(g)(1)(A)(vii).

¹⁰ INA § 214(g)(5)(C); 8 U.S.C. § 1184(g)(5)(C).

¹¹ INA § 214(g)(5)(A)-(B); 8 U.S.C. § 1184(g)(5)(A)-(B).

¹² See USCIS Annual Report to Congress, “Characteristics of H-1B Specialty Occupation Workers,” p. 4 fn. 10 (Apr. 9, 2018); https://www.uscis.gov/sites/default/files/files/nativedocuments/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf (accessed Mar. 11, 2019).

¹³ Employers deemed to be “H-1B dependent” or “willful violators” must agree to two additional attestations that prohibit the displacement of any U.S. worker and require the recruitment of U.S. workers in good faith. See INA § 212(n)(1)(G); 8 U.S.C. § 1182(n)(1)(G).

¹⁴ See INA § 212(n)(1)(A)(ii); 8 U.S.C. § 1182(n)(1)(A)(ii).

¹⁵ See 8 C.F.R. § 214.2(h)(15)(ii)(B)(1).

¹⁶ See INA § 214(g)(7); 8 U.S.C. § 1184(g)(7).

¹⁷ Pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) § 106(a), Public L. No. 106-313 (2000), as amended by the 21st Century Department of Justice Appropriations Authorization Act, § 11030A, Pub. L. No. 107-273 (2002)). See also 8 C.F.R. § 214.2(h)(13)(iii)(D)-(E).

whose request for a change of status or extension of stay is denied, must apply for a visa with DOS at an appropriate U.S. mission, and enter the United States using the H-1B visa before he or she may commence employment.

I. The Legislative History of the H-1B Visa Program

The precursor to today's H-1B visa dates back to 1952, when Congress enacted legislation establishing the H-1 nonimmigrant visa for persons of "distinguished merit and ability" to perform temporary services in the United States.¹⁸ Almost 2 decades later, in 1989, Congress reconfigured the H-1 nonimmigrant category to separate nurses into a new visa classification (H-1A) with a finite period of authorized stay, thus reclassifying all others of distinguished merit and ability into an H-1B category.¹⁹

In 1990, Congress enacted sweeping changes to the INA through the Immigration Act of 1990 (IMMACT90).²⁰ This legislation amended the new H-1B nonimmigrant visa category; the intent was to address concerns that the program lacked labor market protections and had not fulfilled its original purpose to employ individuals of "distinguished merit and ability."²¹ Through IMMACT90, Congress changed the core eligibility criterion for the nascent H-1B category to employment in a "specialty occupation," for which a baccalaureate degree is the qualification for entry into the field. Congress also removed the requirement that H-1B workers demonstrate an intent to return to their foreign residence, generally applicable to other nonimmigrant visas. This enabled H-1B beneficiaries to pursue immigrant status while simultaneously living in the United States as

nonimmigrants.²² The Conference Report justified the changes to the program as a proper response to "the increasing skills gap in the current and projected U.S. labor pool" that had the potential to undermine U.S. business growth in the "increasingly competitive global economy."²³

Congress also imposed certain requirements on employers that were intended to protect the wages and working conditions of U.S. workers.²⁴ IMMACT90 imposed a cap on the number of new H-1B workers that may be admitted in each fiscal year, which it set at 65,000, and limited the total period of authorized H-1B admission to 6 years.²⁵ Some in Congress also expected that these changes, plus the accompanying increase in immigrant visas (i.e., green cards as opposed to nonimmigrant visas) under IMMACT90, would reduce the demand for temporary nonimmigrant labor.²⁶

Only 1 year later, Congress expanded the H-1B category to include fashion models of distinguished merit and ability.²⁷ The same legislation clarified various aspects of DOL's LCA process, including compliance and enforcement

¹⁸ See Act of June 27, 1952, § 101(a)(15)(H), Pub. L. No. 82-414; 8 U.S.C. § 1101(a)(15)(H) (1952) ("an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability...").

¹⁹ See Immigration Nursing Relief Act of 1989, § 3(a)(1)-(2), Pub. L. No. 101-238; 8 U.S.C. § 1101(a)(15)(H)(i) (1989).

²⁰ See Immigration Act of 1990 (IMMACT90); Pub. L. No. 101-649; as codified in scattered sections of the U.S. Code (1990).

²¹ "The H-1 visa (aliens of 'distinguished merit and ability') has been the most controversial nonimmigrant visa because entry is not conditioned on any domestic labor market test and because admissions levels under this category have been escalating...the erosion of definitional lines through administrative decision making has meant...aliens with nothing more than a baccalaureate degree have been deemed 'distinguished.'" H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 44 (1990).

²² The intent to depart the United States at the end of a temporary stay while also pursuing to remain permanently is also referred to as dual intent. Immigration Act of 1990 (IMMACT90), § 205(b), Pub. L. No. 101-649, 8 U.S.C. § 1184(h) (1990), explicitly exempted H-1B status from nonimmigrant intent and added section (h) to section 214 of the INA: "The fact that an alien is the beneficiary of an application for a preference status filed under section 204 or has otherwise sought permanent residence in the United States shall not constitute evidence of an intention to abandon a foreign residence for purposes of obtaining a visa as a nonimmigrant described in subparagraph (H)(i) or (L) of section 101(a)(15) or otherwise obtaining or maintaining the status of a nonimmigrant described in such subparagraph, if the alien had obtained a change of status under section 248 to a classification as such a nonimmigrant before the alien's most recent departure from the United States."

²³ "'Workforce 2000,' which was prepared for the Department of Labor by the Hudson Institute, is one study among several that indicates that the education and skills of the emerging U.S. labor force will be mismatched with labor market needs. Because it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and because such needs are already not being met, the Committee is convinced that immigration can, and should, be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers." H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 41 (1990). "At a time when the United States needs highly skilled workers-scientists, engineers, computer experts, and other professionals The conference agreement allows business to import the necessary skills to help it remain competitive in the international economy." 136 Cong. Rec. H. 27076 (Oct. 1990) (statement of Rep. Fish).

²⁴ See INA § 212(n)(1); 8 U.S.C. § 1182(n)(1).

²⁵ See IMMACT90, § 205; as codified in scattered sections of the U.S. Code (1990).

²⁶ See H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 67 (1990).

²⁷ See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), § 207(b), Pub. L. No. 102-232; as codified in scattered sections of the U.S. Code (1991).

authorities, LCA processing times and prevailing wage rates.²⁸

In FY 1997, driven by increased demand from the information technology sector, the H-1B program reached the annual cap of 65,000 admissions for the first time.²⁹ The following year, in response to intense lobbying from this sector,³⁰ Congress passed the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA).³¹ ACWIA temporarily raised the H-1B cap to 115,000 in FY 1999, to 107,500 in FY 2000, and returned it to 65,000 in FY 2001 and subsequent years.³² At the same time, Congress acknowledged concerns that some petitioners were using the program to import large groups of workers willing to work for lower wages. It accordingly imposed additional LCA attestations requirements³³ on employers deemed “H-1B dependent”³⁴ (as well as on

“willful violators” of the program),³⁵ and gave DOL increased authority to investigate and enforce program compliance.³⁶

In 2000, Congress amended the H-1B program again. Determining that it had underestimated the nation’s need (or demand) for foreign workers,³⁷ it enacted the American Competitiveness in the Twenty-First Century Act (AC21). AC21, among other things, elevated the H-1B cap to 195,000 for FY 2001 through FY 2003, restoring it to 65,000 thereafter.³⁸

AC21 also excluded from the cap H-1B workers employed by institutions of higher education and related or affiliated nonprofit entities, certain nonprofits, and government research facilities.³⁹ The legislation further allowed H-1B workers to accept and begin employment with a new employer in a qualifying specialty occupation immediately upon the filing of a new H-1B petition with USCIS (commonly referred to as H-1B “porting”).⁴⁰ Finally, as mentioned above, AC21 permitted an employee to hold H-1B status beyond the statutory 6 year maximum if the H-1B worker is the beneficiary of a qualifying employment-based immigrant petition impacted by per-

²⁸ MTINA clarified that the prevailing wage determination was to be “based on the best information available.” See MTINA § 303(a)(7)(B)(i)(III). The DOL’s responsibility for reviewing an LCA was limited to checking applications for “completeness and obvious inaccuracies,” and it had 7 days to certify the LCA. See MTINA § 303(a)(7)(B)(iii).

²⁹ USCIS, Report on H-1B Petitions, Fiscal Year 2004, Annual Report, October 1, 2003 – September 30, 2004 (April 2006), p.1; https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/h1b04annual_08_7.pdf (accessed Mar. 11, 2019).

³⁰ “The existing supply of H-1B visas is drastically insufficient to meet the demands of the IT industry.... Congress enacted the H-1B cap in the Immigration Act of 1990, arbitrarily establishing the cap at 65,000. Since that time, the IT industry and the economy as a whole has created millions more jobs, yet no corresponding increase has been made in the H-1B visa cap.” *The High-Tech Worker Shortage and U.S. Immigration Policy: Hearing Before the Senate Comm. On the Judiciary*, 105th Cong. 2nd Sess. 28 (Feb. 25, 1998) (statement of Michael Murray, Microsoft Corporation).

³¹ See S. Rep. No. 105-186, 105th Cong., 2nd Sess., at 10-13 (May 1998). See also American Competitiveness and Workforce Improvement Act (ACWIA), Pub. L. No. 105-277, div. B, tit. IV; as codified in scattered sections of the U.S. Code (1998).

³² See ACWIA, § 411(a), Pub. L. No. 105-277, div. B, tit. IV; as codified in 8 U.S.C. § 1184(g)(1)(A).

³³ The additional attestations implemented by ACWIA include: “no layoff/non-displacement,” “secondary non-displacement,” and “recruitment.” See INA §§ 212(n)(1)(E)-(G); 8 U.S.C. §§ 1182(n)(1)(E)-(G). These additional attestations were implemented to affect previous violators and companies that Congress believed were most likely to abuse the H-1B program. See, e.g., 144 Cong. Rec. E2323 (extension of remarks November 12, 1998) (statement of Rep. Smith) [“...job contractors/shops who are seeking aliens without extraordinary talents (only bachelor[’]s degrees) or offering relatively low wages (below \$60,000).”].

³⁴ An H-1B “dependent employer” is defined as an employer with 25 or fewer full-time equivalent employees and at least 8 H-1B nonimmigrant workers; or 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers. ACWIA, § 412(b), Pub. L. No. 105-277, div. B, tit. IV, amending 8 U.S.C. § 1182(n)(3)(A) (1998). Importantly however, Congress exempted from the additional attestations H-1B workers paid at least \$60,000 annually, or who hold a master’s degree or higher. See ACWIA § 412(b), amending INA § 212(n)(3)(B); 8 U.S.C. § 1182(n)(3)(B).

³⁵ Willful violators are employers who have been found in either a DOL or Department of Justice proceeding to have committed a willful failure or a misrepresentation of a material fact with respect to the H-1B requirements. See INA § 212(n)(2) and (5); 8 U.S.C. § 1182(n)(2) and (5).

³⁶ ACWIA authorized DOL to conduct random investigations of willful violators after the finding of such violations. In response to concerns that H-1B employees feared retaliation and were therefore hesitant to file a complaint, ACWIA included whistleblower protections and allowed DOL to initiate an investigation based on derogatory information obtained from sources other than aggrieved parties. See generally American Competitiveness and Workforce Improvement Act (ACWIA), § 413, Pub. L. No. 105-277, div. B, tit. IV; as codified in scattered sections of the U.S. Code (1998).

³⁷ See S. Rep. No. 260, 106th Cong., 2nd Sess. at 2 (2000). Although ACWIA temporarily raised the H-1B cap in FY 1999 and FY 2000, the cap was reached prior to the end of each respective fiscal year. See “Information Regarding the H-1B Numerical Limitation for Fiscal Year 1999,” 64 Fed. Reg. 3251 (June 15, 1999). See Information Regarding the H-1B Numerical Limitation for Fiscal Year 2000,” 65 Fed. Reg. 15178 (March 21, 2000).

³⁸ See AC21 § 102(a) (amending INA § 214(g)(1); 8 U.S.C. § 1184(g)(1)). In addition, AC21 provides that individuals who have been counted against the cap within the past 6 years will not be counted against the cap again when a new petition is filed on their behalf, unless he or she is eligible for a full 6 years of authorized admission at the time the petition is filed.

³⁹ See AC21 § 103, Pub. L. No. 106-313 (amending INA § 214(g)(5)(A) and (B); 8 U.S.C. § 1184(g)(5)(A) and (B) (2000)). Concerning this exemption, according to a passage found in a Senate Report that “... by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans.... Additionally, U.S. universities are on a different hiring cycle from other employers. The H-1B cap has hit them hard because they often do not hire until the numbers have been used up....” See S. Rep. No. 260, 106th Cong., 2nd Sess. at 21-22 (2000).

⁴⁰ INA § 214(n), 8 U.S.C. § 1184(n).

country limitations, lengthy adjudications, or processing delays.⁴¹

After the cap returned to 65,000 in FY 2004, Congress enacted the H-1B Visa Reform Act of 2004, authorizing the issuance of an additional 20,000 H-1B visas for individuals holding a master's degree or higher from a U.S. institution of higher education.⁴² The H-1B Visa Reform Act also required DOL to implement a four-tiered prevailing wage structure for use in LCAs,⁴³ and gave DOL new authority to conduct investigations of alleged LCA violations under certain limited circumstances.⁴⁴

Other statutory changes have further refined the program. Pursuant to Free Trade Agreements between the United States and Chile, and between the United States and Singapore, USCIS sets aside 6,800 H-1B visas each year for use by certain professionals of these two countries,⁴⁵ with all unused numbers allocated back to the general pool of visas available to nationals from the rest of the world.⁴⁶ Also, since 2010, Congress has imposed a supplemental H-1B filing fee on certain H-1B dependent petitioners (those employing 50 or more employees in the United States if 50 percent or more of its employees hold H-1B or L-1 nonimmigrant status).⁴⁷

II. History of the H-1B Specialty Occupation Definition

The origins of the current specialty occupation definition can be traced back—before the actual creation of the H-1B visa—to administrative decisions that were related to the former H-1 visa created for “aliens of distinguished merit and ability.”

When Congress created the H-1 visa program, it did not define the phrase “of distinguished merit and ability,” leaving the task to agency and judicial action. Then, beginning in the 1970s, several important administrative decisions broadened the interpretation of the H-1 category. The precedent decision of *Matter of Essex Cryogenics Industries* expanded eligibility for the program by holding that members of the “professions,” as defined in INA section 101(a)(32), qualified for the H-1 classification.⁴⁸ This definition includes architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

This decision was reinforced by *Matter of General Atomic Company*, which held that the performance of professional services was within the meaning of “distinguished merit and ability,”⁴⁹ and thus, “members of the professions” were generally eligible for H-1B visas. In doing so, this decision referenced *Matter of Shin*, which interpreted the term “profession” as an occupation that requires specialized knowledge through the attainment of an undergraduate degree, or through equivalent experience, as a minimum requirement for entry.⁵⁰ As a result, entry-level positions that required no more than a bachelor's degree, or its equivalent, were deemed eligible for the designation of “distinguished merit and ability.” The Immigration and Naturalization Service (INS), the precursor to USCIS, adopted these decisions, finding that members of the professions, including at the entry level, were eligible for H-1 visas.⁵¹

⁴¹ See AC21 §§ 104(c) and 106(a) and (b) (as amended by the 21st Century Department of Justice Appropriations Authorization Act, § 11030A, Pub. L. No. 107-273 (2002)).

⁴² See H-1B Visa Reform Act of 2004, § 425(a), Pub. L. No. 108-447 (2004); as codified in 8 U.S.C. § 1184(g)(5)(C).

⁴³ The H-1B Visa Reform Act of 2004 also eliminated the option allowing employers to pay employees 95 percent of the prevailing wage rate. See H-1B Visa Reform Act of 2004, § 423, Pub. L. No. 108-447 (2004); as codified in 8 U.S.C. § 1182(p)(3)-(4).

⁴⁴ INA § 212(n)(2)(G)(i); 8 U.S.C. §§ 1182(n)(2)(G)(i).

⁴⁵ See United States-Singapore Free Trade Agreement Implementation Act, § 402(2), Pub. L. 108-78 (2004) (amending INA § 214(g)(8); 8 U.S.C. § 1184(g)(8)) (the U.S. Government has set aside 1,400 H-1B visas each year for Chile and 5,400 H-1B visas each year for Singapore).

⁴⁶ USCIS Press Release, “USCIS Reaches H-1B Cap” (Aug. 12, 2005); https://www.uscis.gov/sites/default/files/files/pressrelease/H-1Bcap_12Aug05.pdf (accessed May 11, 2018).

⁴⁷ See Making Emergency Supplemental Appropriations for Border Security for the Fiscal Year Ending September 30, 2010, and for Other Purposes, § 402(b), Pub. L. No. 111-230 (2010) (requiring an additional fee of \$2,000 for certain H-1B petitions); James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), § 302, Pub. L. No. 111-347 (2011) (amending Pub. L. No. 111-230, *inter alia*, to extend the expiration of the additional fee to September 30, 2015); Consolidated Appropriations Act, 2016, § 411(b) Pub. L. No. 114-113, signed December 18, 2015 (increasing this fee to \$4,000 for H-1B petitions that meet the 50/50 criterion and extending the expiration date to September 30, 2025).

⁴⁸ See *Matter of Essex Cryogenics Industries, Inc.*, 14 I&N Dec. 196 (Deputy A.C. 1972).

⁴⁹ See *Matter of General Atomic Company*, 17 I&N Dec. 532 (Comm. 1980).

⁵⁰ See *Matter of General Atomic Company*, 17 I&N Dec. 532, 533 (Comm. 1980) (citing *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966)).

⁵¹ See “Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,” 55 Fed. Reg. 2606, 2609 (Jan. 26, 1990) (“The Service has considered membership in a profession and performance of services in a profession as qualifying for H-1 classification for the past 17 years”).

In the late 1980s, the expansion of the H-1 eligibility criteria (especially concerning entertainers, artists, and athletes, who were at the time included in the H-1 category) sparked growing concern among some in Congress and organized labor that the H-1 program no longer reflected Congressional intent, and that it was adversely affecting the wages and working conditions of U.S. workers.⁵² Congress responded to these concerns by repeatedly barring the use of appropriated funds to publish a final rule that sought to formalize the INS policy allowing members of the professions to qualify for H-1 classification.⁵³

The delay of the rule, initially proposed in 1986, allowed for the completion of an independent study commissioned by INS to analyze the characteristics and labor market impact of the H-1 program.⁵⁴ Ultimately, the study found that the agency's broad interpretation resulted in "the approval of petitions for persons who are not in any meaningful sense professionals 'of distinguished merit and ability,'" and it was at odds with the Congressional intent of the program.⁵⁵ It also recommended a statutory change to establish a separate nonimmigrant category to

accommodate employers that use the program to hire entry to mid-level workers "to meet labor shortages."⁵⁶

Nevertheless, on October 26, 1988, INS moved forward with a second proposed rule memorializing existing policy that members of the professions qualified for H-1 classification (among other things). The final rule enumerated specific standards for determining whether a position was a profession for purposes of H-1 eligibility and how to determine membership in a profession.

As it published the rule, INS acknowledged the issues raised within the commissioned study but nevertheless decided to publish the regulation due to "mounting litigation regarding the standards for professionals."⁵⁷ INS also expressed concern that a more restrictive interpretation would, "undoubtedly create adverse consequences for American businesses, universities, hospitals, and other institutions. These employers regard the H-1 classification as a critical and rapid means of obtaining professional workers needed to remain competitive in today's international economy and rapidly changing labor market."⁵⁸

A majority in Congress shared INS' reluctance to restrict access to the H-1 program.⁵⁹ Ultimately, Congress decided to convert the H-1 program into the H-1B program and essentially codified the INS rule by replacing "distinguished merit and ability" with "specialty

⁵² See U.S. Government Accountability Office Report, "Immigration and the Labor Market: Nonimmigrant Alien Workers in the U.S. Labor Market," GAO-PEMD-92-17 (Apr. 1992); <https://www.gao.gov/assets/160/151654.pdf> (accessed Mar. 3, 2019).

⁵³ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, § 211, Pub. L. No. 100-459 (1988); and Joint Resolution Making Further Continuing Appropriations for the Fiscal Year 1988, and For Other Purposes, § 205, Pub. L. No. 100-202 (1987) ("None of the funds appropriated or made available by this Act shall be used prior to October 1, 1989, to issue or implement any final rule in the rulemaking proceeding commenced August 8, 1986, 51 Fed. Reg. 28576-28589"). Within its final rule, INS noted that the "Congressional ban on a publication of a final H rule" expired October 1, 1989 and that "This action eliminates the need to resolve the constitutional question of the limits that can be placed on the Executive Branch's ability to promulgate regulations on issues it enforces." "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 55 Fed. Reg. 2606, 2607 (Jan. 26, 1990).

⁵⁴ "[M]ore time is needed to complete and consider the neutral study being conducted under contract with the Immigration Service.... While there is recognition that H-1 visa regulations need updating, there has been acute division over how to proceed. The Immigration Service commissioned an independent study by Booz, Allen and Hamilton, which should be available sometime this summer." 134 Cong. Rec. S. 18720 (July 1988) (statement of Sen. Hollings).

⁵⁵ U.S. Government Accountability Office Report, "Immigration and the Labor Market: Nonimmigrant Alien Workers in the United States," GAO-PEMD-92-17 (April 1992); <https://www.gao.gov/assets/160/151654.pdf> (accessed March 3, 2019). This study was cited in the GAO report as "Booz, Allen, and Hamilton, Inc., Characteristics and Labor Market Impact of Persons Admitted Under the H-1 Program" (Bethesda, Md.: June 1988). No other publication information is available.

⁵⁶ "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 53 Fed. Reg. 43217, 43218 (Oct. 26, 1988) ("However, the study also found that a significant number of H-1 admissions were entry to mid-level professionals who only nominally meet the statutory standard of 'distinguished merit and ability.' These workers are, for the most part, sought by employers to meet labor shortages of American workers in occupational fields, such as nursing, engineering, and computer science. The contractor concluded that denial of H-1 petitions for such workers would result in undue hardship to employers and recommended a statutory change to establish a separate nonimmigrant category to accommodate them").

⁵⁷ *Id.*

⁵⁸ See "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 55 Fed. Reg. 2606, 2609 (Jan. 26, 1990).

⁵⁹ "The bill recognizes that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H-1 category has produced undue reliance on alien workers, particularly because at present employers are not required to test the U.S. labor market as a prerequisite to petition approval." H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 41, 44 (1990).

occupation.”⁶⁰ INS modified its regulatory requirements accordingly.⁶¹

III. Current H-1B Process— Responsibilities of Agencies Involved

Three federal departments are involved in the H-1B process: DOL, USCIS, and DOS. Further details of the roles and processes at each of these agencies may be useful to better understanding the H-1B program.

A. DOL's Processing Role

The H-1B process begins with the filing of the LCA with DOL's Office of Foreign Labor Certification (OFLC).⁶² Through the submission of an LCA, a petitioning employer makes the above-described attestations regarding wages, benefits, and working conditions of both foreign and U.S. workers.⁶³ Certain employers, such as dependent employers and willful violators, make additional attestations: (1) that they have not and will not displace U.S. workers, and (2) that they have attempted to recruit U.S. workers prior to seeking to hire H-1B employees.⁶⁴ However, for all employers, the most significant of these attestations is commonly referred to as the wage attestation: paying the nonimmigrant worker at least the higher of the actual wage (what the employer pays its own similarly-situated workers) or the prevailing wage (in essence, what the employer's competitors typically pay for that occupation and level of experience in that area).

Under current regulations, the employer determines what it believes to be the actual and prevailing wage rates and then, through the LCA, informs DOL what wage it

intends to pay the beneficiary. While it is easy enough for employers to determine the actual wage, determining the prevailing wage can be confusing.

1. Determining the Prevailing Wage

H-1B law requires only that the prevailing wage rate be based upon the “best information available” at the time the employer files the LCA; no specific source is typically required.⁶⁵ However, DOL regulations provide a road map to help employers by accepting a prevailing wage determined in one of the following ways:

- (1) obtaining it from the collective bargaining agreement, if there is one;
- (2) requesting the DOL's National Prevailing Wage Center (NPWC), managed by the OFLC, to calculate the prevailing wage rate specific to the offered position, based on the arithmetic mean of workers similarly situated (the median is allowable in certain circumstances); or
- (3) obtaining it from an independent authoritative source or another legitimate source of information that uses the arithmetic mean of workers similarly situated (the median is allowable in certain circumstances).⁶⁶

DOL provides aggregate wage rate information from the Occupational Employment Statistics (OES) Wage Survey, published in the Online Wage Library (OWL), which may be used by employers as a legitimate source.⁶⁷ Alternatively, employers may also use an independent wage survey, provided it meets certain conditions,⁶⁸ or a wage rate set pursuant to the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, if one is available for the occupation.⁶⁹

Over time, employers have gravitated away from most of these options. For example, there is a distinct incentive for employers to request a Prevailing Wage Determination (PWD) from the NPWC, as DOL will deem that PWD presumptively correct, providing the employer a “safe

⁶⁰ INA § 214(i)(1)(A)-(B); 8 U.S.C. § 1184(i)(1)(A)-(B).

⁶¹ “The definition and standards for an alien in a specialty occupation mirror the Service's current requirements for aliens who are members of the professions...This proposed rule amends regulations at 8 C.F.R. [§] 214.2(h) (4)(iii) to change all references to ‘profession’ to ‘specialty occupation’ and to specify the same standards for qualifying as an alien in a specialty occupation that were indicated for an alien who is a member of the professions under existing regulations.” “Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,” 56 Fed. Reg. 31553, 31554 (Jul. 11, 1991).

⁶² DOL Webpage, “H-1B, H-1B1 and E-3 Specialty (Professional) Workers” (Dec. 13, 2018); <https://www.foreignlaborcert.doleta.gov/h-1b.cfm> (accessed Mar. 11, 2019).

⁶³ See INA § 212(n)(1)(D); 8 U.S.C. § 1182(n)(1)(D).

⁶⁴ See 20 C.F.R. § 655.736-739.

⁶⁵ INA § 212(n)(1)(A)(i)(II); 8 U.S.C. § 1182(n)(1)(A)(i)(II).

⁶⁶ 20 C.F.R. § 655.731(a)(2)(i)-(ii).

⁶⁷ Foreign Labor Certification Data Center Webpage, “Foreign Labor Certification Data Center Online Wage Library,” <http://www.flcdatcenter.com/> (accessed Mar. 11, 2019).

⁶⁸ 20 C.F.R. § 655.731(b)(3)(B).

⁶⁹ DOL Webpage, “Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs” (Nov. 2009); http://www.flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed May 22, 2019).

harbor”⁷⁰ with respect to the validity of the wage rate in an enforcement action. However, many employers do not request a PWD from the NPWC because of lengthy processing times,⁷¹ which may be particularly problematic for employers who file cap-subject petitions.⁷² In addition, many employers do not use the wage rates collected pursuant to the Davis-Bacon or Service Contract Acts because many positions that qualify for H-1B status are not found in those wages.

Most frequently, employers use the wage data provided by DOL through the OWL to independently determine the prevailing wage. To assist employers in this process, DOL publishes the same guidance the agency itself uses when making a prevailing wage rate determination based on OES wage data.⁷³

OES wage data is useful, but also somewhat limited in scope. The OES survey is a federal-state cooperative program between the Bureau of Labor Statistics (BLS) and individual State Workforce Agencies (SWAs).⁷⁴ The OES program conducts a semiannual survey of wages in multiple locations nationwide, which is then analyzed to produce “estimates of wages” for approximately 800 specific occupations—nationwide, by state, by metropolitan or nonmetropolitan area, and by industry or

ownership.⁷⁵ However, these surveys are wage reports only; the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, nor categorizes them by level of experience, skills, activities, time with the employer, or any other factors.⁷⁶

The OFLC then uses these wage estimates to develop the OWL. The OWL provides occupational “prevailing” wage rates that have been divided into four wage levels, as required by the INA, for each geographic sub-area.⁷⁷ The wage level begins at a Level I and can increase up to a Level IV, Level I being the wage associated with the entry level of the job, progressing up in terms of independence of activity and complexity of duties, with Level IV the most senior.

Since the OES survey does not capture information about actual skills or responsibilities of the workers whose wages are reported, DOL performs this task by calculating the four-tiered wage levels by a mathematical formula to reflect “entry level,” “qualified,” “experienced,” and “fully competent.”⁷⁸ The DOL guidance also provides a basic explanation for each wage level. For example, DOL indicates Level I wage rates are assigned to “beginning level employees who have only a basic understanding of the occupation,” while Level III wage rates are assigned to “experienced employees who have a sound understanding of the occupation and have attained,

⁷⁰ While the DOL may not question the wage itself, the employer is required to retain the determination, and DOL may question the information provided on the ETA-9141 used to request the PWD. 20 C.F.R. § 655.731 (a)(2)(ii)(A)(3).

⁷¹ The processing time to obtain a PWD is currently averaging more than 3 months. See DOL Webpage, “Processing Times” (May 31, 2019); <https://icert.doleta.gov/index.cfm?event=ehGeneral.dspProcessingTimes> (accessed Jun. 12, 2019).

⁷² In FY 2016, the DOL processed only 4,611 prevailing wage determination requests, which represents less than 1 percent of the Labor Condition Applications it processed. See Office of Foreign Labor Certification Annual Report 2016, p. 4; https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf (accessed Mar. 1, 2019).

⁷³ DOL Webpage, “Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Nov. 2009); http://www.fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed Mar. 1, 2019).

⁷⁴ BLS contributes the survey procedures and technical support. It also draws the sample of establishments surveyed each time, and produces the survey materials. The SWAs in all 50 states, the District of Columbia, and U.S. territories actually collect the data. The SWAs mail the survey materials to the selected establishments and make follow-up calls to request data from non-respondents or to clarify data. United States Department of Labor, Bureau of Labor Statistics Webpage, “Occupational Employment Statistics Overview” (Mar. 29, 2019); https://www.bls.gov/oes/oes_emp.htm#overview (accessed May 31, 2019).

⁷⁵ The OES program surveys “approximately 180,000 to 200,000 establishments” every 6 months, collecting wages over a course of 3 years to fully sample 1.2 million establishments. Establishments to be surveyed are selected in order to obtain data from every metropolitan and nonmetropolitan area in every State, across all surveyed industries, and from establishments of varying sizes. Wages published are based on the collections of the preceding 3 years to reduce sampling errors, especially in small geographical areas, and to ensure full coverage of larger employment establishments. *Id.*

⁷⁶ “Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,” 80 Fed. Reg. 24146, 24148 (Apr. 29, 2015).

⁷⁷ INA 212(p)(4), 8 U.S.C. § 1182(p)(4) (“Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision”).

⁷⁸ “Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,” 80 Fed. Reg. at 24155. The expansion from two to four skill levels in 2005 stemmed from 2004 legislation enacting section 212(p)(4) of the INA, 8 U.S.C. § 1182(p)(4), requiring the prevailing wage issued by DOL in the H-1B temporary specialty worker visa program to include four tiers commensurate with experience, education, and level of supervision. The DOL applied that statutory formula to H-2B temporary labor certification applications as well as the H-1B and permanent labor certification programs. See ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (revised May 9, 2005) (“2005 PWD guidance” or “2005 guidance”), available at http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

either through education or experience, special skills or knowledge.”⁷⁹ For instance, the Level I (entry) wage rate is the mean of the lowest-paid 1/3 in that occupation, or approximately the 17th percentile of those reporting wages; Level II is approximately the 34th percentile; the Level III (experienced) wage rate is approximately the 50th percentile; and Level IV is the mean of the highest-paid 2/3, or approximately the 67th percentile.⁸⁰

To illustrate, Figure 1.1 is a sample prevailing wage rate for a librarian in the Washington, DC metropolitan area. All four levels are displayed.

Figure 1.1: OWL Prevailing Wage, Librarian, Washington DC

FLC Wage Results [New Quick Search](#) [New Search Wizard](#)

You selected the All Industries database for 7/2018 - 6/2019.

Your search returned the following: [Print Format](#)

Area Code: 47894
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
OES/SOC Code: 25-4021
OES/SOC Title: Librarians
GeoLevel: 1
Level 1 Wage: \$26.10 hour - \$54,288 year
Level 2 Wage: \$32.80 hour - \$68,224 year
Level 3 Wage: \$39.49 hour - \$82,139 year
Level 4 Wage: \$46.19 hour - \$96,075 year
Mean Wage (H-2B): \$39.50 hour - \$82,160 year

This wage applies to the following O*Net occupations:

25-4021.00 Librarians

Administer libraries and perform related library services. Work in a variety of settings, including public libraries, educational institutions, museums, corporations, government agencies, law firms, non-profit organizations, and healthcare providers. Tasks may include selecting, acquiring, cataloguing, classifying, circulating, and maintaining library materials; and furnishing reference, bibliographical, and readers' advisory services. May perform in-depth, strategic research, and synthesize, analyze, edit, and filter information. May set up or work with databases and information systems to catalogue and access information.

Source: OES prevailing wage levels for a librarian in Washington, DC, from the 2018-2019 Online Wage Library, Office of Foreign Labor Certification; <https://flcdatacenter.com/OesQuickResults.aspx?code=25-4021&area=47894&year=19&source=1> (accessed Jun. 12, 2019).

Pursuant to the DOL’s guidance,⁸¹ assessors (i.e., the NPWC wage assessor or anyone using the guidance) must take the steps below to reach the appropriate wage level. These include determining: (1) the occupational code; (2) the experience required; (3) the education required; (4) whether the job duties require special skills; and (5) whether the job duties include supervisory activities.

1. Determine the appropriate **occupational classification**. Using the O*Net system,⁸² employers find the appropriate O*Net-Standard Occupational Classification (SOC) job code that most closely aligns with the proffered position.⁸³

This is sometimes quite difficult for evolving jobs, or jobs at the forefront of a technology or industry. While the SOC codes are as generic as possible, finding a code that fits the job can be challenging. Our librarian example above (SOC Code 25-4021.00) might, for example, be a computer science librarian whose books are laptops and tablets and whose computer-related tasks go well beyond the “set up or work with databases and information systems” in the job description. This is our SOC code, and we will begin our analysis, using a Level 1 wage, for illustration purposes.

2. Compare the **experience** requirements of the offered position to the experience requirements of the SOC listed in the O*Net. The O*Net provides two measures of experience, the Job Zone and the Specific Vocational Preparation (SVP) range associated with the SOC code. The prevailing wage guidance requires use of the SVP. If the years of experience for the employer’s offered position are greater than the low end of the SVP, employers must increase the wage level accordingly. Depending on the difference between the SVP and the employer’s experience requirements, the wage level may increase by more than one level. Alternatively, if the position does not require any experience, there would be no increase to the starting wage level.

⁷⁹ DOL Webpage, “Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs,” p. 7 (Nov. 2009); http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed Mar. 1, 2019).

⁸⁰ “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 80 Fed. Reg. at 24155.

⁸¹ DOL Webpage, “Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs” (Nov. 2009); http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed Mar. 1, 2019).

⁸² The O*NET database (Occupational Information Network) is a system that was developed by DOL in a public-private partnership and contains hundreds of standardized and occupation-specific descriptors on almost 1,000 occupations covering the entire U.S. economy. O*NET provides the general public information on skills, abilities, knowledge, tasks, work activities, and the specific vocational preparation levels associated with occupations, and uses the Standard Occupational Classification codes as its occupational classifications. O*Net Resource Center Webpage, “About O*NET” (May 14, 2019); <https://www.onetcenter.org/overview.html> (accessed May 14, 2019).

⁸³ “In the 2018 SOC there are 98 minor groups. Each minor group is broken into broad occupations, of which there are 459. There are, at the highest level of specification, 867 detailed occupations. Detailed occupations with similar job duties, and in some cases, similar skills, education, and/or training, are grouped together in the SOC. Each worker is classified into only one of the 867 detailed occupations based on the tasks he or she performs.” U.S. Bureau of Labor Statistics, 2018 Standard Occupational Classification User Guide, p. 2; https://www.bls.gov/soc/2018/soc_2018_user_guide.pdf (accessed Mar. 1, 2019).

This comparison also requires significant thought and attention to the details of the actual requirements of the position. If the position requires 5 years of experience, that marks a requirement above the starting point of the SVP range, so a point should be added. Alternatively, if the position does not require any experience, there would be no increase to the wage level. In our imaginary job, a master's degree but no experience is required, so no additional points are added.

3. Compare the **educational** requirements of the offered position to those listed for the SOC codes. The educational requirements for the SOC codes are listed both in the DOL guidance or the Job Zone in the O*Net. If the educational level required for the offered position is greater than what is generally required by employers (as determined by DOL), the prevailing wage level will increase. For example, if the position usually requires a bachelor's degree and the employer requires a master's, the prevailing wage would increase by one level.

*Here we encounter some difficulty in the analysis because the educational requirements for the Librarian SOC code are different in the DOL guidance than the O*Net. For our librarian position, the Job Zone is Five—Extensive Preparation Needed. According to the DOL Prevailing Wage Guidance appendix, the Job Zone is Three.⁸⁴ There may be multiple reasons for the difference, including the age of the Guidance. The Job Zone in the Guidance was last updated in November 2009, but O*NET undergoes changes on a recurring basis, and the Librarian page was in fact updated in 2019. Therefore a prudent assessment would defer to O*Net Job Zone as more recent. The higher education requirement matches the master's degree we require, so the education adds no additional points to the level.*

4. Compare the **job duties** of the proffered position to the tasks, work activities, knowledge associated with the SOC code to determine if any special skills or other requirements necessitate a wage level increase.

The DOL guidance requires consideration be given to the employer's specific requirements that indicate the need for skills beyond those of an entry-level worker. A few examples of special skills or other requirements include items such as a license, a certificate, extensive travel, or a foreign language.

Let's assume our librarian will work in a part of Washington, D.C. that contains a significant Spanish-speaking population, and that there is a Spanish language fluency requirement. We add a point, and the wage increases to Level II.

5. Determine whether any **supervisory duties** warrant a higher wage level. Unless the description of the occupation in the O*Net contains supervisory duties, an employer's job description indicating that the beneficiary will supervise individuals will require a level increase.

Our librarian will not supervise anyone. Our analysis began with the librarian receiving a Level I prevailing wage, and we increased it one level for the foreign language requirement. So, Level II (in our example, \$32.80 an hour, or \$68,224 a year) remains the correct level to use as the prevailing wage.

As required by statute, the wage level offered by the employer to the H-1B worker must be at least equal to the actual wage (what the employer pays its similarly employed individuals) or the prevailing wage, whichever is greater.

Employers do not need to rely on this process, however, to find a prevailing wage. They may also utilize private surveys, assuming the survey meets the regulatory requirements.⁸⁵ Employers may decide to utilize these surveys when the O*Net does not contain an SOC code that they believe accurately reflects the position's job duties, or if the prevailing wage information provided does not resemble market wages. Neither these surveys, nor the OWL assessment conducted by an employer, will meet the "safe harbor" for purposes of establishing a true prevailing wage; only a wage determination received from the NPWC can.

2. Certification of the LCA

The DOL's certification of the LCA is no more than a certification that DOL has received and reviewed the

⁸⁴ Compare O*NET Webpage, "O*NET Online Job Zones" (May 14, 2019); <https://www.onetonline.org/help/online/zones> (accessed May 16, 2019) (Job Zone Five, extensive preparation requires an SVP Range of 8.0 and above) with DOL Webpage, "Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs" Appendix C, p. 3 (Nov. 2009); http://www.fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed May 16, 2019) (Librarians listed at Job Zone 3).

⁸⁵ 20 C.F.R. § 655.731(b)(3)(iii)(B).

document for “completeness and obvious inaccuracies.”⁸⁶ The legislative history of the LCA explains that DOL is prohibited from “pre-screening of the employer’s assertions and promises as long as the attestation is filled out in a complete manner.”⁸⁷ DOL does not review the substance of the attestations, nor does it confirm the correctness of the prevailing wage, or even that the job is in a specialty occupation. The document is merely a memorialization of the employer’s promises with respect to the obligations of the H-1B program. DOL is required to make a determination on the LCA within 7 days.⁸⁸

3. Enforcement

DOL is also responsible for enforcing the attestations made in the LCA and for ensuring that the employer complies with the recordkeeping⁸⁹ and posting requirements.⁹⁰ DOL’s Wage and Hour Division (WHD) is the entity that has the authority to open an investigation into an employer if it has reasonable cause to believe that a violation has occurred. DOL has the authority to assess civil penalties, order payment of back wages, and temporarily bar an employer’s access to the program.⁹¹

However, there are significant statutory restrictions on how DOL may initiate an investigation to determine culpability. There are four specific ways in which an investigation can begin:

- (1) when credible information is received from a knowledgeable source;
- (2) when a complaint filed by an aggrieved party (e.g., a beneficiary or a U.S. worker) or organization provides reasonable cause to believe a violation has occurred;
- (3) when the Secretary of Labor personally certifies that there is reasonable cause to believe a violation has occurred; and
- (4) by conducting a random investigation of a willful violator.⁹²

⁸⁶ INA § 212(n)(1)(G)(ii); 8 U.S.C. § 1182(n)(1)(G)(ii).

⁸⁷ See H.R. Rep. No. 723, pt. 1, 101st Cong., 2nd Sess at 61 (1990).

⁸⁸ INA § 212(n)(1)(G)(ii); 8 U.S.C. § 1182(n)(1)(G)(ii).

⁸⁹ H-1B employer must make certain materials available to the public within 1 working day of filing the LCA. See 20 C.F.R. § 655.760(a).

⁹⁰ 20 C.F.R. § 655.734.

⁹¹ DOL Webpage, “Wage and Hour Division: Fact Sheet #62U: What is the Wage and Hour Division’s enforcement authority under the H-1B program?” <https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62u.htm> (accessed Mar. 11, 2019).

⁹² See INA § 212(n)(2)(A); 8 U.S.C. § 1182(n)(2)(A).

Despite having a mechanism in place, there are concerns that H-1B employees are hesitant to file a complaint against their H-1B employers. Furthermore, DOL has previously interpreted the restrictions on credible information to exclude information received from USCIS.⁹³ In particular, the statute and DOL regulations limit the use of information contained in the H-1B petition to find reasonable cause to initiate an investigation.⁹⁴ Although H-1B usage has significantly increased since FY 2009,⁹⁵ the number of cases determined to have rule violations has remained flat, and there are fewer numbers of employees receiving back wages.

B. USCIS Role: Adjudicating H-1B Petitions, Administering the H-1B cap, and Fighting Fraud

After DOL issues an LCA, an employer seeking an H-1B worker submits the LCA with a petition for the H-1B worker (Form I-129, Petition for Nonimmigrant Worker, with all required supplements).⁹⁶ The employer must also submit the required fees and supporting evidence to USCIS. The burden is on the employer to prove it has satisfied the H-1B petition requirements by a “preponderance of the evidence.”⁹⁷

⁹³ See U.S. Government Accountability Office, “Reforms are Needed to Minimize the Risks and Costs of Current Program,” GAO-11-26 (Jan. 2011) at 47; <https://www.gao.gov/assets/320/314501.pdf> (accessed Mar. 3, 2019).

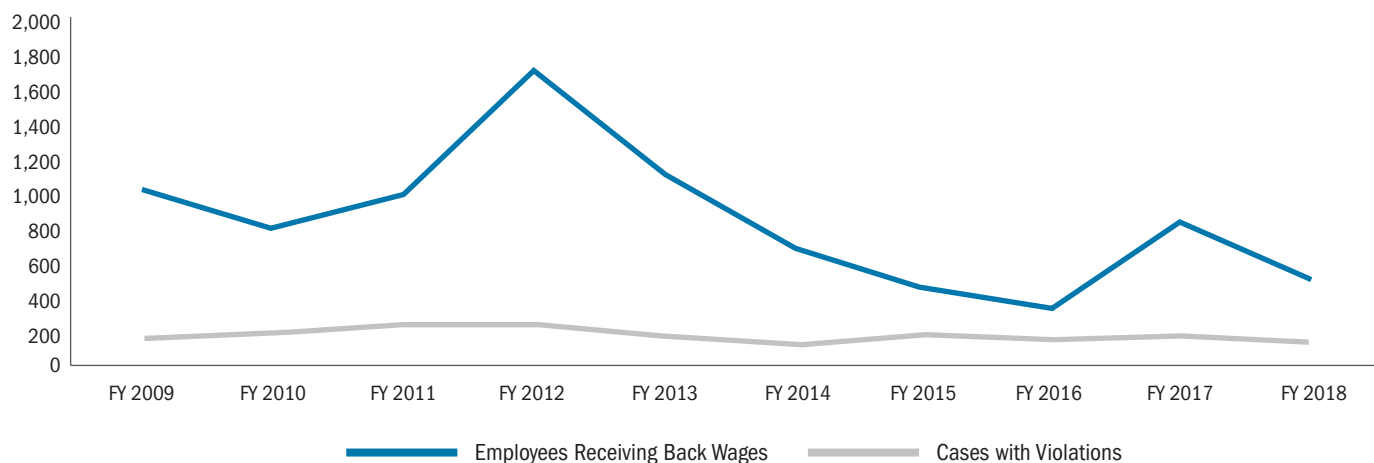
⁹⁴ Specifically, DOL is unable to utilize H-1B petition information to find reasonable cause to conduct a credible source investigation. See INA § 212(n)(2)(G)(v); 8 U.S.C. § 1182(n)(2)(G)(v). The DOL has also stated in a preamble to a regulation that it will not consider information contained on the H-1B petition to be the sole basis of an aggrieved party. See “Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,” 65 Fed. Reg. 80110, 80176 (Dec. 20, 2000).

⁹⁵ In FY 2018, USCIS receipted 418,790 H-1B petitions, which represents an approximate 70 percent increase in receipts since FY 2009. Ombudsman’s calculation based on data provided in USCIS Webpage, “Number of H-1B Petition Filings, Applications and Approvals, Country, Age, Occupation, Industry, Annual Compensation (\$), and Education, 2007 to 2017,” <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-2007-2017-trend-tables-12.19.17.pdf> (accessed Mar. 5, 2019) and USCIS Webpage, “Non-Immigrant Worker Request for Evidence (RFE) Data FY2015-FY2019 Q1,” <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/non-immigrant-worker-rfe-h-1b-quarterly-data-fy2015-fy2019-q1.pdf> (accessed May 23, 2019).

⁹⁶ This includes the H Classification Supplement to Form I-129, and the H-1B Data Collection and Filing Fee Exemption Supplement. See USCIS Web page, “I-129, Petition for Nonimmigrant Worker” (May 22, 2019); <https://www.uscis.gov/i-129> (accessed Jun. 14, 2019).

⁹⁷ *Matter of Chawathe*, 25 I&N Dec. 369, 375 (Administrative Appeals Office (AAO) 2010).

Figure 1.2: Wage & Hour Violation Findings, FY 2009–FY 2018



Source: See DOL Webpage, “Fiscal Year Data for WHD,” <https://www.dol.gov/whd/data/datatables.htm#panel8> (accessed Mar. 11, 2019).

In reviewing an H-1B petition USCIS officers focus on the following process components:

1. H-1B Adjudications

i. Determining whether the proffered position is a specialty occupation

Because eligibility for an H-1B visa depends on the employee working in a “specialty occupation,” USCIS must review the employer’s petition for information on the work the employee is being hired to perform. USCIS determines eligibility based on the proposed job duties and the proffered position’s requirements, not the title of the position in question.⁹⁸

With regard to the educational requirement, USCIS reviews the record to establish the correlation between the proposed duties and the education requirements for the position.⁹⁹ At this point, it is worth noting that USCIS does not examine whether the proffered position requires the application of a body of “highly specialized knowledge,” which constitutes the first half of the specialty occupation definition. Instead, USCIS’ analysis focuses almost entirely on whether the educational requirement, the second half of the definition, is met. The

regulations provide a non-exhaustive list of occupations that satisfy the definition of a specialty occupation, such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.¹⁰⁰ The regulations also contain a set of criteria to determine whether an occupation qualifies as a specialty occupation. The proposed position must meet one of the following criteria:

- (1) a bachelor’s or higher degree or its equivalent is normally the minimum entry requirement for the position;
- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree;
- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a bachelor’s or higher degree.¹⁰¹

⁹⁸ See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

⁹⁹ USCIS Teleconference, “National Public Engagement, H-1B Filing Tips and Understanding Requests for Evidence (RFEs),” p. 3 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/natedocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

¹⁰⁰ 8 C.F.R. § 214.2(h)(4)(ii). As noted above, these positions were previously enumerated as members of the professions.

¹⁰¹ 8 C.F.R. § 214.2(h)(4)(iii)(A).

USCIS interprets “a bachelor’s degree or higher” as “one that relates directly to the duties and responsibilities of a particular position.”¹⁰² This is intended to ensure that H-1B visas are issued to workers trained in a specialty occupation rather than to workers holding a general bachelor’s degree.¹⁰³ USCIS has consistently held that, although a “general-purpose bachelor’s degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation.”¹⁰⁴ For employees working at a third-party worksite, evidence of the third party’s requirements is necessary for determining if the position qualifies as a specialty occupation.¹⁰⁵

Determining whether the position is a specialty occupation constitutes a significant portion of the USCIS adjudication. The most common reason USCIS issues a Request for Evidence (RFE) is in cases where the petitioner did not establish the position qualifies as a specialty occupation.¹⁰⁶ Examining each element of the regulations provides a framework for understanding why petitioners sometimes struggle with meeting this burden, as well as why USCIS officers so frequently request additional evidence to make the appropriate determination.

Element I—A Bachelor’s Degree (or its Equivalent) is Normally Required

USCIS officers rely on DOL’s Occupational Outlook Handbook (OOH) to assess the standard educational and/or experience requirements of the position (i.e., is a bachelor’s degree or higher in a specific specialty

normally required).¹⁰⁷ The OOH provides information about occupations with an SOC, such as a description of the duties and the required training and education typically required to enter the occupation.¹⁰⁸ The OES survey is the primary source of employment data for the OOH.¹⁰⁹ USCIS recognizes the OOH as an authoritative source on the duties and educational requirements of occupations that it addresses.¹¹⁰

Most SOC codes have corresponding chapters in the OOH that provide the entry-level requirements for the given occupation associated with the SOC. Unlike the O*Net, the OOH articulates the specific field(s) of study associated with the minimum educational requirements.¹¹¹ If the OOH contains ambiguous statements regarding the level of education required, or it recognizes the occupation as multidisciplinary, USCIS will generally find that the OOH does not support a conclusion that the position requires at least a bachelor’s degree in a specific specialty, or its equivalent.¹¹² USCIS does not consider the OOH to be the exclusive source of relevant information, only a primary one; petitioners may also provide probative evidence from other objective and authoritative sources.

¹⁰² See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

¹⁰³ See *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191, 1197 (W.D. Wash. 2015) (citing *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007)).

¹⁰⁴ See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (citing *Tapis Int’l v. INS*, 94 F. Supp. 2d 172, 175-76 (D. Mass. 2000); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1164-66 (D. Minn. 1999); Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988)).

¹⁰⁵ *Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000).

¹⁰⁶ See USCIS Report, “Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018,” <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf> (accessed Mar. 3, 2019).

¹⁰⁷ “USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses; however, USCIS does not maintain that the *Handbook* is the exclusive source of relevant information.” USCIS Policy Memorandum, “Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions,’” p. 2, fn. 1 (Mar. 31, 2017); <https://www.uscis.gov/sites/default/files/files/nativdocuments/PM-6002-0142-H-1BComputerRelatedPositionsRescission.pdf> (accessed May 11, 2018).

¹⁰⁸ See DOL Webpage, “OOH FAQs” (May 22, 2018); <https://www.bls.gov/ooh/about/ooh-faqs.htm#outlook1> (accessed Mar. 1, 2019).

¹⁰⁹ See DOL Webpage, “OOH FAQs: Where Can I Find More Detailed Data?” (May 22, 2018); <https://www.bls.gov/ooh/about/ooh-faqs.htm#outlook1> (accessed Mar. 1, 2019).

¹¹⁰ This is despite the fact that the BLS, which publishes the OOH, specifically disclaims such use on its website: “BLS has no role in establishing educational, licensing, or practicing standards for any occupation; any such standards are established by national accrediting organizations and are merely reported by BLS in the *OOH*. The education information in the *OOH* presents the typical requirements for entry into the given occupation and does not describe the education and training of those individuals already employed in the occupation. In addition, education requirements for occupations may change over time and often vary by employer or state. Therefore, the information in the *OOH* should not be used to determine if an applicant is qualified to enter a specific job in an occupation.” BLS Webpage, “Occupational Outlook Handbook: Disclaimer” (Oct. 24, 2017); <https://www.bls.gov/ooh/about/disclaimer.htm> (accessed May 31, 2019).

¹¹¹ USCIS Teleconference, “National Public Engagement, H-1B Filing Tips and Understanding Requests for Evidence (RFEs),” p. 3 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/nativdocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

¹¹² *Id.*

Element II—Common to the Industry, or Complex or Unique

To determine whether it is common to require a degree within a specific industry, USCIS generally considers evidence from the following sources: the OOH, the industry's professional association, letters of affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."¹¹³ However, the evidence submitted must demonstrate that the degree requirement is widely recognized in the industry, which requires an analysis of companies of similar size and scope to the petitioner. If OOH is not conclusive with respect to whether a degree is required for entry into the profession, it will also fail to support that a degree requirement is common to the industry. Similarly, USCIS will question the probative value of affidavits or letters that fail to support the petitioner's assertions with evidence of the job duties and degrees of their claimed employees.¹¹⁴ The petitioner may also submit copies of job advertisements to demonstrate that the degree requirement is standard within the industry; however, the petitioner must articulate how the companies are similar, and how the positions are parallel to the proffered position. Furthermore, if the job advertisements contain a varying set of degree requirements, they likely will fail on the degree specificity requirement.

Alternatively, the petitioner may demonstrate that the particular position is so complex or unique that it only can be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. In an attempt to meet this criterion, petitioners may provide letters or affidavits from firms, professional associations, or individuals in the industry that explain how each of the duties of the position relates to, and requires knowledge obtained while studying for, the particular degree or set of degrees required.¹¹⁵ The designation of the proffered position as a level one wage on the LCA may belie a

claim that the position is particularly complex or unique compared to other positions within the same occupation.¹¹⁶

Element III—Petitioner's Normal Degree Requirements

In order to establish that the employer normally requires a degree for this occupation, the petitioner must demonstrate that it has historically required at least a bachelor's degree in a specific field, or its equivalent, for the proffered position. If the beneficiary will be staffed to a third party, the evidence must demonstrate the third party's requirements for the position.¹¹⁷ Evidence such as resumes or copies of degrees or transcripts from current or previous employees in the position may contain probative value. The petitioner may also attempt to demonstrate that it meets this prong by submitting evidence of its past hiring practices, such as previous job announcements for the particular position. However, the petitioner cannot rely on self-imposed standards to qualify under this criterion, and the record must establish that the degree requirement is necessitated by the position or the duties.¹¹⁸

Element IV—Nature of the Specific Job Duties

The final element set forth in the regulation requires a petitioner to demonstrate that the specific duties of the position are so specialized and complex that the knowledge required to perform them is typically associated with the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. If the OOH indicates that a bachelor's degree is not the normal requirement, the record must demonstrate that the duties are more specialized and complex than other positions in the occupational category. The petitioner may provide an "explanation of the specific duties as they relate to the petitioner's products and services," which describes "how each of the beneficiary's duties relates to and requires knowledge obtained while studying a particular degree or set of degrees."¹¹⁹ Once

¹¹³ See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102- (S.D.N.Y. 1989) (considering these "factors" to inform the commonality of a degree requirement).

¹¹⁴ USCIS Teleconference, "National Public Engagement, H-1B Filing Tips and Understanding Requests for Evidence (RFEs)," p. 4-5 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/nativedocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

¹¹⁵ *Id.*

¹¹⁶ USCIS Policy Memorandum, "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions'" p. 3, fn. 6 (Mar. 31, 2017); <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRescission.pdf> (accessed Mar. 11, 2019).

¹¹⁷ USCIS Teleconference, "H-1B Filing Tips and Understanding Requests for Evidence (RFEs)," p.5 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/nativedocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

¹¹⁸ See *Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000).

¹¹⁹ USCIS Teleconference, "H-1B Filing Tips and Understanding Requests for Evidence (RFEs)," pp. 5-6 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/nativedocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

again, the position's wage-level designation may be a relevant factor in the analysis. Specifically, assertions regarding the specialization and complexity of the position's duties are undermined by a Level I designation.

ii. Determining whether the beneficiary qualifies for the position

Only after USCIS determines that the proffered position qualifies as a specialty occupation will the adjudicator move on to evaluating whether the employee is qualified for the position at the time the H-1B petition was filed.¹²⁰ An employer must establish that the worker is qualified to fill a specific specialty occupation in one of four alternatives ways:

- (1) The alien holds a U.S. bachelor's or higher degree as required by the specialty occupation from an accredited college or university;
- (2) The alien possesses a foreign degree determined to be equivalent to a U.S. bachelor's or higher degree as required by the specialty occupation from an accredited college or university;
- (3) The alien has any required license or other official permission to practice the occupation (for example, architect, surveyor, physical therapist) in the state in which employment is sought; or
- (4) The alien has the education, specialized training, or progressively responsible experience (or a combination thereof) that is equivalent to completion of a U.S. bachelor's degree or higher in the specialty occupation, and has recognition of expertise through progressively responsible positions directly related to the specialty occupation.¹²¹

The first three elements are relatively straightforward. The U.S. degree, or its foreign equivalent, must be in the specific specialty required to enter the occupation. The specialty listed on the degree is not the determinative factor, and transcripts may demonstrate that the employee obtained the specialized knowledge required through specific coursework. If the employer maintains that the employee's foreign degree is equivalent to a U.S. degree,

it may include an evaluation from a reliable service that specializes in evaluating foreign educational credentials to substantiate its claim.¹²² Although the employer may demonstrate that the employee qualifies for the specialty occupation by submitting a state license, the employee must also possess a license where a state requires one.¹²³

The final element allows the employer to demonstrate that the employee's progressive experience (i.e., work experience, education, and/or training) is equivalent to a U.S. bachelor's degree or higher, and that the beneficiary has a recognition of expertise. The regulations contain further criteria to determine if the comparison is appropriate,¹²⁴ and additional criteria to evaluate the employee's expertise.¹²⁵ The regulations also define the amount of experience that may be substituted for each year of college-level training.¹²⁶ Employers will typically attempt to demonstrate that the beneficiary is qualified for the position through experience when the beneficiary does not possess at least a U.S. bachelor's degree, or it foreign equivalency, or if the degree is in an unrelated field.

iii. Ensuring that the LCA corresponds with the H-1B petition

Although DOL is responsible for certifying the LCA, USCIS currently supplements DOL's responsibility with respect to wage determinations. Specifically, USCIS ensures that the content of the LCA aligns with the proffered position and the terms of the H-1B petition.¹²⁷ Adjudicators will assess whether the wage indicated on the employer's petition corresponds with the wage level listed on the LCA. USCIS may also determine that the employer did not select the appropriate SOC code, or that the proffered position is a combination of different SOC codes, which requires the employer to select the highest-paying occupational category.¹²⁸

¹²² See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

¹²³ See 8 C.F.R. § 214.2(h)(4)(v)(A).

¹²⁴ See 8 C.F.R. § 214.2(h)(4)(iii)(D).

¹²⁵ See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

¹²⁶ See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

¹²⁷ See 20 C.F.R. § 655.705(b). See also *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 fn. 6 (AAO 2015).

¹²⁸ DOL Webpage, "Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs," p. 4 (Nov. 2009); http://www.flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed May 23, 2019).

¹²⁰ See *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].")

¹²¹ See 8 C.F.R. § 214.2(h)(4)(iii)(C).

iv. Assessing the Employer-Employee Relationship

In order to be eligible to petition for an H-1B worker, the employer must meet the definition of a U.S. employer.¹²⁹ A U.S. employer is defined as a person, firm, corporation, contractor, organization, or other association in the United States that:

- Engages a person to work within the United States;
- Has an employer-employee relationship with the H-1B beneficiary, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- Has an Internal Revenue Service Tax Identification Number.¹³⁰

USCIS interprets the terms “employer-employee relationship” as the employer’s “right to control” over when, where, and how the proposed employee performs the job by relying on common law principles and two U.S. Supreme Court decisions.¹³¹ The employer-employee relationship must exist with the beneficiary throughout the duration of the requested H-1B validity period.¹³² But in some cases, the employer listed on the petition may not in fact exert that “right to control.” The increasing use of H-1B visas has been accompanied by growth in external or third-party placements of workers through increasingly sophisticated contractual schemes. On January 8, 2010, USCIS issued a guidance memorandum titled “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party

Site Placements” to further clarify what constitutes a valid employer-employee relationship.¹³³

Pursuant to this 2010 memorandum, which is still in effect, employers may establish the requisite right to control through the submission of a combination of the following or similar types of evidence: itinerary, employment agreement, offer letter, explanation of the performance review process, and documentation between the employer and the client that will ultimately utilize the employee’s services (e.g., contracts, statements of work, service agreements, letters from the client, etc.).¹³⁴ The petition must demonstrate who, on behalf of the petitioner, oversees, directs, assigns, reviews, affects, supervises, or otherwise controls the employee’s day-to-day work, and how such control is implemented.¹³⁵

v. Determining the Availability of Work

When a third-party worksite is involved, the employer must establish through detailed documentation, such as contracts and work orders, that it has specific and non-speculative qualifying assignments for the beneficiary for the entire time period requested.¹³⁶ USCIS recommends providing corroborating evidence, such as contracts, work orders, actual work assignments (e.g., technical documentation, milestone tables, marketing analysis, cost-benefit analysis, brochures, and funding documents), and/or detailed letters signed by an authorized official of each ultimate end-client company where the beneficiary

¹²⁹ 8 C.F.R. § 214.2(h)(2)(i)(A).

¹³⁰ 8 C.F.R. § 214.2(h)(4)(ii).

¹³¹ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); and *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-45 (2003).

¹³² USCIS will deny the petition if the employer is unable to provide probative evidence that a valid employer-employee relationship will exist for any time period. Alternatively, if the employer is able to establish that a qualifying employer-employee relationship exists for a portion of the requested validity period, USCIS will limit a petition’s validity. See USCIS Interoffice Memorandum, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements” (Jan. 8, 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (accessed Mar. 11, 2019); and USCIS Webpage, “Questions & Answers: Memoranda on Establishing the “Employee-Employer Relationship” in H-1B Petitions” (Jan. 9, 2019); <https://www.uscis.gov/news/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions> (accessed Mar. 11, 2019).

¹³³ In an effort to clarify the requirements for a valid employer-employee relationship, the memorandum specifies 11 factors that adjudicators must consider. The memorandum notes that a petitioner whose business involves placing its employees at companies that contract with the petitioner for personal needs (i.e., third party placement) may not be able to establish the requisite control, and that such placements are “likely to require close review in order to determine if the required relationship exists.” USCIS Interoffice Memorandum, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements,” p.2 (Jan. 8, 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (accessed Mar. 11, 2019).

¹³⁴ USCIS Interoffice Memorandum, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements” pp. 8-9 (Jan. 8, 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (accessed Mar. 11, 2019).

¹³⁵ *Id.*

¹³⁶ USCIS Policy Memorandum, “Contract and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites,” p. 4 (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

will actually work.¹³⁷ Similar to the employer-employee relationship, demonstrating the availability of qualifying work becomes more difficult when the employee is placed at a third party worksite. Typically, this is due to the employment practices of such industries, which involve contracting out their beneficiaries' services to customers for relatively short-term projects.¹³⁸ USCIS will, in its discretion, generally limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work.¹³⁹

vi. Approving or Denying the Petition

H-1B petitions are reviewed at a USCIS Service Center, where processing times will vary; currently the processing time range is 2.5 months to 14.5 months.¹⁴⁰ The processing time depends on the Service Center responsible for adjudicating the petition and the requested action (e.g., consular processing, change of status, extension of stay, etc.).

USCIS adjudicators may approve or deny a petition, issue a RFE (requesting additional clarifying information or evidence), or issue a Notice of Intent to Deny (NOID) (giving the petitioner notice of deficiencies or derogatory evidence and an opportunity to address the negative factors before the case is denied). If approved, the duration of authorized H-1B employment may be for the full period requested, or may be shortened if the adjudicator has reason to believe that the petitioner does not have sufficient (non-speculative) work for the beneficiary for the duration requested. If the beneficiary is in a different lawful status in the United States when the petition is approved and has requested a change or extension of stay, the adjudicator may also change the beneficiary's status to H-1B. If the beneficiary is outside the United States, or USCIS otherwise determines it must deny a change or extension request, but the H-1B petition is approved, the beneficiary must apply for an H-1B visa at a DOS consular

post, and be admitted into the United States on that visa before beginning valid H-1B employment.

To receive a decision more quickly, petitioners may request Premium Processing service, which guarantees that USCIS will take action on the petition within 15 calendar days for a fee of \$1,410, and will refund the fee if it fails to do so.¹⁴¹ USCIS reserves the right to retain the fee if it opens an investigation for fraud or misrepresentation relating to the benefit request.¹⁴² In an attempt to reduce overall H-1B processing times, USCIS has repeatedly suspended the availability of Premium Processing service for sometimes substantial periods.¹⁴³

2. Administering the Numerical Cap

With certain exceptions, federal law caps the number of initial H-1B visas USCIS may approve to 65,000 per year. The law also permits the issuance of another 20,000 H-1B visas to individuals with master's degrees or higher. Employers who want H-1B workers subject to these caps must file a petition 6 months before the next fiscal year's visas become available, which is on the first business day in April.¹⁴⁴

In 2005, in response to challenges the agency faced in anticipating when the cap is reached, USCIS issued an interim rule that sought to ensure the fair and orderly allocation of cap-subject H-1B visas, in part by establishing what is generally called the H-1B lottery.¹⁴⁵ Under the rule, USCIS makes numbers available to petitions in the order in which they are filed, and applies different projected rates of approval to estimate when the

¹³⁷ USCIS Teleconference, "H-1B Filing Tips and Understanding Requests for Evidence (RFEs)," p. 7 (Mar. 7, 2019); https://www.uscis.gov/sites/default/files/files/nativedocuments/H-1B_Filing_Tips_and_Understanding_Requests_for_Evidence_RFEs.pdf (accessed May 11, 2019).

¹³⁸ "[T]hese companies are petitioning for foreign workers simply to then turn around and provide these same workers to other companies who need cheap labor for various short-term projects." 156 Cong. Rec. S. 6998 (Aug. 2010) (statement of Sen. Schumer).

¹³⁹ See USCIS Policy Memorandum, "Contract and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" p. 7 (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

¹⁴⁰ USCIS Webpage, "Check Processing Times," as of May 29, 2019; <https://egov.uscis.gov/processing-times/#mainContent> (accessed May 29, 2019).

¹⁴¹ USCIS Webpage, "How Do I Use the Premium Processing Service?" (Mar. 19, 2019); <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service> (accessed May 6, 2019).

¹⁴² See 8 C.F.R. § 103.7(e)(2)(ii).

¹⁴³ USCIS Webpage, "USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays" (Aug. 28, 2018); <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays> (accessed Mar. 3, 2019). USCIS Webpage, "USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H-1B Cap Petitions" (Mar. 20, 2018); <https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions> (accessed Mar. 5, 2018). USCIS Webpage, "USCIS Will Temporarily Suspend Premium Processing for All H-1B Petitions" (Mar. 3, 2017); <https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions> (accessed Mar. 3, 2019).

¹⁴⁴ USCIS Webpage, "H-1B Fiscal Year (FY) 2020 Cap Season" (Apr. 11, 2019); <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2019-cap-season> (accessed May 24, 2019).

¹⁴⁵ See "Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004," 70 Fed. Reg. 23775 (May 5, 2005).

cap will be reached.¹⁴⁶ USCIS notifies the public when it determines that it has received the necessary number of petitions to meet the cap (i.e., “final receipt date”). For petitions received on the final receipt date, USCIS employs a computer-generated random selection process to choose, “the remaining number of petitions deemed necessary to generate the numerical limits of approvals.”¹⁴⁷ This process is often referred to as the H-1B lottery.

USCIS first used the visa lottery in FY 2008 to manage the approximately 150,000 cap-subject H-1B petitions it received during the first 2 days petitioners were able to file.¹⁴⁸ However, during its selection process, USCIS discovered roughly 500 cases where a single beneficiary had been named on multiple petitions filed by the same employer. The agency realized that existing regulations did not punish those who filed duplicate petitions, and that due to the pressure to file petitions on the first day numbers are made available, USCIS would continue to receive a large number of filings which would, in turn, pose significant logistical challenges.¹⁴⁹

Accordingly, in March 2008, USCIS issued another interim rule to modify how it administered the cap.¹⁵⁰ In an attempt to eliminate the rush to file, the rule provided that when the cap is reached within the first 5 business days of April, all of the petitions received during this timeframe shall be included within the random selection process.¹⁵¹ In addition, the rule prohibited an employer from filing multiple cap-subject petitions on behalf of the same employee, but did not preclude related entities from engaging in this practice where there is a legitimate business need.¹⁵²

On January 31, 2019, USCIS published a final rule amending regulations governing the H-1B lottery process that impacts the order of the lottery, which actually occurs

in two stages.¹⁵³ Previously, a lottery was held to award the 20,000 visas available to U.S. master’s degree holders, and those not selected were then entered in the regular lottery for the other 65,000 visas.¹⁵⁴ To help ensure that H-1B visas are issued to the “most-skilled or highest-paid petition beneficiaries,” the regulation reversed the selection order of the H-1B regular cap and the advanced degree cap.¹⁵⁵ USCIS projects that reversal of the cap selection order may result in an increase of up to 16 percent (or 5,340 workers) in the number of selected petitions filed on behalf of beneficiaries with a U.S. master’s degree or higher.

In addition, the rule seeks to reduce overall costs for cap-subject employers and USCIS by introducing an electronic registration requirement. Rather than submitting an entire petition with supporting documentation, the rule enables employers to provide only basic information online about their company and the requested foreign worker. The lottery will then be run based on those electronic registrations, and only selected registrants will be eligible to file a cap-subject petition. USCIS suspended the electronic registration for the FY 2020 cap season to ensure that the system and process are functional. Therefore, the electronic registration process will first take place for visas that will be awarded for the FY 2021 cap season.

3. Combatting Fraud and Abuse

USCIS is concerned with fraud and abuse within the H-1B program. Such fraud and abuse could be as innocuous as employers finding loopholes “to game” the existing legal framework or may constitute serious, material misrepresentations. Due to DOL’s limited enforcement authority, the role of monitoring compliance with H-1B program requirements falls primarily with USCIS. In February 2005, the USCIS Office of Fraud Detection and National Security (FDNS) developed and implemented the Benefit Fraud Assessment program, later renamed the Benefit Fraud and Compliance Assessment (BCFA) program, in an effort to quantify the nature and extent of fraud in various nonimmigrant and immigrant benefit

¹⁴⁶ These factors, which may vary from year to year, include, “the number of petitions already approved, denied, and still pending, the period of time that unadjudicated petitions have been pending, and the education level of the petitions that are pending.” USCIS also takes into account historical data related to approvals, denials, and revocations. See “Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004,” 70 Fed. Reg. at 23778.

¹⁴⁷ *Id.*

¹⁴⁸ USCIS Webpage, “USCIS Reaches FY 2008 H-1B Cap” (Apr. 3, 2007); <https://www.uscis.gov/sites/default/files/archive/H1BFY08Cap040307.pdf> (accessed May 24, 2019).

¹⁴⁹ See “Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation,” 73 Fed. Reg. 15389, 15391 (Mar. 24, 2008).

¹⁵⁰ *Id.*

¹⁵¹ See 8 C.F.R. § 214.2(h)(8)(ii)(B).

¹⁵² See 8 C.F.R. § 214.2(h)(2)(i)(G).

¹⁵³ “Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens,” 84 Fed. Reg. 888 (Jan. 31, 2019).

¹⁵⁴ See USCIS Webpage, “USCIS Completes the H-1B Cap Random Selection Process for FY 2019” (Apr. 12, 2018); <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2019> (accessed Mar. 11, 2019).

¹⁵⁵ “Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens,” 84 Fed. Reg. at 912-915.

programs, including the H-1B program.¹⁵⁶ In 2007, the BCFA conducted a review of 246 randomly selected H-1B petitions filed between October 1, 2005 and March 31, 2006, employing unannounced site visits to verify the existence of the petitioning company and the place of employment, and to interview individuals associated with the H-1B position.¹⁵⁷ The results of this review revealed a significant amount of fraud and technical violations.¹⁵⁸

In 2009, USCIS formally transformed these H-1B site visits into the Administrative Site Visit and Verification Program (ASVVP). As part of ASVVP, FDNS conducts unannounced post-adjudication site visits in randomly selected H-1B petitions.¹⁵⁹ During these visits, FDNS officers perform a compliance review, verifying the H-1B workers' wages, job duties, and work location.¹⁶⁰ USCIS also looks for evidence that workers are not being paid while in the United States as they wait for projects

or work, a practice known as "benching."¹⁶¹ If USCIS suspects criminal activity or national security risks, it may refer the case to U.S. Immigration and Customs Enforcement (ICE) or another government agency for further investigation.¹⁶²

Between October 1, 2012 and September 30, 2018, FDNS completed a total of 44,721 H-1B ASVVP site visits,¹⁶³ which represents approximately 2.3 percent of the H-1B petitions the agency approved during this time period.¹⁶⁴ Of the 44,721 site visits conducted, USCIS determined that 39,253 (88 percent) were compliant and 5,468 (12 percent) were noncompliant.¹⁶⁵ For site visits conducted from October 1, 2012 to September 30, 2016, USCIS revoked 53 percent of the petitions deemed noncompliant.¹⁶⁶

¹⁵⁶ See "H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers" *before the Subcommittee on Immigration Policy and Enforcement of the Committee of the House Judiciary Committee*, 112th Cong. 1st Sess. 8, 13 (2011) (statement of Donald Neufeld, USCIS Associate Director Of Service Center Operations); <https://www.govinfo.gov/content/pkg/CHRG-112hrg65488/pdf/CHRG-112hrg65488.pdf> (accessed Mar. 11, 2019).

¹⁵⁷ See USCIS Questions and Answers, "H-1B Benefit Fraud and Compliance Assessment" (Aug. 28, 2008); available at <https://www.aila.org/File/Related/12052147ee.pdf> (AILA Infonet Doc. No. 12052147) (accessed Jun. 13, 2019).

¹⁵⁸ A total of 51 cases within the sample of 246 were confirmed as representing fraud, a technical violation and/or multiple technical violations—a total violation rate of 20.7 percent. Specifically, 33 cases were confirmed as representing fraud. Examples of the types of misrepresentations uncovered included: businesses that did not exist; educational degrees or experience letters confirmed to be fraudulent; forged signatures on supporting documentation; and/or the beneficiary was performing job duties significantly different from those described in the petition. In addition, a total of 18 cases were identified as having a technical violation or multiple technical violations. Some examples of technical violations included instances where the petitioner deducted certain fees associated with filing the I-129 petition from the beneficiary's salary; the employer failed to pay the beneficiary at least the prevailing wage for the particular occupation in the specific geographical location; and/or the employer placed the beneficiary in a non-productive status. See USCIS Questions and Answers, "H-1B Benefit Fraud and Compliance Assessment" (Aug. 28, 2008); available at <https://www.aila.org/File/Related/12052147ee.pdf> (AILA Infonet Doc. No. 12052147) (accessed Jun. 13, 2019).

¹⁵⁹ The sampling methodology for identifying ASVVP site visits excludes amended petitions and approved petitions in which the beneficiary is located outside of the United States. See DHS Office of the Inspector General, "USCIS Needs a Better Approach to Verify H-1B Visa Participants," OIG-18-03 (Oct. 2017) at 9-10; <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf> (accessed Mar. 11, 2019).

¹⁶⁰ USCIS Webpage, "Administrative Site Visit and Verification Program" (Oct. 30, 2014); <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (accessed Mar. 11, 2019).

¹⁶¹ USCIS Webpage, "Combating Fraud and Abuse in the H-1B Visa Program" (July 23, 2018); <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program> (accessed on Mar. 11, 2019).

¹⁶² USCIS Report to Congress, "H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," p. 2 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019).

¹⁶³ Ombudsman's calculation based on: Information provided by USCIS (April 29, 2019) (FY 2018 data), Information provided by USCIS (Apr. 18, 2018) (providing data for FY 2017) and USCIS Report to Congress, "H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," p. 3 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019) (providing data for FYs 2013 to 2016).

¹⁶⁴ From FY 2013 to FY 2017, USCIS approved 1,588,891 H-1B petitions. See USCIS Annual Report to Congress, "Characteristics of H-1B Specialty Occupation Workers," p. 5 (Apr. 9, 2018); <https://www.uscis.gov/sites/default/files/reports-studies/Characteristics-of-Specialty-Occupation-Workers-H-1B-Fiscal-Year-2017.pdf> (accessed May 10, 2018); see also USCIS Report to Congress, "H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," p. 4 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019).

¹⁶⁵ Calculation based on: Information provided by USCIS (April 29, 2019) (FY 2018 data), information provided by USCIS (Apr. 18, 2018) (FY 2017 data) and USCIS Report, "H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," p. 6 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019) (FY 2013 to FY 2016 data).

¹⁶⁶ See USCIS Report to Congress, "H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," p. 7 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019).

During the same period, H-1B and L-1A compliance reviews led to only seven referrals to ICE.¹⁶⁷

Notwithstanding the detection of violations that resulted in petition revocations, and the referral of a handful of petitions to ICE, the DHS Office of Inspector General (OIG) issued a report in October 2017 critical of the ASVVP Program.¹⁶⁸ The report concluded that USCIS' then-current site visit program was having limited impact on H-1B program integrity, and could be more effective if the agency conducted risk-based site visits.¹⁶⁹ As discussed in further detail below, USCIS initiated a new approach to conducting site visits—targeted site visits.

C. DOS's Processing Role: Reviewing the Beneficiary's Visa Application for Inadmissibility Issues and Consistency with the Petition Approval

The last step in the H-1B visa process involves according an H-1B visa to, or H-1B status upon, the worker. If the worker named in the petition is in the United States, status is granted (if eligible) at the time of the petition's approval where a change of status was requested. If the worker is not in the country, the DOS is responsible for determining if the H-1B beneficiary/visa applicant is eligible to receive a visa at a U.S. Embassy or Consulate abroad. The DOS Foreign Affairs Manual (FAM) instructs consular officers that USCIS' approval of an H-1B petition is *prima facie* evidence that all of the statutory and regulatory requirements to be classified an H-1B beneficiary were satisfied.¹⁷⁰ Nevertheless, the visa applicant bears the burden of establishing visa eligibility during the visa interview.¹⁷¹

After approving the petition, USCIS sends a duplicate copy of the H-1B petition to DOS's Kentucky Consular Center (KCC). The KCC then scans the petition into the Petition Information Management Service (PIMS), which U.S. Consulates/Embassies can access electronically. Although the Consulate/Embassy may not issue a visa until KCC uploads the appropriate information into PIMS, the beneficiary may apply for a nonimmigrant visa and

schedule an appointment for a visa interview after USCIS approves the petition.

During the interview, consular officers review the completed forms provided by the visa applicant. In nearly all cases, consular officers also have access to electronic copies of the petition approval notices, I-129 and supplemental forms, and other documents submitted to USCIS in support of the petition.¹⁷² Based on the evidence, consular officers must determine if the visa applicant is inadmissible based on the immigration or criminal history, medical grounds, or for one of a number of another specified reasons listed in the INA.¹⁷³ Consular officers may also probe issues bearing on the petition itself. Without limitation, officers may ask about the type of work that is to be performed, where the beneficiary went to school, past employment history and immigration history, where the work will be performed, and the wage rate the beneficiary expects to be paid.

In conducting the interview, DOS may uncover information or evidence that was not available to USCIS when it approved the petition. For example, a consular officer may be aware that a particular university or an employer referenced on the applicant's education or work history were fabricated. If specific information casts doubt on the *bona fide* nature of the petition or on the beneficiary's application during the interview process, DOS may deny the visa application, returning the visa petition to USCIS for possible revocation.¹⁷⁴

IV. The Current H-1B Program and its Underlying Policy Issues

Due to the broad categories of workers that employers may sponsor and its dual-intent nature, the H-1B is popular with U.S. employers and foreign workers. In FY 2018, USCIS accepted 418,790 H-1B petitions, which represents

¹⁶⁷ *Id.*

¹⁶⁸ DHS Office of the Inspector General, "USCIS Needs a Better Approach to Verify H-1B Visa Participants," OIG-18-03 (Oct. 2017) at 9-10; <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf> (accessed Mar. 11, 2019).

¹⁶⁹ *Id.*

¹⁷⁰ 9 FAM 402.10-9(A).

¹⁷¹ *Id.*

¹⁷² Ombudsman Recommendations, "Recommendation Regarding USCIS' Role in the Petition Information Management Service," p. 2 (May 16, 2012); <https://www.dhs.gov/xlibrary/assets/cisomb/cisomb-pims.pdf> (accessed Mar. 11, 2019).

¹⁷³ See INA § 212(a); 8 U.S.C. § 1182(a).

¹⁷⁴ 9 FAM 402.10-9(A)(b).

a 70 percent increase since FY 2009.¹⁷⁵ This number includes not only initial petitions but amendments to prior petitions and renewals. Accepted petitions (those not rejected for administrative reasons) have had a relatively high approval rate. From FY 2015 through FY 2018, USCIS approved approximately 92 percent of adjudicated H-1B petitions.¹⁷⁶ The majority of the top 30 employers of the H-1B program are large companies specializing in information technology services, business consulting, and outsource staffing services.¹⁷⁷ As such, approximately 66 percent of the H-1B petitions approved in FY 2018 were for computer-related occupations.¹⁷⁸ The overwhelming majority of H-1B visa holders are nationals of India,¹⁷⁹ and approximately 64 percent of the H-1B petitions approved in FY 2018 were for employees between the ages of 25 and 34.¹⁸⁰

As the H-1B program has grown in scope and popularity, several policy debates surrounding the program have followed. These debates have largely focused on finding the appropriate balance between the interests of employers

and U.S. workers. There has also been increasing concern about potential abuse and exploitation of the H-1B workers themselves.

A. U.S. Employers' Access to H-1B Labor

Congress created the H-1B program for U.S. employers to obtain the employees they argue keep them competitive in the global marketplace; many policies adopted since then have been designed to further assist employers to access this pool of foreign labor. From the start, for example, to streamline the hiring process, Congress declined to impose on H-1B employers a requirement to recruit qualified and available U.S. workers before hiring an H-1B worker.¹⁸¹ And while Congress eventually required H-1B *dependent* employers to attest they have recruited U.S. workers before petitioning for H-1B workers,¹⁸² legislative attempts to apply this requirement to *all* H-1B employers have failed.¹⁸³ Congress also accepted employers' desire for flexibility in the prevailing wage rate formula.¹⁸⁴ Moreover, Congress deliberately limited the DOL's ability to review an employer's LCA; once an employer submits its LCA to the DOL, the DOL by statute has only 7 days to certify it, and may review it only for "completeness and obvious inaccuracies." DOL's review of an LCA can neither confirm the correctness of the prevailing wage, nor even whether the job is a specialty occupation.¹⁸⁵

Employers seeking H-1B workers have viewed the annual cap on visas as a challenge to hiring and retaining foreign talent, and accordingly have repeatedly sought legislative

¹⁷⁵ Ombudsman's calculation based on: USCIS Webpage, "Number of H-1B Petition Filings, Applications and Approvals, Country, Age, Occupation, Industry, Annual Compensation (\$), and Education, 2007 to 2017," <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-2007-2017-trend-tables-12.19.17.pdf> (accessed Mar. 5, 2019) and USCIS Webpage, "Non-Immigrant Worker Request for Evidence (RFE) Data FY2015-FY2019 Q1," <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/non-immigrant-worker-rfe-h-1b-quarterly-data-fy2015-fy2019-q1.pdf> (accessed May 23, 2019). In comparison, in FY 2018, USCIS received 41,293 Form I-129 petitions requesting either L-1A, Intracompany Transferee Executive or Manager or L-1B, Intracompany Transferees Specialized Knowledge classifications. See USCIS Webpage, "Non-Immigrant Worker Request for Evidence (RFE) Data FY2015-FY2019 Q1," <https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first> (accessed Mar. 5, 2019).

¹⁷⁶ See USCIS Webpage, "Non-Immigrant Worker Request for Evidence (RFE) Data FY2015-FY2019 Q1," <https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first> (accessed Mar. 5, 2019).

¹⁷⁷ See USCIS Webpage, "H-1B Quarterly Request for Evidence (RFE) FY2015-FY2019 Q1 Top 30 Employers," <https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first> (accessed Mar. 4, 2019).

¹⁷⁸ See USCIS Annual Report to Congress, "Characteristics of H-1B Specialty Occupation Workers," pp. 11-13 (Apr. 4, 2019)(in the possession of the Ombudsman).

¹⁷⁹ In FY 2018, approximately 74 percent of the H-1B the petitions received were filed on behalf of Indian nationals. See USCIS Webpage, "H-1B Petitions by Gender and Country of Birth, Fiscal Year 2018," <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-petitions-by-gender-country-of-birth-fy2018.pdf>, (accessed Mar. 5, 2019).

¹⁸⁰ See USCIS Annual Report to Congress, "Characteristics of H-1B Specialty Occupation Workers," p. 9 (Apr. 4, 2019)(in the possession of the Ombudsman).

¹⁸¹ "Nonimmigrants in specialty occupations will be admitted on the basis of a streamlined attestation with no recruitment requirement or any possible challenge prior to entry." See H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 68 (1990).

¹⁸² "H-1B nondependent employers are not subject to the conditions [recruitment attestation], and their H-1B workers may be hired even when a qualified U.S. worker wants the job, and a U.S. worker can be displaced from the job in favor of the foreign worker." U.S. Department of Labor, Strategic Plan: Fiscal Years 2006 – 2011, 35; <https://www.dol.gov/sites/default/files/StrategicPlan2006-2011.pdf> (accessed Mar. 5, 2019).

¹⁸³ "To remain competitive in global markets, the Committee believes hiring decisions must remain the realm of U.S. companies and universities, rather than Federal bureaucrats." S. Rep. No. 186, 105th Cong., 2nd Sess., at 18 (1998).

¹⁸⁴ "The first problem which these corrections address is the rigid wage determination formula contained in the provisions of the Immigration Act of 1990.... the employer is not required to use any specific methodology to determine that the alien's wage complies with the wage requirements of the Act and may utilize a state agency determination, such as a SESA, an authoritative independent source, or other legitimate sources of wage information." 137 Cong. Rec. S34966 (Nov. 26, 1991) (statement of Sen. Kennedy).

¹⁸⁵ See MTINA § 303(a)(7)(B)(iii) (amending INA § 212(n)(1)(D)); 8 U.S.C. § 1182(n)(1)(D)).

increases. Members of Congress frequently introduced legislation to increase the H-1B cap, although Congress has proven more willing to adopt such legislation during relatively strong economic periods. For example, the marked increase in demand for IT workers during the late 1990s resulted in employers successfully lobbying Congress to increase the cap, albeit temporarily.¹⁸⁶ Congress has also exempted certain petitioners from the cap entirely,¹⁸⁷ and USCIS has codified regulations that expand upon this statutory exemption.¹⁸⁸

Employers affected by the caps have long contended that there is a gap in the supply of U.S. workers, particularly in the STEM fields.¹⁸⁹ Supporters also maintain that the labor market is not a zero-sum game: the replacement of a U.S. worker does not happen in every instance in which an employer hires an H-1B worker. Moreover, they argue that the inability to fill these positions results in the movement of jobs offshore, which portends a negative impact on U.S. workers.¹⁹⁰

Finally, as more beneficiaries neared the end of 6 years working under an H-1B visa, employers frequently sought to keep these H-1B workers by sponsoring them for employment-based immigrant visas. However, the statutory caps on employment-based immigrant visa categories and the per-country limitations created long wait times to obtain those green cards, particularly for individuals born in India and China. To enable employers to keep these H-1B workers here longer, AC21 allowed

H-1B workers to extend their stay beyond the otherwise applicable 6-year limit.¹⁹¹

B. Protecting U.S. Workers' Jobs and Wages

To help protect U.S. workers from the impact of the H-1B program, IMMACT90 required employers to make certain attestations, including the promise that it will pay H-1B workers the greater of the actual wage or prevailing wage and that hiring H-1B workers will not adversely affect the wages or working conditions of U.S. workers. These attestations have remained the bedrock of the program. The requirement to pay the greater of the actual wage or prevailing wage, in particular, was meant to protect U.S. wages by decreasing the incentive for hiring cheap foreign labor.¹⁹² Finally, the law included a complaint-driven, back-end enforcement of the attestations.¹⁹³

When employers successfully lobbied to increase the H-1B cap in 1998 and 2000, Congress sought to counterbalance those increases by supplementing DOL's enforcement capabilities and requiring more attestations. For example, when employers successfully advocated to increase the H-1B cap through ACWIA, additional attestations were incorporated into the LCA, most notably the requirement that H-1B dependent employers attest they have recruited U.S. workers before petitioning for H-1B workers.¹⁹⁴ Congress also expanded DOL's investigative authority and raised monetary penalties that it could assess. Congress implemented additional filing fees to promote fraud prevention,¹⁹⁵ to target foreign companies known for

¹⁸⁶ "Virtually no employers the Committee has contacted have related anything but a serious difficulty in finding skilled individuals to fill key positions. The employers have found that these unfilled positions are limiting their companies' growth potential and ability to create more jobs, products, and services for Americans." S. Rep. No. 186, 105th Cong., 2nd Sess., at 10 (1998).

¹⁸⁷ "The principal reason for the first exemption is that by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupation fields we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education." See S. Rep. No. 260, 106th Cong., 2nd Sess. at 21-22 (2000).

¹⁸⁸ See "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 Fed. Reg. 82398 (Nov. 18, 2016).

¹⁸⁹ "Now we face a critical shortage of scientific talent, and there's only one way to solve that crisis today: Open our doors to highly talented scientists and engineers who want to live, work, and pay taxes here." Microsoft Webpage, "Bill Gates: U.S. Senate Committee Hearing on Strengthening American Competitiveness" (Mar. 7, 2007); <https://news.microsoft.com/2007/03/07/bill-gates-u-s-senate-committee-hearing-on-strengthening-american-competitiveness/> (accessed on Jun. 13, 2019).

¹⁹⁰ See S. Rep. No. 186, 105th Cong., 2nd Sess., at 12-17 (1998).

¹⁹¹ See AC21 §§ 104(c) and 106(a) and (b) (as amended by 21st Century Department of Justice Appropriations Authorization Act, § 11030A, Pub. L. No. 107-273 (2002)). USCIS has also promulgated regulations that allows certain beneficiaries in H-1B status to apply for separate employment authorization if they face compelling circumstances while they wait for an immigrant visa to become available. 8 C.F.R. § 204.5(p).

¹⁹² "[A]ttestations are required to assure the wages and working conditions of U.S. workers are not adversely affected." "Implementation of the Immigration Act of 1990," *before the Subcommittee on International Law, Immigration, and Refugees of the U.S. House Judiciary Committee*, 102nd Cong., 1st Sess. 96 (1991) (statement of David O. Williams, Deputy Assistant Secretary for Employment and Training, Department of Labor).

¹⁹³ H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 61 (1990).

¹⁹⁴ "[J]ob contractors/shops who are seeking aliens without extraordinary talents (only bachelor's degrees) or offering relatively low wages (below \$60,000)." 144 Cong. Rec. E2323 (extension of remarks November 12, 1998) (statement of Rep. Smith).

¹⁹⁵ The H-1B Visa Reform Act of 2004 imposes a \$500 fraud prevention and detection fee on certain employers filing H-1B petitions. See INA § 214(c)(12), 8 U.S.C. § 1184(c)(12).

outsourcing IT jobs,¹⁹⁶ and to fund STEM education for U.S. workers. The education funding, which sought to address claims that there were insufficient U.S. workers in the IT industry, was accomplished by creating the H-1B Nonimmigrant Petitioner Fee account (i.e., the “ACWIA fee”) in 1998.¹⁹⁷ Funds gathered through this fee are primarily allocated between DOL and the National Science Foundation to fund job training programs, scholarships, and grants for mathematics, engineering, or science enrichment courses.¹⁹⁸ In FY 2018, approximately 66 percent of the H-1B petitions filed were subject to the ACWIA fee, which resulted in over \$500 million in funds disbursed.¹⁹⁹

C. Reducing H-1B Worker Exploitation

In order to decrease the likelihood that H-1B foreign workers are exploited, or dissuaded from reporting violations by employers, Congress implemented several policies to protect the H-1B workers from abuse and retaliation. For example, Congress created H-1B portability provisions, allowing beneficiaries to change employers when the new employer files a petition, rather than having to wait for the petition approval.²⁰⁰ In addition, ACWIA incorporated whistleblower protections for H-1B employees who feared retaliation and were therefore hesitant to file a complaint with the DOL.²⁰¹ When DOL determines that an employer is not compliant with the H-1B requirements (e.g., failing to pay the

appropriate wage), it can impose remedies such as payment of back wages as well as civil penalties.²⁰²

D. Outsourcing

The debate surrounding outsourcing that takes place in the H-1B program is perhaps the prime example of how the interests of employers, U.S. workers, and H-1B workers have clashed. Over time, large U.S. companies have outsourced their IT functions, sometimes entire departments, to computer consulting companies, including H-1B dependent employers, often replacing established employees with junior workers performing similar or identical functions. Many of these outsourcing firms heavily rely on H-1B workers, mostly from India, to perform the same functions as U.S. IT workers, often at lower wages. Once the H-1B workers are trained, the IT function has been essentially “outsourced” and the U.S. workers are laid off.²⁰³

The last decade has seen several high-profile employers replacing their mid-level IT functions with H-1B dependent IT consulting firms, who bring in H-1B workers to perform the duties.²⁰⁴ In several cases, work activities were outsourced and U.S. workers were forced to train their H-1B counterparts at the consulting companies.²⁰⁵ The lower wages paid in some cases to the H-1B workers allowed employers to cut labor costs significantly by

¹⁹⁶ “The emergency border funds will be paid for by assessing fees on foreign companies known as chop shops that outsource good, high-paying American technology jobs to lower wage, temporary immigrant workers from other countries...it will level the playing field for American companies and American workers to compete against these foreign companies known in the industry as using ‘outsourcing visas.’” 156 Cong. Rec. S.6838-6839 (2010) (statement of Sen. Schumer).

¹⁹⁷ See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 414(a), Pub. L. No. 105-277, div. B, tit. IV; as codified at 8 U.S.C. § 1184(c).

¹⁹⁸ For a breakdown of the disbursement of funds between NSF, DOL, and USCIS see Linda Levine and Blake A. Naughton, Congressional Research Service, “Programs Funded by the H-1B Visa Education and Training Fee, and Labor Market Conditions for Information Technology (IT) Workers” (Oct. 5, 2007).

¹⁹⁹ Ombudsman’s calculation based on data provided in USCIS Annual Report to Congress, “Report on H-1B Petitions, Fiscal Year 2018” (Mar. 18, 2019), Table 2, p. 7 (report in possession of the Ombudsman).

²⁰⁰ See S. Rep. No. 260, 106th Cong., 2nd Sess. at 22-23 (2000).

²⁰¹ USCIS also considers employer retaliation against certain H-1B workers as a situation that may justify the need for employment authorization pursuant to compelling circumstances, and it also may constitute “extraordinary circumstances” that allow USCIS to forgive failures to maintain status. 8 C.F.R. § 214.2(h)(20).

²⁰² 20 C.F.R. § 655.731(c)(11).

²⁰³ See Julia Preston, “Large Companies Game H-1B Visa Program, Costing the U.S. Jobs,” *The New York Times* (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html?action=click&contentCollection=U.S.®ion=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia> (accessed Jun. 13, 2019).

²⁰⁴ See, e.g., 60 Minutes, “Are U.S. jobs vulnerable to workers with H-1B visas?” (CBS television broadcast Mar. 19, 2017); <https://www.cbsnews.com/news/are-u-s-jobs-vulnerable-to-workers-with-h-1b-visas/> (Mar. 4, 2019) and Michael Hiltzik, “How the University of California exploited a visa loophole to move tech jobs to India,” *Los Angeles Times* (Jan. 6, 2017), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-visas-20170108-story.html> (accessed Mar. 4, 2019).

²⁰⁵ See Patrick Thibodeau, “Senator Durbin Calls Abbott Labs’ IT Layoffs ‘Harsh and Insensitive,’” *Computerworld* (Feb. 29, 2016); <https://www.computerworld.com/article/3039353/sen-durbin-calls-abbott-labs-it-layoffs-harsh-and-insensitive.html> (accessed Mar. 5, 2019). See also Daisuke Wakabayashi and Nelson D. Schwartz, “Not Everyone in Tech Cheers Visa Program for Foreign Workers,” *The New York Times* (Feb. 5, 2017); <https://www.nytimes.com/2017/02/05/business/h-1b-visa-tech-cheers-for-foreign-workers.html> (accessed Mar. 4, 2019).

means of these outsourcing arrangements.²⁰⁶ This H-1B outsourcing is legal, but it has generated significant controversy about how current statutory and regulatory provisions create opportunities for abuse.

Although employers may reap certain business advantages from outsourcing, such as focusing on core competencies, most stakeholders agree the H-1B visa was not created to enable employers to maximize profits by depressing the wages of U.S. and foreign workers; rather, the intent of the program was to fill gaps by bringing specific skills to the domestic workforce.²⁰⁷ Furthermore, significant employer

violations may occur when employers place employees at third-party worksites.²⁰⁸

Currently, H-1B program does not protect U.S. workers from this controversial business practice, which, when juxtaposed with the current administrative framework, highlights statutory gaps. Consulting companies that contract with U.S. employers to supply H-1B IT workers are typically H-1B dependent,²⁰⁹ and are therefore subject to the “non-displacement” attestation (which includes not displacing a client’s employees) and the “recruitment” attestation. However, employers are exempt from these provisions if they pay the H-1B worker at least \$60,000 per year, regardless of geographic location or the worker’s education level (often a master’s degree). In FY 2018, approximately 98 percent of the LCAs submitted by dependent employers were filed on behalf of employees exempt from the additional attestations.²¹⁰ In addition, although all H-1B employers attest on the LCA that they will not adversely affect the working conditions of similarly situated employees, the corresponding regulations narrowly interpret this requirement as only applying to workers employed by the H-1B employer, and not to workers employed by a third party.²¹¹

²⁰⁶ “H-1B workers are being paid 33-39% less than the Disneyworkers.” “The Impact of High-Skilled Immigration on U.S. Workers,” *before the Subcommittee on Immigration and the National Interest of the U.S. Senate Judiciary Committee*, 114th Cong. 2nd Sess. (Feb. 25, 2016) (statement of Ronil Hira, Ph.D., P.E., Associate Professor of Public Policy at Howard University, Washington D.C.), <https://www.judiciary.senate.gov/imo/media/doc/02-25-16%20Hira%20Testimony.pdf> (accessed Mar. 4, 2019). H-1B workers performing work at Southern California Edison (SCE) were paid up to 41 percent less than the SCE employees they replaced. See Ron Hira, “New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program,” *Economic Policy Institute: Working Economics Blog* (Feb. 19, 2015); <http://www.epi.org/blog/new-data-infosys-tata-abuse-h-1b-program> (accessed Mar. 4, 2019). In the Disney case, the court ruled that, because the function was outsourced, the appropriate wage level was within the company performing the outsourced activities and not the company (Disney) from whom the activities were taken.

²⁰⁷ “The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts.” “Petitioning Requirements for the H Nonimmigrant Classification,” 63 Fed. Reg. 30419, 30420 (June 4, 1998). “[T]he H-1B program was not intended for an employer to establish a business of H-1B aliens to contract out to U.S. employers.” DOL Office of the Inspector General Report, “The Department of Labor’s Foreign Labor Certification Programs: The System is Broken and Needs to be Fixed,” 06-96-002-03-321 (May 1996) at 25; https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=06-96-002-03-321&y=pre_1998 (accessed Mar. 11, 2019).

²⁰⁸ See e.g., Department of Justice (DOJ) Press Releases, “Owner of Information Technology Staffing Company Charged with Visa and Naturalization Fraud” (Feb. 5, 2019); <https://www.justice.gov/usao-nj/pr/owner-information-technology-staffing-company-charged-visa-and-naturalization-fraud> (accessed Mar. 11, 2019) (“[petitioner] falsely represented that the foreign workers had full-time positions awaiting them at a national bank”); “Owner of Information Technology Companies Admits Visa Fraud and Tax Crimes” (Feb. 1, 2018); <https://www.justice.gov/usao-nj/pr/owner-information-technology-companies-admits-visa-fraud-and-tax-crimes> (accessed Mar. 11, 2019) (owner of IT staffing and consulting companies presented false documents showing the foreign workers would be working for third-party clients); “Rochester Couple Charged with Fraud and Money Laundering” (Nov. 30, 2017); <https://www.justice.gov/usao-wdny/pr/rochester-couple-charged-fraud-and-money-laundering> (accessed Mar. 11, 2019) (couple falsely claimed foreign workers would enter the United States to work for IT companies as computer programmers); and “San Jose Businesswoman Sentenced to Prison for High-Technology Worker Visa Fraud” (Dec. 20, 2017); <https://www.justice.gov/usao-ndca/pr/san-jose-businesswoman-sentenced-prison-high-technology-worker-visa-fraud> (accessed Mar. 11, 2019) (petitioner falsely stated the beneficiaries would be working at an IT company”).

²⁰⁹ Letter from M. Patricia Smith, Solicitor of Labor, DOL, to Richard J. Durbin, U.S. Senator (Apr. 21, 2015).

²¹⁰ Ombudsman’s calculation based on data provided on DOL Webpage, “OFLC Performance Data, Disclosure Data, LCA Programs (H-1B, H-1BA, E-3) FY 2018” (May 13, 2019); <https://www.foreignlaborcert.doleta.gov/performance/cfm> (accessed May 27, 2019).

²¹¹ See 20 C.F.R. § 655.732(a). See also *Perrero v. HCL America, Inc. et al*, No. 6:16-cv-112-Orl-31TBS (M.D. Fla. 2016).

Therefore, the integrity of the program relies heavily on H-1B employers offering wages that are comparable to those of U.S. workers. The wage requirement was designed to ensure that H-1B workers receive a wage that does not undercut the wages of similarly situated U.S. workers. Nonetheless, the employer's ability to determine the appropriate wage level often results in the employer selecting a prevailing wage at one of the two lowest wage levels, both of which fall below the median income for that occupation (i.e., Level III). For example, in FY 2017, for employers that utilized an OES wage survey,²¹² approximately 37 percent of the certified LCAs contained a prevailing wage Level I, and approximately 31 percent were filed for a wage Level II position.²¹³ By predominately selecting a Level I or Level II wage, employers are setting the prevailing wage at a rate that is below what the average U.S. worker is paid.²¹⁴

The lower wages offered to H-1B workers not only create the potential for displacing U.S. workers, but also raise concerns that wages within the entire IT industry are being suppressed.²¹⁵ Among the top 20 H-1B employers, H-1B dependent employers pay their employees nearly

\$30,000 less on average and employ more workers without advanced degrees than non-dependent employers.²¹⁶ Offering lower wages also undermines the statutory requirement that the specialty occupation demand highly specialized knowledge from the H-1B worker.²¹⁷

In addition, the pervasiveness of entry-level jobs within the H-1B market and the increase in U.S. college graduates with STEM degrees have raised doubts about the extent of the perceived STEM worker shortage.²¹⁸ The majority of foreign students who changed status from F-1 nonimmigrant student status to H-1B between FY 2012 through May 2018 graduated with a degree in Computer Science.²¹⁹ Concurrently, there have been dramatic increases in enrollment in undergraduate Computer Science courses and related fields in U.S. colleges and universities.²²⁰ From 2013 to 2017, the number of undergraduates majoring in Computer Science more than doubled.²²¹ This growth is the result of a significant increase in the number of U.S. citizens and permanent

²¹² Ombudsman's calculation based on data provided on DOL Webpage, "OFLC Performance Data, Disclosure Data, LCA Programs (H-1B, H-1BA, E-3) FY 2017" (May 13, 2019); <https://www.foreignlaborcert.doleta.gov/performance/data.cfm> (accessed May 27, 2019). The data sample only includes "Certified," and "Certified-Withdrawn" LCAs submitted in FY 17 seeking either H-1B or H-1B1 visa classification. In addition, the sample includes employers that selected "OES" as their prevailing wage source, as well as those employers that selected "Other" for their prevailing wage source, but ultimately specified the source of the prevailing wage survey as OFLC or Online Wage Library (i.e., OES).

²¹³ Although data captured on the certified LCAs can show some trends, it is also limited because there is not a one-to-one relationship between LCAs certified by DOL, and I-129 petitions filed with USCIS. For example, DOL certified 553,008 LCAs in FY 2017, but USCIS only received 403,155 petitions in FY 2017. Since DOL does not collect a filing fee for the LCA, many employers file defensive LCAs. In addition, unlike the I-129 petition, one LCA can be filed for multiple H-1B workers.

²¹⁴ "Employers that select a Level 1 wage reap a \$40,000 discount on what the average American is paid.... [Level II], which is typically 20 percent below the average US worker's wages." Ron Hira and Bharath Gopalaswamy, "Reforming US' High-Skilled Guestworker Program," Atlantic Council South Asia Center, pp. 9-10 (Jan. 2019); https://www.atlanticcouncil.org/images/publications/Reforming_US_High-Skilled_Guestworkers_Program.pdf (accessed Mar. 11, 2019).

²¹⁵ See "The Impact of High-Skilled Immigration on U.S. Workers" *before the Subcommittee on Immigration and the National Interest of the Senate Judiciary Committee*, 114th Cong. 2nd Sess. (2016) (statement of Prof. Hal Salzman, Ph.D., E.J. Bloustein School of Planning and Public Policy, J.J. Heldrich Center for Workforce Development at Rutgers University); <https://www.judiciary.senate.gov/download/02-25-16-salzman-testimony> (accessed Jun. 13, 2019). See also John Bound, Gaurav Khanna, and Nicolas Morales, "Understanding the Economic Impact of the H-1B Program on the U.S.," National Bureau of Economic Research, Working Paper 23153 (Feb. 2017), <https://www.nber.org/papers/w23153> (accessed Jun. 18, 2019).

²¹⁶ Sarah Pierce and Julia Gelatt, "Evolution of the H-1B: Latest Trends in a Program on the Brink of Reform," Migration Policy Institute, p. 10 (Mar. 2018); <https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform> (accessed Mar. 11, 2019).

²¹⁷ Level I (entry) wage rates "are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment." DOL Webpage, "Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs," p. 7 (Nov. 2009); http://www.flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (accessed Mar. 11, 2019).

²¹⁸ "For every two students that U.S. colleges graduate with STEM degrees, only one is hired into a STEM job." Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, "Guestworkers in the High-Skill U.S. Labor Market," Economic Policy Institute Briefing Paper #359, p. 2 (Apr. 2013); <https://www.epi.org/files/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf> (accessed Mar. 11, 2019).

²¹⁹ USCIS Webpage, "Number and Characteristics of F-1 Beneficiaries Who Changed Status to H-1B, Fiscal Years 2012-2018 (to date);" <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/number-and-characteristics-of-f-1-beneficiaries-who-changed-status-to-h-1b-fiscal-years-2012-2018.pdf> (accessed Jul. 11, 2019).

²²⁰ See "Assessing and Responding to the Growth of Computer Science and Undergraduate Enrollments," The National Academies Press, The National Academies of Sciences Engineering Medicine (2018); <https://www.nap.edu/read/24926/chapter/1#ix> (accessed Mar. 5, 2019).

²²¹ See Natasha Singer, "The Hard Part of Computer Science? Getting Into Class," *The New York Times* (Jan. 24, 2019); <https://www.nytimes.com/2019/01/24/technology/computer-science-courses-college.html> (accessed Mar. 5, 2019).

residents obtaining bachelor's degrees in Computer Science and related fields.²²²

While the extent of the STEM labor shortage is difficult to assess,²²³ there appears to be increased numbers of U.S. college graduates capable of performing the type of entry-level work prevalent within the H-1B program. In turn, the availability of qualified U.S. workers fuels the need to ensure that the H-1B visas are awarded to the most talented foreign workers, and that employers are using the visa to fill legitimate business needs.

V. The Implementation of the BAHA Executive Order

Responding in part to concerns that H-1B employers are displacing U.S. workers, President Trump issued the BAHA EO on April 18, 2017. The EO directs DHS to, among other requirements, propose new rules and issue new guidance “to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.”²²⁴ The BAHA EO also orders the “Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security [to] suggest reforms to help ensure that H-1B visas are awarded *to the most-skilled or highest-paid petition beneficiaries*.”²²⁵

Pursuant to BAHA, USCIS has issued several policy memoranda, implemented additional measures to deter H-1B visa fraud, and amended the H-1B lottery process through regulation.²²⁶

A. Operational Changes and Interagency Collaboration

In April 2017, USCIS announced that it was supplementing its existing random site visit program, the ASVVP described above, with a more refined approach. This new program, called the Targeted Site Visit and Verification Program (TSVVP), focuses site visits on companies where fraud and abuse may be more likely to occur, based on the following risk factors: H-1B-dependent employers; cases where USCIS cannot validate the employer's basic business information through commercially available data; and employers who assign their H-1B workers to another company's location.²²⁷ Targeted site visits help USCIS determine whether H-1B dependent employers are actually paying their workers the statutorily required salary to qualify for an exemption from the “recruitment” and “non-displacement” attestations.²²⁸ Between its inception in July 2017 and the close of the fiscal year on September 30, 2018, USCIS had conducted 482 TSVVP site visits.²²⁹ Of these, USCIS found fraud in 168 cases; issued inconclusive findings for 126; and found no fraud in the remaining 188.²³⁰

The BAHA EO also requires the agencies concerned with immigration administration to “rigorously enforce and administer the laws governing entry into the United States of workers from abroad....”²³¹ This order has led to more coordinated efforts in the enforcement and administration of the H-1B program. In January 2017, USCIS and DOL executed a Memorandum of Agreement (MOA) to share access to electronic systems that contain certain labor condition application and employment-based petition information.²³² In addition, the MOA provides DOL with access to USCIS' Validation Instrument for Business Enterprises (VIBE) database, which contains

²²² For example, from 2005 to 2015 the number of students that earned a bachelor's degree in Computer Science increased by 61 percent. During the same period, the number of United States citizens or permanent residents earning a bachelor's degree in this field increased by 64 percent. See “Science and Engineering Indicators 2018,” National Science Foundation, appendix table 2-22 (Jan. 2018); <https://www.nsf.gov/statistics/2018/nsb20181/report/sections/higher-education-in-science-and-engineering/undergraduate-education-enrollment-and-degrees-in-the-united-states> (accessed Jun. 18, 2019).

²²³ “Revisiting the STEM Workforce: A Companion to Science and Engineering Indicators 2014,” National Science Foundation, p. 9 (Feb. 4, 2015); <https://www.nsf.gov/pubs/2015/nsb201510/nsb201510.pdf> (accessed Mar. 3, 2019).

²²⁴ Executive Order 13788, “Buy American and Hire American” (Apr. 18, 2017); 82 Fed. Reg. 18837, 18838 (Apr. 21, 2017).

²²⁵ Executive Order 13788, “Buy American and Hire American,” 82 Fed. Reg. at 18839 (emphasis added).

²²⁶ “Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens,” 84 Fed. Reg. 888 (Jan. 31, 2019).

²²⁷ See USCIS Report to Congress, “H-1B and L-1A Compliance Review Site Visits: Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016),” p. 10 (Jan. 17, 2018); <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (accessed Mar. 11, 2019).

²²⁸ See USCIS Webpage, “Combating Fraud and Abuse in the H-1B Visa Program” (July 23, 2018); <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program> (accessed on Mar. 11, 2019).

²²⁹ Information provided by USCIS (Apr. 29, 2019; Apr. 18, 2018).

²³⁰ *Id.*

²³¹ Executive Order 13788, “Buy American and Hire American,” 82 Fed. Reg. at 18838.

²³² See DHS Privacy Impact Assessment Update, “Validation Instrument for Business Enterprises (VIBE)” pp. 3-4 (Oct. 13, 2017); <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-VIBE-october2017.pdf> (accessed Mar. 11, 2019).

information on fraudulent H-1B petitioners.²³³ USCIS is currently exploring the possibility of sharing its site visit information with DOL's WHD. Finally, USCIS is in discussions with DOS to facilitate the sharing of site visit information and derogatory evidence.²³⁴

In addition, on May 11, 2018, USCIS and the DOJ Civil Rights Division's Immigrant and Employee Rights Section (IER) announced a Memorandum of Understanding (MOU) that orchestrates the exchange of data and interagency case referrals between FDNS and IER.²³⁵ In February 2017, IER launched its "Protecting U.S. Workers Initiative" that targets, investigates, and prosecutes companies who engage in discrimination against U.S. workers in the hiring process.²³⁶ The MOU expanded on previous collaborations, enhancing data sharing of information regarding an employer's potential misuse of visa programs to discriminate against available and qualified workers, and the potential violation of the statutes and regulations governing the processes for seeking employment-based visas.²³⁷ It improves the ability of both agencies to share information that will assist in identifying, investigating, and prosecuting employers that may be discriminating against U.S. workers and/or violating immigration laws.²³⁸

B. Policy Memoranda

On March 31, 2017, USCIS issued a Policy Memorandum rescinding its December 22, 2000 "Guidance memo on H-1B computer-related positions." The previous policy

had permitted adjudicators to presume that computer programmer positions qualify as a specialty occupation.²³⁹ In the new memorandum, USCIS states that an entry-level computer programmer position would not generally qualify as a position in a specialty occupation based on the criteria outlined in the OOH. To support this decision, USCIS references the OOH, which states that individuals with only an "associate's degree" may enter this occupation, and notes that the earlier memo failed to link the degree requirement to a specific field of study (e.g., computer science or information systems). USCIS also discusses in a footnote the wages offered to the H-1B beneficiary, instructing adjudicators to consider the designated wage rate to determine if it "appears to correspond to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation*."²⁴⁰

It appears that this memorandum may have resulted in higher reported H-1B wages. Initially, as the new policy was implemented, stakeholders reported receiving an increase in RFEs that asked employers whether the LCA submitted properly reflects the position offered in the H-1B petition—and specifically, the appropriateness of the employer's Level I wage designation. Then, in FY 2018, certified LCAs containing a Level 1 prevailing wage dropped by 21 percentage points (from 37 percent in FY 2017 to 16 percent in FY 2018).²⁴¹ Correspondingly, the median salary on approved H-1B petitions increased from \$85,000 in FY 2017 to \$95,000 in FY 2018.²⁴²

Unsurprisingly, the memorandum has also likely resulted in fewer employers selecting the SOC code for Computer

²³³ *Id.*

²³⁴ See DHS Office of the Inspector General, "USCIS Needs a Better Approach to Verify H-1B Visa Participants," OIG-18-03 (Oct. 2017) at 19; <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf> (accessed Mar. 11, 2019).

²³⁵ See USCIS Webpage, "USCIS and the Justice Department Formalize Partnership to Protect U.S. Workers from Discrimination and Combat Fraud" (May 11, 2018); <https://www.uscis.gov/news/news-releases/uscis-and-justice-department-formalize-partnership-protect-us-workers-discrimination-and-combat-fraud> (accessed May 22, 2018).

²³⁶ See DOJ Press Release, "Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud" (Oct. 11, 2017); <https://www.justice.gov/opa/pr/departments-justice-and-state-partner-protect-us-workers-discrimination-and-combat-fraud> (accessed Mar. 11, 2019).

²³⁷ See "Memorandum of Understanding Between U.S. Department of Justice, Civil Rights Division, and the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regarding Information Sharing and Case Referrals," <https://www.justice.gov/opa/press-release/file/1062251/download> (accessed May 15, 2019).

²³⁸ See USCIS Webpage, "USCIS and the Justice Department Formalize Partnership to Protect U.S. Workers from Discrimination and Combat Fraud" (May 11, 2018); <https://www.uscis.gov/news/news-releases/uscis-and-justice-department-formalize-partnership-protect-us-workers-discrimination-and-combat-fraud> (accessed Mar. 11, 2019).

²³⁹ USCIS Policy Memorandum, "Rescission of the December 22, 2000 'Guidance memo on H-1B computer related positions'" (Mar. 31, 2017); <https://www.uscis.gov/sites/default/files/files/nativdocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf> (accessed Mar. 11, 2019).

²⁴⁰ *Id.*

²⁴¹ Ombudsman's calculation based on data provided on DOL Webpage, "OFLC Performance Data, Disclosure Data, LCA Programs (H-1B, H-1BA, E-3) FY 2018 and FY 2017" (May 13, 2019); <https://www.foreignlaborcert.doleta.gov/performance/cfm> (accessed May 27, 2019). The data sample only includes "Certified," and "Certified-Withdrawn" LCAs submitted in FY 17 and FY 18, respectively, seeking either H-1B or H-1B1 visa classification. In addition, the sample includes employers that selected "OES" as their prevailing wage source, as well as those employers that selected "Other" for their prevailing wage source, but ultimately specified the source of the prevailing wage survey as OFLC or Online Wage Library (i.e., OES).

²⁴² See USCIS Annual Report to Congress, "Characteristics of H-1B Specialty Occupation Workers," p. 5 (Apr. 4, 2019) (in the possession of the Ombudsman).

Programmers (15-1131) on the LCA. Specifically, in FY 2017, approximately 11 percent of certified LCAs contained the 15-1131 SOC code; however, in FY 2018, only approximately 4 percent of certified LCAs contained this code.

In October 2017, USCIS issued a second BAHA-related policy memorandum to address when USCIS adjudicators should afford deference to prior adjudications involving the same petitioner, the same beneficiary, and the same position. Entitled “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status,”²⁴³ this policy memorandum instructs adjudicators to apply the same level of scrutiny to both initial petitions and requests to extend nonimmigrant visa status. In doing so, it rescinded the standing 2004 guidance that required deference to the findings of a previously approved petition, arguing that affording such deference improperly shifted the burden of proof to the agency.²⁴⁴

In February 2018, USCIS issued a third policy memorandum to address abuses that may occur when employers assign their H-1B workers to third-party worksites.²⁴⁵ To reduce the likelihood of such abuses, the new policy requires employers to submit detailed documentation, such as contracts and work orders, establishing that it has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary, and that a legitimate employer-employee relationship will be maintained for the entire time requested in the petition.²⁴⁶ The policy also clarifies that

adjudicators may limit the validity period to reflect the length of time eligibility has been established.

Subsequent to the implementation of new third-party worksite policy, stakeholders reported receiving truncated H-1B validity periods. Previously, USCIS would generally set the validity period requested to the amount of time for which the right to control was established, or one year, whichever was greater.²⁴⁷ However, in accordance with the new policy, the validity periods on the approval notices now mirror the duration of contracts or statements of work, which may result in validity periods shorter than one year. In some cases, employers received approval notices with validity periods that were already expired, often reflecting a retroactive end date (e.g., I-129 petition approved on 02/01/2019, H-1B validity period issued: 10/20/2018 to 12/31/2018). In addition to limiting the validity period, IT consulting firms within the top 30 H-1B employers have seen their approval rates fall well below the national average.²⁴⁸

C. Additional H-1B Program Changes On The Horizon

Based on its regulatory agenda, USCIS currently plans to revise the definition of specialty occupation to further focus the H-1B program on admitting “the best and the brightest foreign nationals.”²⁴⁹ USCIS also plans to revise the definition of employment and employer-employee relationship to protect U.S. workers and wages. Finally, the agency indicates that it will propose new requirements designed to ensure H-1B employers pay appropriate wages. USCIS anticipates this regulation will be published in draft form in August 2019.

²⁴³ USCIS Policy Memorandum, “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status” (Oct. 23, 2017); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf> (accessed Mar. 11, 2019).

²⁴⁴ *Id.*

²⁴⁵ USCIS Policy Memorandum, “Contracts and Itineraries Requirement for H-1B Petitions Involving Third-Party Worksite” p. 4 (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

²⁴⁶ The memo identified various types of evidence that USCIS would like to see when reviewing petitions when the beneficiary is to perform work at a third-party worksite. Additionally, the memo emphasizes that petitioning employer must provide an itinerary with the dates and locations of the services to be provided with all petitions that require services to be performed in more than one location, such as multiple third-party worksites. USCIS Policy Memorandum, “Contracts and Itineraries Requirement for H-1B Petitions Involving Third-Party Worksite” (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

²⁴⁷ Information provided by USCIS (May 2, 2018).

²⁴⁸ See USCIS Webpage, “H-1B Quarterly Request for Evidence (RFE) FY2015-FY2019 Q1 Top 30 Employers,” <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-quarterly-requests-for-evidence-2015-2019-Q1-top-30-employers.pdf>; (accessed Mar. 4, 2019). See also USCIS Webpage, “Non-Immigrant Worker Request for Evidence (RFE) Data FY2015-FY2019 Q1,” <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/non-immigrant-worker-rfe-h-1b-quarterly-data-fy2015-fy2019-q1.pdf> (accessed Mar. 5, 2019).

²⁴⁹ U.S. Office of Management and Budget Webpage, “Unified Agenda of Regulatory Plan” (Spring 2019), “Strengthening the H-1B Nonimmigrant Visa Classification Program,” <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1615-AC13> (accessed May 31, 2019).

VI. Potential Changes to H-1B Program that Align with the BAHA EO

Similar to the H-1 nonimmigrant visa before it, the H-1B program has reached a crossroads. Labor market protections built into the program have proven largely inadequate in protecting the interests of U.S. workers.²⁵⁰ The annual cap on admissions, which ostensibly sought to protect U.S. workers, has been circumvented through exemptions, and the authorization of extensions beyond the statutory 6-year limit. Unsurprisingly, certain employers have taken advantage of the weaknesses in the H-1B program by using H-1B visas in a manner that creates adverse conditions for U.S. workers, and is inconsistent with the original intent of the program. Conversely, there are employers with legitimate business practices that use the program to hire the most qualified workers, who are sometimes the foreign workers themselves.

Absent legislative action that fortifies labor market protections, government agencies are tasked with not only protecting the interests of U.S. workers, but also the legitimacy of the H-1B program. As discussed in the previous section, pursuant to the BAHA EO, USCIS has undertaken reforms to combat H-1B fraud, and to increase the wages and skill levels of H-1B beneficiaries. However, there is still need for additional reform, in particular with regard to wages offered and the skill requirements of a specialty occupation. The responsible agencies can provide clarity through regulatory changes and policy guidance. Consistent with the BAHA EO, any programmatic changes must align with the stated goal of protecting the wages and working conditions of U.S. workers. We will now examine some of the potential changes agencies can explore.

A. Wage Requirements—Awarding H-1B Visas to the Highest-Paid

To effectively protect U.S. workers, DOL should consider: revising how it collects data and calculates the wage levels

on OES surveys; reducing processing times for PWDs requested from the NPWC; and updating its prevailing wage guidance, to ensure that H-1B visas are awarded to the highest-paid beneficiaries. In addition, amending the statute that governs which H-1B dependent employers are exempt from the “recruitment” and “non-displacement” attestations could significantly increase wages.

1. Recalibrating Prevailing Wage Surveys

In order to reduce the number of H-1B beneficiaries paid below the median wage, DOL should consider recalibrating the methodology by which it calculates wage levels on OES surveys. The statute requires that DOL provide a governmental survey with at least four wage levels that are commensurate with experience, education, and the level of supervision, but it does not specify how DOL should calculate each wage level.²⁵¹ As noted earlier, DOL currently calculates the four wage levels by the following approximate calculations: Level I is the 17th percentile, Level II is the 34th percentile, Level III is the 50th percentile, and Level IV is the 67th percentile.²⁵² Approximately 72 percent of the LCAs certified in FY 2018 utilized Level I or Level II prevailing wage.²⁵³ Bringing the first two wage levels closer to the median wage for the designated occupational classification will significantly raise the wages of H-1B beneficiaries, carrying with it the potential to increase U.S. workers’ salaries as well.

Similarly, DOL should consider updating its prevailing wage guidance, which has not been updated since 2009, to reflect current practices and market realities, as well as current information. The prevailing wage guidance does

²⁵¹ See INA § 212(p)(4); 8 U.S.C. § 1182(p)(4). The statute does say that “Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.” *Id.*

²⁵² “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 80 Fed. Reg. at 24148. While the regulation for which the information was provided regarded H-2B visa classifications and wages, the same wage surveys and methodology is used for both the H-1B and H-2B programs.

²⁵³ Ombudsman’s calculation based on data provided on DOL Webpage, “OFLC Performance Data, Disclosure Data, LCA Programs (H-1B, H-1BA, E-3) FY 2018” (May 13, 2019); <https://www.foreignlaborcert.doleta.gov/performance/data.cfm> (accessed May 27, 2019). The data sample only includes “Certified,” and “Certified-Withdrawn” LCAs submitted in FY 18 seeking either H-1B or H-1B1 visa classification. In addition, the sample includes employers that selected “OES” as their prevailing wage source, as well as those employers that selected “Other” for their prevailing wage source, but ultimately specified the source of the prevailing wage survey as OFLC or Online Wage Library (i.e., OES).

²⁵⁰ According to the DOL’s OIG, the LCA program does “little to protect the jobs or wage levels of U.S. workers.” DOL Office of the Inspector General, “The Department of Labor’s Foreign Labor Certification Programs: The System is Broken and Needs to be Fixed,” 06-96-002-03-321 (May 1996) at 3; https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=06-96-002-03-321&y=pre_1998 (accessed Mar. 11, 2019).

not explicitly contemplate third-party placement or the third-party companies' job requirements for the position, for example. However, when the work is to be performed at a third-party worksite, evidence of the third-parties' job requirements is necessary for determining if the position qualifies as a specialty occupation,²⁵⁴ and therefore is also necessary for determining the appropriate prevailing wage. DOL prevailing wage guidance also should reflect current DOL policies. For example, it should make plain that frequent relocation required by an employer necessitates a wage level increase. Similarly, multiple work locations listed on the LCA and/or the submission of several amended I-129 petitions may demonstrate an employee that is frequently required to relocate. Assuming that frequent relocation is not typically required for the occupational classification, this results in a higher wage level and should be explicitly included in calculating wages.²⁵⁵

Finally, as noted earlier in this article, the OES surveys of wages do not capture information about actual skills or responsibilities of the reported wages, only the wages themselves. Changing the survey to capture not only the wage spectrum but the characteristics of the wages, specifically the number of years of experience correlative to the wages, could provide DOL with far more robust information in calculating the levels it is required to provide. This would be a significant administrative undertaking given the current collection methods and instruments, but would allow for a far more granular view into wages for a number of uses beyond the H-1B program. If the OES survey captured this information, rather than rely on the methodology it currently uses, it could potentially provide surveys that result in higher wages for H-1B workers.

2. Reducing Processing Times for PWDs

As discussed in Section III, despite the safe-harbor incentive to use a PWD issued by the DOL's NPWC,²⁵⁶ many employers decide not to utilize this service

because of lengthy processing times.²⁵⁷ As a result, the vast majority of LCAs contain prevailing wage levels that employers, and not a neutral party, determine to be appropriate. In order to reduce the likelihood of employers selecting an improper prevailing wage level, and to increase the objectivity involved in making this determination, additional resources should be provided to DOL to increase production of PWDs and decrease the NPWC's processing times. A reduction in the processing times will make this service more attractive to H-1B employers who seek to gain the benefits of the safe harbor provision while also ensuring that their H-1B petition is supported by an LCA that corresponds with the proffered position. In turn, an increase in PWD requests will provide DOL with greater resources for ensuring that employers offer their H-1B workers appropriate wages. The ability of a third party to assess the job skills and duties, especially one well versed in doing so, will improve the likelihood of more accuracy in prevailing wage distribution. Civil penalties assessed by DOL's WHD could be used to ramp up the resources needed to reduce processing times.

3. Redefining "Exempt H-1B Nonimmigrant"

In 1998, ACWIA established additional attestations on H-1B dependent employers. Employers are exempt from these provisions if they pay the H-1B worker at least \$60,000 per year, or the worker has a relevant master's degree.²⁵⁸ However, ACWIA did not index wage requirements to keep pace with wage growth; the standard set 20 years ago remains the threshold.²⁵⁹ In addition, the number of individuals living in the United States with at least a master's degree has grown significantly since 2000.²⁶⁰ Likewise, and as discussed in further detail below, the number of potential cap-subject H-1B beneficiaries with at least a U.S. master's degree has also increased

²⁵⁴ *Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000) (finding USCIS did not abuse its discretion by interpreting "the statute and regulations so as to require [the petitioner] to adduce evidence that the entities actually employing the nurses' services required the nurses to have degrees.")

²⁵⁵ See DOL Web page "Prevailing Wage FAQ Number 11," February 6, 2013; <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm?q!581> (accessed Jun. 11, 2019).

²⁵⁶ DOL will deem that PWD presumptively correct, providing the employer a "safe harbor." See 20 C.F.R. § 655.731 (a)(2)(ii)(A)(3).

²⁵⁷ The processing time to obtain a PWD is currently averaging more than 3 months. See DOL Webpage, "Processing Times" as of May 31, 2019; <https://icert.doleta.gov/index.cfm?event=ehGeneral.dspProcessingTimes> (accessed Jun. 10, 2019).

²⁵⁸ INA 212(n)(3)(B), 8 U.S.C. § 1182(n)(3)(B).

²⁵⁹ "A graduate with a bachelor's degree in computer science is projected to earn a starting salary of \$68,103, while a computer science major earning a master's degree this year is expected to earn \$82,275, for a difference of more than \$14,000." National Association of Colleges and Employers Webpage, "The Difference a Master's Degree Can Have on Starting Salary" (Feb. 6, 2019); <https://www.nacweb.org/job-market/compensation/the-difference-a-masters-degree-can-have-on-starting-salary/> (accessed May 31, 2019).

²⁶⁰ United States Census Bureau Webpage, "Number of Master and Doctoral Degrees Doubles Among Population" (Feb. 21, 2019); <https://www.census.gov/newsroom/press-releases/2019/education-degrees-double.html> (accessed May 30, 2019).

considerably. Revising the definition of “exempt H-1B nonimmigrant” to remove the ability to qualify based on a master’s or higher degree while also increasing the annual salary threshold will strengthen provisions designed to protect U.S. workers and increase H-1B workers’ wages.

B. Revising the Skill Requirements of a Specialty Occupation

1. Defining “Highly Specialized Knowledge” and Incorporating Wages as a Factor

The law defines “specialty occupation” as an occupation that requires a theoretical or practical application of a body of *highly specialized knowledge*.²⁶¹ In addition to requiring an application of a body of highly specialized knowledge, the occupation must also require the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.²⁶² Although these are two separate requirements, the regulation that defines the qualifying criteria for specialty occupations does not define the term “highly specialized knowledge.”²⁶³ Rather, the four different standards contained within the regulation pertain to meeting the educational requirement of the definition. This leaves half the statutory definition unexplored in establishing eligibility, an outcome Congress presumably did not intend. In order to ensure that the position requires a theoretical or practical application of a body of highly specialized knowledge, USCIS should consider defining the term “highly specialized knowledge” in the H-1B context.

Wages proffered to the beneficiary could be a factor in the consideration of whether or not a position requires a body of highly specialized knowledge. Currently, in the context of its specialty occupation determination, USCIS’ review of the wages offered is limited. USCIS maintains that a Level I prevailing wage designation will generally contradict a claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation.”²⁶⁴ This finding typically precludes

the petitioner from establishing that the position qualifies as a specialty occupation under the second part of the second criterion, as well as the fourth criterion.²⁶⁵ In addition, outside of its specialty occupation determination, USCIS will also evaluate whether the wage rate designated on the LCA appropriately reflects the proffered position.²⁶⁶ This prevents the petitioner from misrepresenting the prevailing wage, and selecting a lower wage level than what is appropriate.

Incorporating proffered wages within the regulatory criteria for specialty occupations appears to be consistent with the intent of the program, and could promote higher wages among H-1B beneficiaries overall. Specifically, a substantial salary offered for the proffered position generally decreases the likelihood that the position will have an adverse impact on similarly situated U.S. workers. Furthermore, a higher than average wage could evidence that the proffered position is typically one that requires a body of highly specialized knowledge.

2. Prioritizing Wages and Skill-Level in H-1B Lottery

Currently, the H-1B program contains significant numbers of potential beneficiaries with a U.S. master’s degree or higher. As demonstrated by Figure 1.3, the number of cap-subject petitions filed under the advanced degree exemption has been steadily increasing. The continued increase of prospective beneficiaries with at least a U.S. master’s degree demonstrates a pool of potential foreign workers with a higher level of academic knowledge.

USCIS has taken the position that reforming the H-1B lottery process is one way to ensure that H-1B visas are awarded to the most-skilled beneficiaries. Apart from a separate, smaller lottery conducted for petitions filed on behalf of beneficiaries with at least a U.S. advanced degree, the selection process does not consider the beneficiary’s skill level. As shown in Figure 1.4, the number of unselected petitions filed under the advanced degree exemption has increased markedly. Although the reversal of the cap selection order increases the odds of selection for foreign workers with a U.S. master’s degree or higher, DHS argues it does not have the statutory authority to prioritize H-1B beneficiaries based on their

²⁶¹ INA § 214(i)(1)(A); 8 U.S.C. § 1184(i)(1)(A).

²⁶² INA § 214(i)(1)(A)-(B); 8 U.S.C. § 1184(i)(1)(A)-(B). 8 C.F.R. § 214.2(h)(4)(ii).

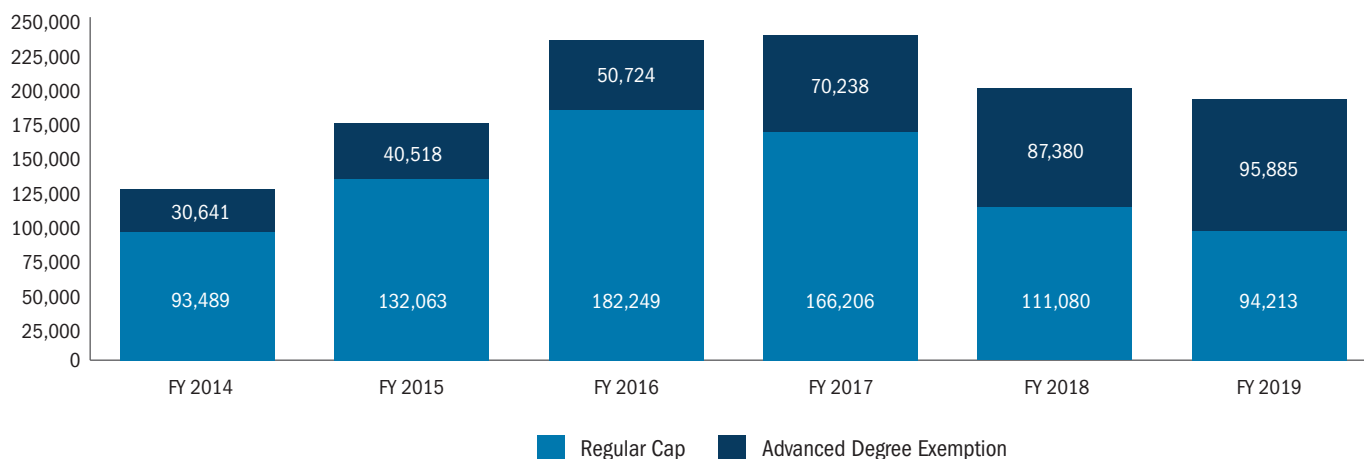
²⁶³ See 8 C.F.R. § 214.2(h)(4)(iii)(C).

²⁶⁴ USCIS Policy Memorandum, “Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions,’” p. 3 fn. 6 (Mar. 31, 2017); <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf> (accessed Mar. 11, 2019).

²⁶⁵ See 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4).

²⁶⁶ USCIS Policy Memorandum, “Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions,’” p. 3 fn. 6 (Mar. 31, 2017); <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf> (accessed Mar. 11, 2019).

Figure 1.3: H-1B Petitions Received by Regular Cap and Advanced Degree Exemption (FY 2014–FY 2019 Cap)



Source: Information provided by USCIS during Ombudsman teleconference, “The USCIS H-1B Lottery Process” (June 27, 2018).

skills.²⁶⁷ Congress has previously considered legislation that would, among other reforms, eliminate the random selection system in favor of prioritization based on other factors (e.g., wage offered, education level attained, etc.).²⁶⁸ Without Congressional action, the inherently random nature of the current H-1B lottery system will continue to disserve the most-skilled beneficiaries.

²⁶⁷ “Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens,” 84 Fed. Reg. 888, 914 (Jan. 31, 2019).

²⁶⁸ See, e.g., Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Immigration Innovation Act of 2013, S. 169, 113th Cong. (2013); H-1B and L-1 Visa Reform Act of 2015, S. 2266, 114th Cong. (2015); American Jobs First Act of 2015, S. 2394, 114th Cong. (2015); H-1B and L-1 Visa Reform Act of 2017, S. 180, 115th Cong. (2017); Immigration Innovation Act of 2018, S. 2344, 115th Cong. (2018).

3. Revising Degree Equivalency Criteria

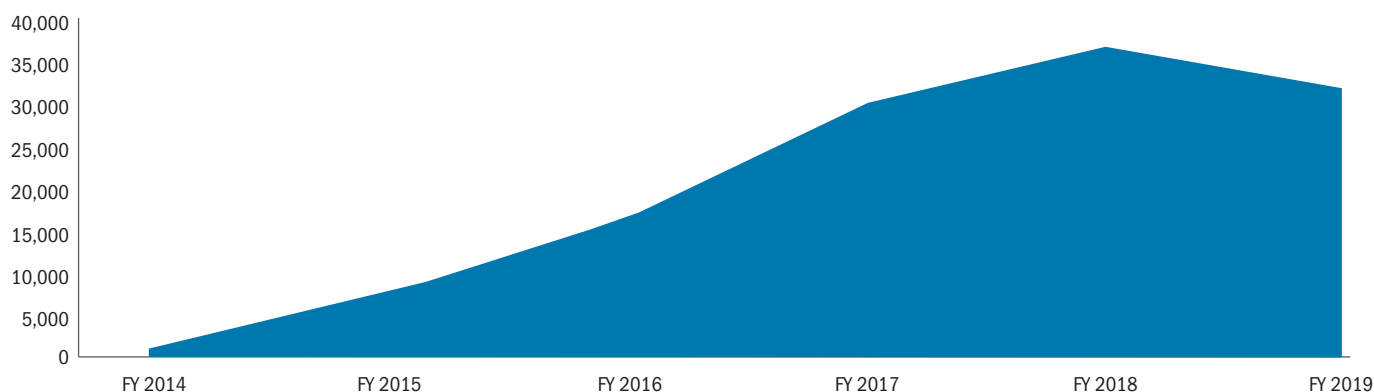
With respect to regulatory changes, USCIS could consider refining its degree equivalency criteria as an additional reform under the BAHA EO. The statute permits awarding H-1B visas to beneficiaries who lack a U.S. bachelor’s degree.²⁶⁹ Specifically, the petitioner may demonstrate that the beneficiary meets the requirements based on experience in the specialty that is equivalent to the completion of the required degree.²⁷⁰ The beneficiary must also have recognition of expertise in the specialty through progressively responsible positions.²⁷¹ The regulations

²⁶⁹ INA § 214(i)(2)(C); 8 U.S.C. § 1184(i)(2)(C).

²⁷⁰ *Id.*

²⁷¹ *Id.*

Figure 1.4: Number of Unselected Advanced Degree Exemption Petitions (FY 2014–FY 2019 Cap)



Source: Ombudsman teleconference, “The USCIS H-1B Lottery Process” (June 27, 2018).

allow for a combination of experience, education, and/or training to be considered in the equivalency determination.²⁷² When showing a beneficiary's qualifications through experience, 3 years of increasingly responsible professional experience equates to 1 year of college-level training (i.e., a bachelor's degree equates to 12 years of experience).²⁷³ For equivalence to a master's degree, the beneficiary must have a bachelor's degree followed by at least 5 years of increasingly responsible experience in the specialty; a doctorate must be in the form of a U.S. doctorate or its foreign equivalent.²⁷⁴

To ensure that H-1B visas are awarded to the most-skilled beneficiaries, USCIS could modify its regulations to increase the level of experience that may be substituted for each year of college-level training. For example, instead of using a 3 to 1 formula, USCIS could increase the ratio. Similarly, as it has done for positions that require a doctorate degree,²⁷⁵ USCIS could remove the experience equivalency allowed for a master's degree, especially given the increases in master's degrees among the U.S.-educated population referenced above. These reforms would increase the skill level required for beneficiaries who do not possess at least a U.S. bachelor's degree or a foreign degree determined to be its equivalent, as well as for those who possess a degree in an unrelated field.

C. Additional Protections for U.S. Workers

1. Labor Market Test

Some stakeholders believe the H-1B visa program should enable U.S. companies to recruit foreign nationals only when there is a scarcity of qualified domestic workers in the country. However, with two limited exceptions,²⁷⁶ federal law does not require an employer to establish that it attempted, and was unsuccessful, finding a qualified and available U.S. worker for the offered position. As stated by USCIS, due to these limited protections, U.S. workers

who are qualified, able, and willing to work in these fields have at times been "ignored or unfairly disadvantaged."²⁷⁷

Unlike petitioners for Temporary Agricultural Workers (H-2As) Temporary Non-Agricultural Workers (H-2Bs), Congress specifically declined to impose a recruitment requirement on employers in order to streamline the process.²⁷⁸ Congress believed that the complaint-driven enforcement scheme, coupled with the whistleblower protections, provided meaningful safeguards for U.S. workers.²⁷⁹ However, as discussed in section III, the complaint-driven enforcement mechanism is underutilized.²⁸⁰ Incorporating a labor market test as a prerequisite for entry into the program, or expanding the current recruitment attestation requirement, would require legislative action.²⁸¹

2. Increased Compliance

Increasing compliance, in particular at third-party worksites, will offer greater protections for U.S. workers. In announcing its TSVVP, USCIS specifically included third-party placements within its risk criteria because significant employer violations are potentially more likely to occur at these locations. Early results of this program support a continued targeted approach to ensure

²⁷² See 8 C.F.R. § 214.2(h)(4)(iii)(C). See also *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175 (D. Mass. 2000) ("By including the 'or its equivalent' language, the statute and regulations recognize that the needs of a specialty occupation can be met through education, experience, or some combination of the two.")

²⁷³ 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

²⁷⁴ *Id.* (Additionally, it "must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty....")

²⁷⁵ *Id.* ("If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent.")

²⁷⁶ See INA § 212(n)(1)(G)(ii); 8 U.S.C. § 1182(n)(1)(G)(ii).

²⁷⁷ See USCIS Webpage, "Combating Fraud and Abuse in the H-1B Visa Program" (July 23, 2018); <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program> (accessed on Mar. 11, 2019).

²⁷⁸ H-2A and H-2B petitioners must first receive temporary labor certifications from DOL. In order to grant labor certification for an H-2A worker, for example, DOL must determine (1) "there are not sufficient workers who are able, willing, and qualified," and available, and (2) hiring the nonimmigrant "will not adversely affect the wages and working conditions of workers in the United States similarly employed." See INA §§ 101(a)(15)(H)(ii)(b) and 218(a)(1); 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1188(a)(1); and 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iii)(A).

²⁷⁹ H.R. Rep. No. 723, 101st Cong., 2nd Sess., pt. 1 at 61 (1990).

²⁸⁰ "While the majority of complaints received by Labor have been reported by H-1B workers, very few complaints are filed." U.S. Government Accountability Office, "H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program," GAO-11-26 (Jan. 2011) at 48; <https://www.gao.gov/assets/320/314501.pdf> (accessed Mar. 3, 2019).

²⁸¹ Congress has previously considered such proposals. See, e.g., H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007, S. 1035, 110th Cong. (2007); Comprehensive Immigration Reform, S. 1348, 110th Cong. (2007); Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Congress (2013).

compliance.²⁸² USCIS should expand on the TSVVP's initial success by increasing the number of targeted site visits it conducts.

In addition, USCIS should continue to expand its risk criteria for the TSVVP. For example, for petitioners with multiple H-1B beneficiaries, if one of their beneficiaries is refused the issuance of an H-1B visa by DOS due to conflicting information, and the approval of the petition is subsequently revoked, USCIS could consider this as a possible risk factor. Depending on the nature of the conflicting information, USCIS should contemplate investigating the employer's other approved H-1B petitions. USCIS should also consider including any employers previously deemed non-compliant during an ASVVP site visit within the risk criteria used for the TSVVP. In order to increase program compliance, USCIS must continue to rely on its experience in administering the H-1B program to direct its resources towards locations where fraud and abuse are more likely to occur.

In addition, USCIS should continue to promote the Tip Line Center, and the mailbox it has set up for the public to report H-1B abuse: ReportH1BAbuse@uscis.dhs.gov. The USCIS Tip Unit, which is co-located with the ICE Tip Line Center, refers actionable leads to USCIS officers.²⁸³ Since becoming operational in June 2018, the Tip Unit has developed over 26,000 leads resulting in "numerous fraud findings and referrals" submitted to ICE

for criminal investigation.²⁸⁴ Providing the public with a well-advertised avenue for reporting potential H-1B violations presents the agency with a vital tool for ensuring compliance. Other agencies could also simplify their complaint processes, making it easier for those impacted by program violations to seek redress.

3. Redefining the Employer-Employee Relationship

Since H-1B violations—such as paying less than the required wage, benching employees, and employing H-1B workers in non-specialty occupations—may be more likely to occur when beneficiaries are placed at third-party worksites,²⁸⁵ USCIS will likely refine its definition of what constitutes an "employer-employee relationship."²⁸⁶ Currently, in evaluating whether an employer-employee relationship exists, the agency applies common law agency principles, which emphasize the standard of control.²⁸⁷ USCIS has recognized that the placement of the beneficiary at a third-party worksite generally makes it more challenging for it to assess whether the requisite employer-employee relationship exists and will continue to exist.²⁸⁸ Redefining this term could provide both petitioners and USCIS officers with more clarity.

In redefining this term, USCIS should consider the patterns and practice of past violators, and use this as a guide in providing a definition that limits the likelihood of future program abuse. This could result in USCIS specifying a type of employment practice that is unable to demonstrate the requisite control. For example, USCIS has acknowledged that the employer-employee

²⁸² In FY 2018, USCIS completed 414 TSVVP H-1B site visits, confirming fraud in 149 cases. "A Review of the FY 2020 Budget Request for U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Service," *before the Subcommittee on Border Security, Facilitation, and Operations of the U.S. House Committee on Homeland Security*, 116th Cong. 1st Sess. 28 (May 9, 2019) (statement of Tracy Renaud, former Acting Deputy Director USCIS); <https://www.uscis.gov/tools/resources/hearing-a-review-fy-2020-budget-request-us-customs-and-border-protection-us-immigration-and-customs-enforcement-and-us-citizenship-and-immigration-services-may-9-2019-acting-deputy-director-tracy-renaud> (accessed Jun. 16, 2019).

²⁸³ "A Review of the FY 2020 Budget Request for U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Service," *before the Subcommittee on Border Security, Facilitation, and Operations of the U.S. House Committee on Homeland Security*, 116th Cong. 1st Sess. 28 (May 9, 2019) (statement of Tracy Renaud, then-Acting Deputy Director USCIS); <https://www.uscis.gov/tools/resources/hearing-a-review-fy-2020-budget-request-us-customs-and-border-protection-us-immigration-and-customs-enforcement-and-us-citizenship-and-immigration-services-may-9-2019-acting-deputy-director-tracy-renaud> (accessed Jun. 13, 2019).

²⁸⁴ *Id.* "As of March 31, [2019], the H-1B tip line has received nearly 7,700 tips. Roughly, 30 percent of these tips have resulted in leads." USCIS Webpage, "Buy American and Hire American Listening Session" (Apr. 18, 2019); https://www.uscis.gov/sites/default/files/files/nateddocuments/Buy_American_and_Hire_American_Listening_Session_Director_Cissnas_Remarks.pdf (accessed Jun. 13, 2019).

²⁸⁵ USCIS Policy Memorandum, "Contracts and Itineraries Requirement for H-1B Petitions Involving Third-Party Worksite" p. 4 (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

²⁸⁶ U.S. Office of Management and Budget Webpage, "Unified Agenda of Regulatory Plan" (Spring 2019), "Strengthening the H-1B Nonimmigrant Visa Classification Program," <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1615-AC13> (accessed May 31, 2019).

²⁸⁷ For a further discussion regarding the employer-employee relationship requirement, *see* section III, part b, subpart iv.

²⁸⁸ *See* USCIS Interoffice Memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," p. 2 (Jan. 8, 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (accessed Mar. 11, 2019).

relationship between the petitioner and beneficiary becomes more attenuated through multiple intermediary contractors, vendors, or brokers.²⁸⁹ Accordingly, a new definition could restrict access to the program for this type of third-party, off-site arrangement. Moreover, although USCIS' previous guidance indicates that the employer-employee relationship hinges on the right to control the beneficiary,²⁹⁰ a new rule could specify that actual control must be exercised. This revision would help to clarify which petitioners do not qualify, such as those employers whose employees service software owned by the client or a third-party.

Conclusion

Multiple agencies have responsibility for implementing the H-1B program and each can take steps to align the program with the BAHA EO. The Ombudsman has outlined possible changes above. The DOL, in particular, has jurisdiction over the level of wages offered to H-1B workers, and this is a critical element in ensuring the H-1B program does not undermine the position of U.S. workers.

With regard to USCIS specifically, the agency has a difficult task in reforming the H-1B program to fully implement the BAHA EO. But clarifying its rules governing the H-1B program would assist both adjudicators and employers alike. In particular, with respect to the definition of specialty occupation, the agency could set forth a more refined explanation of the "theoretical or practical application of a body of highly specialized knowledge" phrase within the statutory definition, which would greatly assist the BAHA EO's goals of reserving H-1B status for the most highly skilled workers.

²⁸⁹ USCIS Policy Memorandum, "Contracts and Itineraries Requirement for H-1B Petitions Involving Third-Party Worksite" p.5 (Feb. 22, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf> (accessed Mar. 11, 2019).

²⁹⁰ See USCIS Interoffice Memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (accessed Mar. 11, 2019).



From InfoPass to InfoMod: a Crossroads for Applicant Support Services

Responsible USCIS Offices: External Affairs and Field Operations Directorates

Key Facts and Findings

- USCIS has sought to improve efficiencies in its provision of support services to the public, in part as a result of increased demand for services performed in field offices by Immigration Services Officers (ISOs).
- USCIS identified disadvantages in its InfoPass system, including an inefficient use of appointments for issues that did not require in-person interaction. In particular, field offices were using limited resources to address issues that could have been resolved through other methods, while individuals whose issues could only be resolved by visiting a field office had difficulty securing timely appointments.
- To address these issues, in March 2018, USCIS began piloting the Information Services Modernization Program (InfoMod) at five field offices. The pilot program required individuals to call the Contact Center during business hours, during which

USCIS representatives would determine whether the individual's situation required an in-person appointment, or if it could be resolved through the use of online tools and information or further interaction over the phone.

- After the implementation of InfoMod at the piloting field offices, a decreased number of applicants appeared for in-person appointments, which allowed their ISOs more time to conduct interviews and complete cases.
- In November 2018, USCIS began implementing InfoMod on a rolling basis to all its field offices. It is anticipated that the transition from InfoPass to InfoMod will be complete by the end of the fiscal year.
- USCIS anticipates InfoMod will improve its interactions with the public by emphasizing self-help tools and reserving its more complex assistance for situations requiring in-person interaction. Broadly disseminated information will help the public better understand its features and benefits.
- While the InfoMod program is already demonstrating some benefits, stakeholders have expressed concern that the changes USCIS is making—centralizing the appointment scheduling system and relying on an interactive call center to place inquiries—will not provide the same level of service and assistance they believe they need.

Introduction

USCIS' applicant support services are vital to individuals and employers navigating what can sometimes be a confusing and complex legal process. Meaningful assistance during the application process improves overall efficiency and ultimately promotes the interests of all Americans to have a fair and efficient immigration benefits program. In 2018, USCIS made substantial changes—organizational, programmatic, and technology-based—to its applicant support service programs in an effort to improve consistency, equalize access, and modernize its functions. This article describes how USCIS' changes have impacted interactions with the public and analyzes initial reaction to these changes, offering some suggestions on ways to improve the process.

Background

According to USCIS' Policy Manual, the agency's commitment with respect to servicing applicants and petitioners is to "provide[] accessible, reliable, and accurate guidance and information about its public services."²⁹¹ The agency's applicant support services goal, and the methods by which it has sought to achieve it, have evolved in the last few years. In 2012, after decades of primarily localized assistance and communications, USCIS established the Customer Service and Public Engagement Directorate (CSPED), a headquarters-level component devoted to directing public communication and assistance. Until June 2018, CSPED managed information flow to the public about immigration benefits.²⁹² The Public Engagement Division of CSPED coordinated agency-wide dialogue with external stakeholders. The Customer Service Division oversaw the national call center, now known as the USCIS Contact Center, providing information and guidance to those seeking benefits (and their recognized representatives).²⁹³

In 2016, the Contact Center, then known as the National Customer Service Center (NCSC), answered approximately 14 million calls from individuals seeking information about immigration services and benefits.²⁹⁴ Operating as a two-tier telephone call center, Tier 1 was (and continues to be) staffed by contractors who provided information on a variety of topics, including how to apply for immigration benefits and the processing times for most forms types.²⁹⁵ Tier 1 provided the most basic of case status information, which was already publicly available on USCIS' Case Status Online—the form type filed, the date it was filed, and the last action taken.²⁹⁶ If Tier 1 could not resolve an inquiry, the contractor transferred the call to a federal employee at Tier 2, or created a service request through USCIS' Service Request Management Tool (SRMT), sending it to the field office or service

²⁹¹ USCIS Policy Manual, Pt. A, Ch. 1.A; <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-1> (accessed May 21, 2019).

²⁹² Another component of USCIS that engaged with the public was the Office of Citizenship (OoC)—created by the Homeland Security Act of 2002. It specialized in providing naturalization and citizenship information to the public.

²⁹³ See Ombudsman's Annual Report 2013, p. 42.

²⁹⁴ DHS Privacy Impact Assessment, "Live Chat" (May 19, 2017) p. 1; <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-livechat-may2017.pdf> (accessed Apr. 26, 2019).

²⁹⁵ See Privacy Impact Assessment for the National Customer Service Center, DHS/USCIS/PIA-054 (July 14, 2014); <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-ncsc-july2014.pdf> (accessed Apr. 25, 2019).

²⁹⁶ Information provided by USCIS (Mar. 11 and 20, 2019).

center location where the case was pending for a response. If at Tier 1 a caller specifically requested to speak to Tier 2, USCIS policy required the transfer.²⁹⁷

Tier 2 was (and continues to be) staffed by ISOs, federal employees who have more in-depth immigration benefits training and access to more information in USCIS systems than Tier 1 representatives. Tier 2 representatives handled callers with immigration service needs that could not be resolved at the Tier 1 level.²⁹⁸

In 2015, USCIS added the online tools “Emma” and “Live Chat” to provide online assistance to the public in English and Spanish. Emma is an online Intelligent Virtual Assistant; Live Chat is an online chat system that connects individuals seeking help to representatives. Both tools rely on typed communication and are accessible from the USCIS website. Emma’s purpose is to help individuals quickly find answers to common immigration questions on USCIS’ website, providing website information to answer questions and links to related topics based on the individual’s inquiry and analytics. Individuals can ask Emma questions as if they were having a real world conversation with another human being, and Emma responds in the same manner.²⁹⁹ If Emma is unable to provide assistance or the individual is seeking case-specific information, then Emma will offer the individual an opportunity to engage in Live Chat with a Contact Center representative. If the offer is accepted, then the individual will be placed in a queue to be connected to the next available Tier 1 representative.³⁰⁰

To complement its arsenal of tools to help filers, USCIS implemented InfoPass in 2004, which “automate[d] the process of scheduling an appointment with USCIS through the internet and allow[ed] USCIS to efficiently manage and streamline its appointment scheduling

process.”³⁰¹ The InfoPass online appointment scheduling system permitted applicants, petitioners and their legal representatives to *self-schedule* a specific appointment to appear in person at a local field office to speak directly to an ISO within a 2-week timeframe.³⁰² Individuals obtained appointments for a variety of reasons, including to file certain motions, obtain Alien Documentation Identification and Telecommunication (ADIT) stamps or emergency travel documents, and inquire about pending cases. ISOs also accepted certain forms for submission and documents submitted after an interview. Stakeholders relied on InfoPass appointments to provide them with the opportunity to inquire about cases that were pending well beyond the normal processing time, ensure documents and information provided after an interview were incorporated without delay into the case file for consideration by the adjudicators, and make urgent requests.³⁰³

With InfoPass, applicants, petitioners, and attorneys selected from pre-chosen appointment categories to give the field office notice regarding the purpose of their visit. Each field office managed its own appointments, including the number of appointments offered and when and how new appointments were released. The field offices were also responsible for managing the number of ISOs that would be dedicated to applicant services support and to InfoPass appointments specifically.³⁰⁴

²⁹⁷ Ombudsman Teleconference, “USCIS Applicant Support Services,” February 14, 2019.

²⁹⁸ USCIS Policy Manual, Pt. A, Ch. 3.C.1, <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-3> (accessed May 13, 2019). Thirty percent of the ISOs at all center locations must be bilingual in English and Spanish. Information provided by USCIS (Mar. 28, 2019).

²⁹⁹ USCIS Privacy Impact Assessment, “Live Chat” (May 19, 2017), p. 2; <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-livechat-may2017.pdf> (accessed Apr. 26, 2019).

³⁰⁰ *Id.*

³⁰¹ USCIS Privacy Impact Assessment, “Customer Scheduling and Services” (Mar. 25, 2014), p. 3. InfoPass appointments may be made by accessing the USCIS website at <https://my.uscis.gov/en/appointment/v2>. Some local field offices would also see visitors without appointments. Until January 21, 2019, the public could inquire about their cases at USCIS Service Centers via email. USCIS discontinued the email addresses for each service center as part of its overall modernization efforts. See USCIS Alert, “Update on Case Assistance by Service Centers” (Dec. 21, 2018); <https://www.uscis.gov/news/alerts/update-case-assistance-service-centers> (accessed Feb. 22, 2019).

³⁰² InfoPass appointments could be scheduled in 1 of 12 languages (English, Spanish, Creole, Arabic, French, Chinese, Russian, Vietnamese, Tagalog, Korean, Portuguese, and Polish). USCIS Webpage, “InfoPass,” <https://my.uscis.gov/en/appointment/v2> (accessed Feb. 12, 2019).

³⁰³ American Immigration Lawyers Association comment dated Jan. 4, 2019, submitted in response to “Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: InfoPass,” 83 Fed. Reg. 55390 (Nov. 5, 2018); <https://www.regulations.gov/document?D=USCIS-2009-0024-0013> (accessed May 1, 2019).

³⁰⁴ Typically, entry-level ISO-1s assisted people who visited the field office requesting assistance and were expected to spend at least 25 percent of their time interviewing and adjudicating certain form-types, such as N-600s, N-400s, I-130s, and I-485s. Information provided by USCIS (Apr. 29, 2019).

Challenges Faced by USCIS Under the Pre-2018 Model

While the reliance on InfoPass for direct applicant communication with the agency provided applicants, petitioners and representatives with consistent agency access, it also presented significant challenges to USCIS' ability to meet its public service and adjudication responsibilities, especially as the number of applicants seeking benefits grew.

Field office resources were increasingly needed for adjudication, due to increases in filings and an expansion of workload. Prior to 2017, ISOs primarily interviewed applicants for naturalization and family-based adjustment of status to lawful permanent residence, along with some spouses seeking to remove conditions on permanent residence and special immigrant juveniles. These applications, particularly naturalization, increased in number, expanding the workload in the field offices. At the same time, e-filing and eProcessing of naturalization applications through the Electronic Immigration System (ELIS) database slowed the adjudication process due to technical issues and training demands.³⁰⁵ These factors gave rise to significant increases in cases to be worked by ISOs in the field offices. Comparing Fiscal Year (FY) 2015 to FY 2018, pending family-based I-485, *Application for Adjustment of Status*, almost doubled, rising from 194,046 to 372,185; pending N-400s, *Application for Naturalization*, increased from 367,009 to 738,991; and pending I-751s, *Petition to Remove Conditions on Permanent Residence*, more than doubled, increasing from 118,793 to 256,186.³⁰⁶

³⁰⁵ DHS Office of the Inspector General (OIG), "USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery," OIG-18-23 (Nov. 30, 2017) at 30; <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf> (accessed May 13, 2019) ("Despite its goals to increase efficiency, customer service, and security, evolving use of ELIS has resulted in additional workloads, more processing time, and greater security risks as new product lines are added and deployed.")

³⁰⁶ Compare USCIS Website, *USCIS Number of Service-wide Forms by Fiscal Year To Date, Quarter, and Form Status* (2015); https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2015_qtr4.pdf; to USCIS Website, *USCIS Number of Service-wide Forms by Fiscal Year To Date, Quarter, and Form Status* (2018) (accessed Mar. 2019); https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY18Q4.pdf (accessed Mar. 15, 2019). (The data for naturalization applications includes military and non-military applicants.) Of the 118,550 Forms I-751 USCIS adjudicated in FY 2018, 1,816 of them—or slightly less than 8 percent of all of the completions—were relocated to field offices for interview and review. Information provided by USCIS (Apr. 12, 2019).

Field offices also saw an expansion of the types of benefit requests they were required to adjudicate, further increasing their workload. On October 1, 2017, USCIS began to phase in interviews in person for all employment-based adjustment of status applicants as well as the family members of refugees and asylees seeking adjustment of status.³⁰⁷ As a result, in FY 2018, 61.33 percent (12,809) of the adjudicated employment-based I-485s forms were sent to the field offices for interview as the program expanded to interviews in every employment-based adjustment. Slightly more than 10 percent (924) of the adjudicated Forms I-730, *Refugee/Asylee Relative Petition*, were sent to field offices for interviews or review.³⁰⁸

Applicants, Petitioners, and Legal Representatives did not use InfoPass efficiently. InfoPass indeed gave benefit-seekers the ability to make their own appointments, but the inability of the Contact Center to screen these requests meant that benefit seekers often made appointments to address concerns that did not require in-person interaction, such as checking the status of a case, or even inquiring about cases located at other USCIS offices. Based on survey and other data, USCIS determined that 70 to 80 percent of the applicants who attended InfoPass appointments wanted to check their case status or request general "how-to" information,³⁰⁹ information that is available through USCIS' toll-free number or the USCIS website. On a regular basis, applicants and petitioners attended InfoPass appointments to ask non-immigration related questions that should have been directed to the Social Security Administration, the Department of Motor Vehicles, or another agency.³¹⁰ Compounding these difficulties, USCIS found that nationwide approximately 25 percent of applicants with scheduled InfoPass appointments failed to appear, yet ISOs were still assigned to the InfoPass windows, forgoing other work.³¹¹ For the field offices that eventually became the pilot offices for a new scheduling system, USCIS found that 20 to 38 percent of applicants were not showing up for their appointments.³¹²

³⁰⁷ See USCIS News Release, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants* (Aug. 28, 2017); <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants> (accessed Feb. 22, 2019).

³⁰⁸ Information provided by USCIS (Apr. 12, 2019).

³⁰⁹ Information provided by USCIS (Feb. 11, 2019).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Information provided by USCIS (Apr. 12, 2019).

A typical request for assistance to the Ombudsman on InfoPass: More than 6 months had passed since one applicant had attended her naturalization interview at the New York Field Office, during which she was recommended for approval. After not being able to find an available InfoPass appointment online for the New York Field Office, the naturalization applicant wrote to the Ombudsman, “Please help. I have been trying to schedule an InfoPass appointment from the past several months, I have not been able to get one.”

This usage pattern, combined with the increasing workload, meant that field offices struggled to timely handle actual emergencies where a field office appointment was necessary. Through the Ombudsman’s casework and engagements, individuals complained that getting an appointment was difficult, if not nearly impossible. For the five field offices that became the pilot offices for a new scheduling system, the average wait time for available InfoPass appointments ranged from 6.6 days to 12 days—acceptable for many purposes but not for emergencies.³¹³

USCIS’ Response: Centralizing Access and Realigning Resources

Institutional Changes. To address these challenges, USCIS made significant institutional and structural changes to its customer service and public engagement organizations. In December 2017, USCIS created the External Affairs Directorate (EXA), now the umbrella organization after subsuming CSPED on June 1, 2018. EXA includes the following offices: Legislative and Intergovernmental Affairs, Public Affairs, and Citizenship and Applicant Information Services (CAIS). The merger sought to ensure that USCIS conveyed “accurate, consistent and transparent information and unified messaging to both [its] external and internal audiences.”³¹⁴

³¹³ Information provided by USCIS (Apr. 12, 2019).

³¹⁴ USCIS Webpage, “External Affairs Directorate,” <https://www.uscis.gov/about-us/directorates-and-program-offices/external-affairs-directorate> (accessed Mar. 29, 2019). CSPED attended 128 community outreach and stakeholder meetings and conferences, reaching 21,186 attendees, during its last year in existence. Information provided by USCIS (Apr. 12, 2019). CAIS awarded 40 grants and hosted or attended a total of 76 teacher trainings, webinars, and conferences, from October 1, 2017 to December 31, 2018. Information provided by USCIS (Apr. 4, 2019). (Because the timeframe for the data begins before the existence of CAIS, the Ombudsman assumes that some of the total number of engagements were by the offices encompassing CAIS before its creation.)

CAIS encompasses the Office of Citizenship and the functions of the former Office of Communication and CSPED, and is divided into the Office of Citizenship, the Public Services Division (PSD), and the Digital Services Division.

Expanding Digital Interactions. USCIS’ online self-help tool *myUSCIS* plays a significant part in USCIS’ customer service platform, decreasing applicants’ reliance on seeking information from field office ISOs. Visitors to <https://my.uscis.gov> can find a variety of information, including how to prepare for the naturalization civics test, explore immigration options, and locate doctors authorized to perform medical examinations for immigration purposes. Applicants who have created a secure online account through *myUSCIS* can also file certain immigration requests online, get personalized case status information and reminders, and communicate with USCIS.

Between 2017 and 2018, USCIS added services to *myUSCIS*, including the ability to link a legal representative to Forms I-90, *Application to Replace Permanent Resident Card*, N-400, N-336, *Request for a Hearing on a Decision in Naturalization Proceedings*, and N-565, *Application for Replacement Naturalization/Citizenship Document*; track forms processed in case management systems other than ELIS; file online Forms I-131A, *Application for Travel Document*, N-600, and N-600K, *Application for Citizenship and Issuance of Certificate Under Section 322*; and pay the USCIS Immigrant Fee. By the end of December 2018, the total number of active *myUSCIS* accounts was 2.27 million and growing, and individuals had used the tool over 2.4 million times in that month alone to obtain information.³¹⁵ Eventually, USCIS plans to make *myUSCIS* the sole method for checking case status online, discontinuing the Case Status Online web page.³¹⁶

USCIS also made changes to other online tools that, among other things:

- improve the display of processing times on its website,
- increase access to the e-Request “Appointment Accommodations” webpages,
- enable asylum applicants to change their address using the Change of Address Online Tool, and

³¹⁵ Information provided by USCIS (Apr. 12, 2019).

³¹⁶ Information provided by USCIS at the Ombudsman’s Eighth Annual Conference (Nov. 16, 2018).

- add asylum case status information to Case Status Online.³¹⁷

Finally, Emma, the internet-based virtual assistant managed by CAIS' Public Services Division, was used by almost 3.4 million individuals in FY 2018.³¹⁸ However, aside from general content updates, PSD did not make major changes to Emma in FY 2018.³¹⁹

Revamping of InfoPass into InfoMod. To improve efficiency and the availability of ISO resources, USCIS launched an overhaul of InfoPass, transforming it into what is now called InfoMod. The core concept underlying InfoMod is to steer service requests to the Contact Center where USCIS representatives will determine whether the applicant's request requires an in-person appointment, or whether it can be resolved through online information or a call with a service representative who has access to basic USCIS databases. If an appointment is deemed necessary, a Contact Center representative will assist the individual in making the appointment. By limiting the use of appointments to applicants whose issues cannot be resolved without in-person interaction, USCIS hopes to conserve field office resources to focus on adjudications.³²⁰

On March 19, 2018, USCIS initiated the InfoMod pilot at the El Paso, Hartford, Jacksonville, Sacramento, and San Francisco field offices,³²¹ utilizing the Contact Center to change the availability of in-person services to those most needing them and requiring other applicants and petitioners to employ self-help tools.³²² The Contact Center has developed guidelines to assist its representatives in determining when to schedule an InfoPass appointment, which are updated as needed in collaboration with the Field Office Directorate (FOD). The guidelines include the approved reasons for the Contact Center to schedule an applicant for an in-person appointment, such as obtaining an emergency advance parole document, an ADIT stamp

for proof of permanent residence, or a certified copy of a naturalization certificate.³²³

Based on initial, positive results of the pilot program,³²⁴ USCIS began expanding the program in November 2018. By February 2019, InfoMod had replaced InfoPass at 33 percent of its local field offices.³²⁵ The agency is now phasing in the remaining field offices by August 2019.³²⁶ USCIS is notifying each local field office and its stakeholder community approximately 4 to 6 weeks prior to implementing InfoMod. USCIS sends email blasts to local stakeholders informing them of the transition, posts signs in the affected field offices, and announces the transition during outreach events.³²⁷ The transition is also announced on the relevant field office's InfoPass web page.³²⁸

The Increasing Role of the Contact Center. As the implementation of InfoMod has centralized the scheduling of in-person appointments and limited the appointments to problems that require in-person interaction, the Contact Center is assuming greater responsibility for servicing the needs of applicants, petitioners, and representatives.

To reflect the Contact Center's expanded capability beyond solely a call center, NCSC changed its name to the USCIS Contact Center in March 2018.³²⁹ Individuals can seek assistance from the Contact Center by telephone, through electronic message via *myUSCIS*,³³⁰ and through Emma via Live Chat. Requests for an appointment also can be initiated via telephone or Live Chat when Tier 1 representatives are available, and through *myUSCIS*. The Tier 2 Contact Center receives communications from applicants sent through *myUSCIS*. USCIS anticipates the Tier 2 Contact Center locations will begin online chats in 2019.³³¹

³¹⁷ Information provided by USCIS (April 12, 2019). Case Status Online is a USCIS webpage available at <https://egov.uscis.gov/casestatus/landing.do> where an individual can enter a receipt number and find out the last action USCIS took on the case.

³¹⁸ Information provided by USCIS (Apr. 12, 2019).

³¹⁹ USCIS Webpage, "External Affairs Directorate," <https://www.uscis.gov/about-us/directorates-and-program-offices/external-affairs-directorate> (accessed Feb. 22, 2019). A complete list of USCIS Online tools is available at <https://www.uscis.gov/tools>.

³²⁰ Information provided by USCIS (Feb. 11, 2019).

³²¹ Information provided by USCIS (Apr. 12, 2019). The pilot launch at each field office was as follows: Hartford, March 19, 2018; Jacksonville, April 2, 2018; El Paso, April 16, 2018; San Francisco, April 30, 2018; and Sacramento, May 14, 2018.

³²² Information provided by USCIS (Feb. 11, 2019).

³²³ Information provided by USCIS (Apr. 9, 2019).

³²⁴ Information provided by USCIS (Apr. 12, 2019).

³²⁵ Information provided by USCIS (Feb. 11, 2019).

³²⁶ Information provided by USCIS (Apr. 12, 2019).

³²⁷ Information provided by USCIS (Feb. 13, 2019).

³²⁸ Ombudsman Teleconference (Feb. 14, 2019).

³²⁹ Information provided by USCIS at the Ombudsman's Eighth Annual Conference (Nov. 16, 2018).

³³⁰ Applicants logged on to their *myUSCIS* account can send an authenticated message to USCIS concerning forms filed online or an unauthenticated message from the USCIS' Contact Us link, <https://my.uscis.gov/account/v1/needhelp>. Information provided by USCIS (May 9, 2019).

³³¹ Information provided by USCIS (Mar. 28, 2019). A Tier 1 representative's shift is split between 4 hours answering telephone calls and 4 hours responding to live chats. Information provided by USCIS (Mar. 11, 2019). A Tier 2 representative's shift is split between 4 hours answering telephone calls and 4 hours responding to online messages. Information provided by USCIS (Mar. 28, 2019).

Individuals who use the telephone hear recorded information that prompts them through a series of menu options designed to answer most callers' questions. Though this Interactive Voice Response (IVR) system is available to callers 24 hours a day, 7 days a week, Tier 1 contractors are available only during specified times—Monday to Friday from 8:00 a.m. to 8:00 p.m. Eastern time, except federal holidays, at the time of the drafting of this report.

As mentioned above, Tier 1, which constitutes the initial line of inquiry, is housed in centers that are staffed by contractors who have been provided basic immigration training. All Tier 1 staff are trained with the same materials used to train federal Contact Center ISOs. USCIS staff draft the training materials, scripts, and background resources the contractors use, drawing the material from USCIS' initial training covering all aspects of immigration law. New Tier 1 contractors must pass exams on basic immigration law and process, customer service principles, and use of equipment and systems before handling public inquiries.

After the classroom training, during a so-called “nesting” period, the representatives are closely mentored and monitored by experienced staff members. The trainees listen to real-time calls, and then experienced staff members provide advice and feedback as they learn to handle calls on their own. Contact Center representatives at both tiers also receive additional refresher training throughout the year and when USCIS rolls out a new policy or regulation.³³² All live chats and calls are recorded and maintained for 90 days for performance review, training purposes, and to address complaints.³³³

Tier 1 contractors must triage all incoming requests, quickly resolving the simple ones by providing information, while escalating the calls that either qualify for an appointment or require additional research. To improve the responsiveness of Contact Center representatives, in August 2018, USCIS increased Tier 1 contractors' access to USCIS systems to include many of its databases and operating systems, such as CLAIMS (Computer-Linked Application Information Management System) and SRMT.³³⁴ As a result, Tier 1 contractors are able to view more information about an individual's case, such as the names and other personally identifiable

information for the individuals included on the requests for immigration benefits, the most recent case status history, and the location of those individuals' files. The contractors are also able to see whether the applicant has communicated with Contact Center representatives before and how the previous contacts were resolved.³³⁵ Individuals receiving more information from Tier 1 representatives could lessen their need to visit a field office. USCIS is also in the process of increasing the number of Tier 1 contractors from 500 to more than 800 in 2019.³³⁶

If the Tier 1 representative determines that the applicant meets the criteria for an in-person appointment, the representative will transfer the inquiry to the second tier of assistance, where a second representative, a federal employee with more training in and knowledge of immigration, will: (1) confirm the inquiry meets one of the specified reasons requiring a field office appointment, and (2) contact the requestor within 24 to 48 hours³³⁷ to assist in scheduling the in-person appointment.³³⁸ The Tier 2 representative will make two attempts to return a call to an individual to make an appointment or provide information.³³⁹ If the Contact Center is unable to reach a requestor either time, the individual will need to resubmit an inquiry either by calling the Contact Center again or through the *myUSCIS* website.³⁴⁰ If the Tier 2 representative determines, however, that the appointment request does not warrant a visit to a field office, the representative will either email or call the requestor and provide USCIS' self-service tools information, or explain the action the representative intends to take to resolve the inquiry (for example, submit a biometric appointment reschedule request).³⁴¹

Where the Tier 2 representative is unable to resolve a complex inquiry (for example, the applicant's naturalization certificate was destroyed erroneously, or

³³⁵ Information provided by USCIS (Mar. 11, 2019).

³³⁶ Information provided by USCIS (Apr. 12, 2019). Until October 2018, USCIS had contracts with two vendors to operate the Tier 1 Contact Center and had approximately 750 contractors operating the phones. As the new single-vendor contractor fully took over, it has faced challenges with providing staff due to bottlenecks in the clearance process. Since October 2018, the Contact Center has been operating with around 500-535 contractors.

³³⁷ Ombudsman Teleconference “USCIS Applicant Support Services” (Feb. 14, 2019). The time selected for the return call is determined by the Contact Center.

³³⁸ Information provided by USCIS (Mar. 28, 2019).

³³⁹ *Id.*

³⁴⁰ Information provided by USCIS (Apr. 9, 2019).

³⁴¹ Information provided by USCIS (Mar. 28, 2019).

³³² Information provided by USCIS (Apr. 12, 2019).

³³³ Information provided by USCIS (Mar. 11, 2019).

³³⁴ *Id.*

the applicant was assigned the wrong alien number), the representative will escalate the inquiry to a supervisor for resolution.³⁴² If needed, a supervisor will consult with the “hotline [point of contact] POC” at the relevant field office,³⁴³ and will direct the ISO to contact the requestor to schedule an appointment.³⁴⁴

In December 2018, with 20 percent of field offices under the InfoMod program, the Contact Center received 379,653 phone calls and 4,420 live chats at Tier 1.³⁴⁵ By March 2019, the monthly live chat volume had increased to between 8,000 to 10,000 live chats per month as the agency transitioned to InfoMod. Based on data, historical trends, and future plans, the Contact Center projects the number of calls received at the Tier 1 level will increase to 400,000 monthly.³⁴⁶

InfoMod's Impact on USCIS Operations

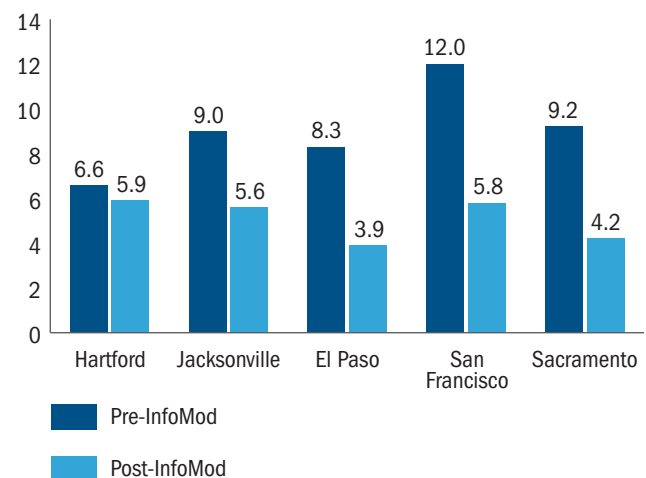
USCIS states that the transition to InfoMod “has improved the delivery of emergency and other services that can only be provided in person and made operations more efficient overall.”³⁴⁷ Among these benefits are improved access to appointments, reduced processing times, and better communication between FOD and EXA.

Improved access to available appointments. One disadvantage to InfoPass, voiced by both USCIS and public stakeholders, was the consistent unavailability of appointments. In comparison, data indicates that individuals who successfully navigate the InfoMod program are getting into field offices more quickly, with the average wait time decreasing to a range of 3.9 to 5.9 days at the piloting field offices.³⁴⁸ The average wait time for an appointment with the San Francisco Field

Office decreased by 6.2 days, which was the largest drop reported among the offices that piloted the program. See Figure 2.1 (*Average Wait Time in Days for Available In-Person Appointments Before and After Implementation of InfoMod*). In the case of the El Paso Field Office, the average number of daily appointment slots decreased by approximately 71 percent by December 2018.³⁴⁹

As USCIS has implemented InfoMod at more field offices across the country, the average wait time for an available appointment has decreased from 10 to 5 days, despite fewer available appointment slots at field offices.³⁵⁰ However, the percentage of slots filled also decreased,³⁵¹ giving field offices the flexibility to offer same-day appointments to some applicants.³⁵²

Figure 2.1: Average Wait Time in Days for Available In-Person Appointments Before and After Implementation of InfoMod



*The Pre-InfoMod date range is the specific field office's launch to December 31, 2017, and the Post-InfoMod date range is a year after the launch date to December 31, 2018.
Source: Information provided by USCIS (Apr. 12, 2019).

Potential Decrease in Processing Times. Since the implementation of InfoMod, USCIS has experienced an approximately 50 to 80 percent decrease in scheduled appointments,³⁵³ thereby enabling field offices to assign more ISOs to adjudication duties. For example, before the implementation of InfoMod, the Atlanta Field Office assigned 10 to 11 ISOs to InfoPass duties; after implementation, it has assigned only 2 or 3 ISOs. See Figure 2.3 (*Average Number of Adjudicators Who Handled Application Support Services*

³⁴² *Id.*

³⁴³ The hotline is a network of POCs who have committed to promptly responding to communications from Tier 3 Contact Center representatives on a case-by-case basis. Information provided by USCIS (Apr. 9, 2019).

³⁴⁴ Information provided by USCIS (Mar. 28, 2019).

³⁴⁵ Information provided by USCIS (Apr. 12, 2019). The Contact Center received an average number of 44,183 telephone calls per day from November 13, 2018 to December 31, 2018, which was 7,572 fewer calls than during the same period in 2017. USCIS explained that the Contact Center volume data may not reflect the true impact of the program due to the Contact Center volumes being typically lower in November and December due to the Thanksgiving and Christmas holidays and the menu for Case Status information being moved to the top of the IVR because it is the highest requested menu item. According to USCIS, providing easier access to case status information has reduced the number of calls that escalate to live assistance, therefore lowering Tier 1 and Tier 2 call volumes.

³⁴⁶ Information provided by USCIS (Mar. 11, 2019).

³⁴⁷ USCIS News Release, *USCIS to Expand Information Services Modernization Program to Key Locations* (Oct. 30, 2018).

³⁴⁸ Information provided by USCIS (Apr. 12, 2019).

³⁴⁹ Calculation based on information provided by USCIS (Apr. 29, 2019).

³⁵⁰ Information provided by USCIS (Feb. 11, 2019).

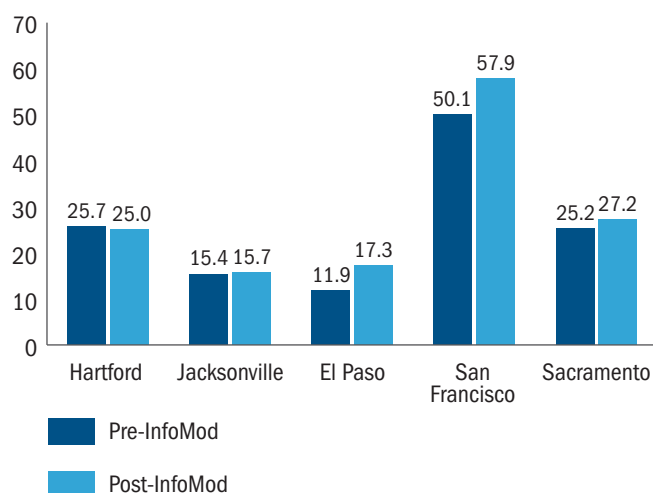
³⁵¹ Information provided by USCIS (Apr. 12, 2019).

³⁵² Information provided by USCIS (Feb. 14, 2019).

³⁵³ Information provided by USCIS (Feb. 11, 2019).

Before and After Implementation of InfoMod). The remainder of the ISOs have been assigned to adjudications, enabling them to contribute to a higher number of completed cases in their offices.³⁵⁴

Figure 2.2: Average Number of Adjudicators Before and After Implementation of InfoMod



*The Pre-InfoMod date range is the specific field office's launch to December 31, 2017, and the Post-InfoMod date range is a year after the launch date to December 31, 2018.
Source: Information provided by USCIS (Apr. 12, 2019).

Early data, though limited, shows a general decrease in the processing times for applications and an increase in the number of completed adjustment and naturalization applications at the field offices that have adopted InfoMod, which may be attributable to having more adjudication time or may be due to other variables such as eProcessing or filing decreases. The processing times for non-military naturalization applications at field offices, for example, decreased 3 months after their implementation of InfoMod: Between August and December 2018, the 93rd percentile processing times for naturalization applications decreased from 441 to 397 days at the Buffalo Field Office, from 295 to 230 days at the Raleigh-Durham Field Office, and 534 to 282 days at the Louisville Field Office.³⁵⁵ On the other hand, the Hartford Field Office has experienced an increase in processing times for Forms N-400: 9.9 months in December 2018, 10.1 months in January 2019, and 10.4 months in February 2019, suggesting other factors, such as staffing gaps, may be contributing to a field office's completion rate.³⁵⁶ In comparison, the processing times for field offices that have not yet transitioned to InfoMod are higher. For example,

³⁵⁴ Information provided by USCIS (Feb. 13, 2019).

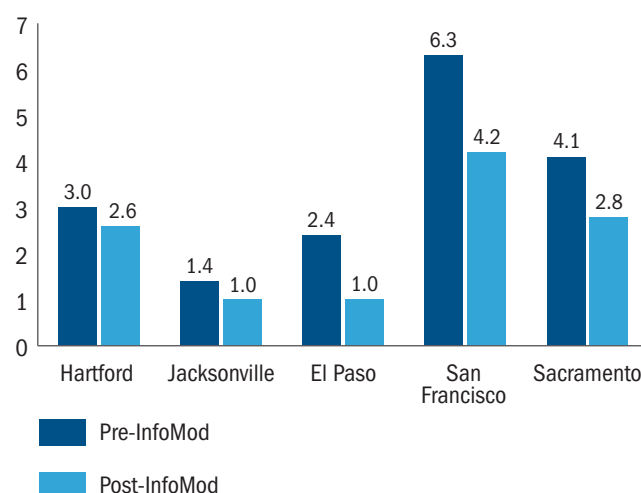
³⁵⁵ Information provided by USCIS (Mar. 7, 2019).

³⁵⁶ Information provided by USCIS (Apr. 11, 2019).

the 93rd percentile processing times for adjustment and naturalization applications at the Seattle Field Office are 21.5 and 21 months, respectively, and 19.5 and 14 months, respectively, at the Washington Field Office.³⁵⁷

Reflecting the trend in lower processing times, adjustment and naturalization completion rates increased at four of the five piloted field offices after their implementation of InfoMod. For example, the El Paso Field Office completed 1,280 adjustment applications between April and June 2018—an increase of 893 applications (or 230 percent) from January to March 2018; the Hartford Field Office completed 3,123 naturalization applications between April and June 2018—an increase of 653 applications (or 26 percent) from January to March 2018. However, the increases are not uniform; the San Francisco Field Office was the only piloted field office to complete fewer adjustment and naturalization applications after its implementation of InfoMod.³⁵⁸

Figure 2.3: Average Number of Adjudicators Who Handled Application Support Services Before and After Implementation of InfoMod



*The Pre-InfoMod date range is the specific field office's launch to December 31, 2017, and the Post-InfoMod date range is a year after the launch date to December 31, 2018.
Source: Information provided by USCIS (Apr. 12, 2019).

Improved data collection and communication among the Contact Center, FOD, and its field offices. With the centralization of appointment scheduling, USCIS is now able to collect more precise data on how and why the public contacts the agency for service support.³⁵⁹ During the Ombudsman's recent site visits to Contact Center

³⁵⁷ USCIS Webpage, "Check Case Processing Times," <https://egov.uscis.gov/processing-times/> (accessed May 10, 2019).

³⁵⁸ Calculations based on information provided by USCIS (Aug. 22, 2018).

³⁵⁹ Information provided by USCIS (Mar. 28, 2019).

locations and field offices, USCIS staff indicated improved communications with other USCIS offices involved in providing applicant support services. For example, the Contact Center meets regularly with FOD to discuss new content and instructions and improvements in how the contractors handle calls. Staff indicated it was in daily contact with other Tier 2 Contact Center locations and had biweekly meetings with the Tier 1 Contact Center to discuss operations. It also has designated POCs at the field offices to discuss situations that are not covered by the current guidelines. These POCs have bi-weekly regional meetings to discuss InfoMod.³⁶⁰ The Contact Center also reviews its volume and trends with FOD to determine when to expand the content of its guidelines and adjust appointment scheduling.³⁶¹ This increased data and improved communication can transform USCIS' ability to use analytics in decision making.

Challenges That Remain

While the transition to InfoMod represents a new approach to applicant support services that provides significant benefits to USCIS operations, the Ombudsman notes several challenges remain in providing effective support services to individuals seeking immigration benefits. Some of these challenges existed before the transition to InfoMod, such as inadequate information being provided, or limitations on legal representatives' ability to assist their clients. Others may correlate more closely to the changes engendered by InfoMod. These include difficulty connecting to a live representative or holding for lengthy periods of time, calls not being transferred to Tier 2 when appropriate, or quality assurance monitoring standards.

Mechanical breakdowns (higher call volumes, missed Tier 2 calls). USCIS has acknowledged the Contact Center is experiencing an increased demand upon its services that it is working to resolve.³⁶² As more field offices move into the InfoMod model, these demands will only expand. The Ombudsman has received some anecdotes from applicants that may reflect these pressures. Some callers report being put on hold for 45 minutes to over 3 hours or being told to call back due to high call

volume.³⁶³ Others state they have received recorded messages indicating the wait for the next available representative would be 300 minutes or more.³⁶⁴ An Ombudsman's staff member reported calling the Contact Center on February 20, 2019 and, after requesting to speak to a representative, received an automated message asking the caller to call at a different time because of unusually high volume, and was subsequently disconnected.³⁶⁵

Tier 2 is challenged with returning calls to people transferred to the Tier 2 level. Tier 2 representatives are supposed to return calls within 24 to 48 hours.³⁶⁶ However, stakeholders have reported that USCIS does not always return calls timely, or, because it chooses the time at which the return call is made, does so at an inconvenient hour; there have also been isolated reports of calls going unreturned by Tier 2.³⁶⁷ Legal representatives reported additional issues, some related to a requirement that only the attorney who has the signed Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, on file with USCIS may discuss that case with the Contact Center.³⁶⁸ Paralegals and attorneys associated with the same law firm but who are not on the G-28 cannot, however, make requests on behalf of the applicant or petitioner.³⁶⁹

Tier 2 representatives received 82,950 contacts in December 2018—24 percent of the total number of contacts received by Tier 1 that same month.³⁷⁰ While some of the contacts not transferred to Tier 2 may not have qualified, the Ombudsman has received complaints that Tier 1 representatives are not transferring people with legitimate reasons for visiting a field office to Tier 2.

³⁶⁰ Information provided by USCIS (Apr. 15, 2019).

³⁶¹ Information provided by USCIS (Apr. 9, 2019).

³⁶² USCIS News Alert, "New Online Tools Reduce Wait Times for Callers" (Feb. 25, 2019); <https://www.uscis.gov/news/alerts/new-online-tools-reduce-wait-times-callers> (accessed May 14, 2019) ("The USCIS Contact Center is currently experiencing higher than normal wait times for callers to speak to a representative. While we work to resolve this, we encourage you to use our online tools.").

³⁶³ Information provided by USCIS (Apr. 12, 2019). See also USCIS News Alert, "New Online Tools Reduce Wait Times for Callers" (Feb. 25, 2019); <https://www.uscis.gov/news/alerts/new-online-tools-reduce-wait-times-callers> (accessed May 14, 2019).

³⁶⁴ Information provided by stakeholders (Apr. 24, 2019).

³⁶⁵ Office of the Citizenship and Immigration Services Ombudsman interoffice email (Feb. 25, 2019).

³⁶⁶ *Id.*

³⁶⁷ Ombudsman Teleconference, "USCIS Applicant Support Services" (Feb. 14, 2019) and information received through requests for case assistance.

³⁶⁸ Contact Center representatives at each tier can and do discuss case-specific information with the applicants themselves, even those who have a representative with a G-28 on file. The criteria is based on the applicant's right to the information they are seeking at the time of the contact. "It's always at the discretion of the applicant, and we offer them the opportunity to conference in their attorney if they desire." Written contacts from attorneys are responded to in writing and sent to both the attorneys and the applicant/petitioner. Information provided by USCIS (May 22, 2019).

³⁶⁹ Ombudsman Teleconference, "USCIS Applicant Support Services" (Feb. 14, 2019).

³⁷⁰ Information provided by USCIS (Feb. 11, 2019).

The Ombudsman also received complaints from legal representatives that the Contact Center was not transferring their calls to Tier 2 to make appointments to pay the required fees associated with motions to the Immigration Court and appeals from decisions denying visa petitions as required by regulation and Executive Office for Immigration Review (EOIR) practices.³⁷¹ The Ombudsman has raised awareness on this point with USCIS to increase the availability of appointments for this purpose. Before InfoMod, legal representatives did not need an appointment for this purpose. USCIS said the attorneys should ask for a supervisor or keep calling back until they find a Tier 1 representative who would transfer their call.³⁷²

Opportunity for user feedback. USCIS' current feedback system helps to ensure the accuracy and usefulness of the information Contact Center representatives deliver to the public. Quality assurance analysts review contacts on a regular basis for training purposes and corrective action, as necessary.³⁷³ USCIS also has implemented quality assurance programming to leverage a random statistical sample of engagements for review. The agency records its interactions with applicants and representatives and can review a call or message exchange to provide specific quality control.³⁷⁴ The Contact Center also currently conducts a monthly telephone survey to measure customer satisfaction.³⁷⁵ In early FY 2020, USCIS will deploy a new survey tool that will allow it to better refine what type of information is solicited as part of an inquiry and to assess the resulting satisfaction rate.³⁷⁶

More can be measured in terms of quality assurance data, and used to inform future refinements. Though USCIS has protocols for how to handle callers who want to complain about a Contact Center representative and a database system to track incoming communications with individuals, for example, it does not yet keep statistics on how many complaints it receives concerning the service or information provided at the Tier 1 and 2 levels.³⁷⁷ As InfoMod expands, the incorporation of targeted and more descriptive feedback from the public to measure the individual experience, should be used to identify additional reasons for escalation, which would improve operational efficiency.

³⁷¹ Information provided by USCIS (Apr. 11, 2019).

³⁷² *Id.*

³⁷³ Information provided by USCIS (Mar. 28, 2019).

³⁷⁴ Information provided by USCIS (May 21, 2019).

³⁷⁵ Information provided by USCIS (Apr. 5, 2019).

³⁷⁶ *Id.*

³⁷⁷ Information provided by USCIS (Apr. 12, 2019).

Public awareness may be critical to early adoption. The Hartford Field Office piloted InfoMod first, launching it on March 19, 2018,³⁷⁸ with only a month to notify the public of the change.³⁷⁹ Though each field office's circumstances are different, Hartford would have benefited from additional time and training to prepare for the launch. The field office staff received training on how to use USCIS' online tools, but the training lacked guidance on instructing the public on how to use the tools. The field office held four engagements with the specific purpose of notifying its stakeholders about the implementation of InfoMod,³⁸⁰ which signifies a serious commitment on the part of the office, given it had only one Community Relations Officer and notifying the public fell primarily on the field office.³⁸¹ However, even this robust outreach was insufficient, as it did not include individuals who were required to interact with the office but were not reached by the notice leading up to the transition. The field office leadership acknowledged that individuals who were not aware of the InfoMod changes and visited the office after the launch were dissatisfied.³⁸² This first transition experience provided the agency with valuable information to assist future launches. As the changeover has moved through other field offices, its visibility has grown, again assisting in implementation across a broader spectrum.

Conclusion and Recommendations

USCIS' transition to InfoMod is the next step forward in streamlining applicant support services and conserving resources for its adjudicatory functions. The rollout is still in progress and presents opportunities for modification and improvement as USCIS establishes new routines with the filing community.

The Ombudsman makes the following recommendations to USCIS as it continues to implement InfoMod at more field offices. The Ombudsman will continue to monitor the transition of InfoPass to InfoMod and its impact on stakeholders.

- 1. Enhance quality assurance monitoring standards to include a higher level of substantive review to inform InfoMod enhancements.** USCIS has the capability to review its interactions with the regulated public, and already engages in a robust quality control through review of the actual interactions.

³⁷⁸ *Id.*

³⁷⁹ Information provided by USCIS (Apr. 15, 2019).

³⁸⁰ Information provided by USCIS (Apr. 12, 2019).

³⁸¹ Information provided by USCIS (Apr. 15, 2019).

³⁸² *Id.*

It can review recorded calls to target those who communicated with the Contact Center to request an appointment but were not transferred to Tier 2. This kind of review could result in additional enhancements of the criteria for appointments or higher levels of interactions, to resolve individual issues or improve operational efficiency.

2. **Work toward a convenient window of time to call back individuals to limit missed calls.** In the current process, the Contact Center returns calls at a time it selects, rather than a time known to the applicant or representative. An applicant or representative missing the return call only leads to more work for the agency and frustration for the applicant. Providing a narrower window than 24 to 48 hours, as is currently the case, would likely ensure a higher rate of successful returned calls and fewer missed ones, especially across time zones.
3. **Educate potential users on the continued improvements to *myUSCIS*, especially its multiple benefits, such as communicating with the Contact Center through electronic messages.** As eProcessing expands, USCIS will rely more on its applicant portal to communicate with the affected public. Educating the public on *myUSCIS* and its benefits will help both applicants and USCIS communicate more efficiently and effectively. Moreover, providing an opportunity for feedback will also help USCIS identify improvements needed as this program moves forward.
4. **Allow attorneys and accredited representatives in the same law firm or organization to engage with the agency.** Attorneys and accredited representatives bound by ethical obligations to a state bar as well as under the ethical structures of EOIR can be held

responsible for their actions before the agency. Allowing other attorneys and legal representatives access to be able to handle administrative issues such as requesting appointments, seeking rescheduling, and reporting issues would increase efficiency for both the agency and the applicant. This would also increase the responsiveness of return calls, if a fellow attorney can be called upon when the attorney of record is not available.

5. **Update the InfoPass appointment guidance to the Contact Center to include procedures for escalating an individual's call that requires immediate attention due to exigent circumstances.** While USCIS cannot anticipate all situations, certain exigent circumstances could receive a higher level of attention, including the possibility of a same-day appointment. These might include obtaining an ADIT stamp to show an employer as proof of employment, or an emergency advance parole document when a still-pending Form I-131 will not be adjudicated in time to meet the applicant's urgent travel need. The updated guidance would further USCIS' goal to require appointments to visit a field office and provide timely services to applicants with legitimate needs.
6. **Conduct a strategic evaluation of applicant support services every 3 years to make sure the methods continue to be efficient and effective, and that new technology is incorporated as appropriate.** While USCIS engages in frequent review of its processes to ensure effectiveness and integrity, regular evaluations of the communication and interaction methods would permit more frequent incorporation of technology upgrades and strategic improvements.



Spotlight: Asylum Vetting Center: USCIS Centralizes Asylum Screening Operations

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

Background

In the 2018 Annual Report, the Ombudsman provided a comprehensive overview of USCIS' asylum program and the challenges faced due to growing backlogs from increased affirmative asylum filings as well as credible fear claims at the border. The 2018 report also highlighted the steps USCIS was taking to reduce the affirmative asylum backlog while continuing to process a growing number of

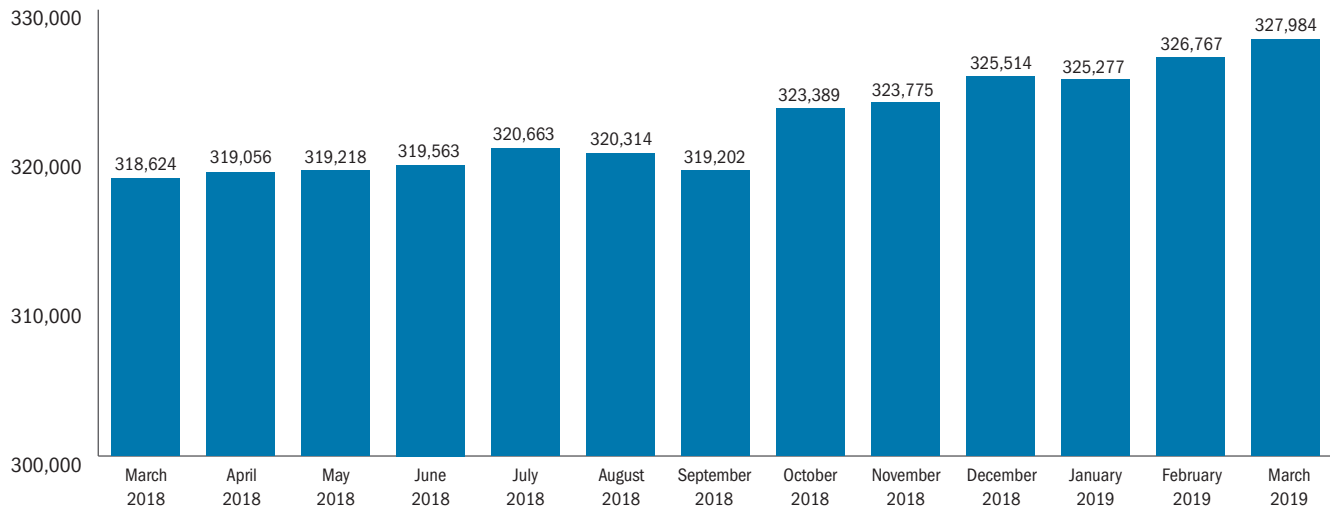
credible fear and reasonable fear claims. We noted then that 318,624 cases were awaiting an affirmative asylum decision. At the end of January 2019, there were 325,277 affirmative asylum applications pending, showing the asylum program continues to carry a significant backlog.³⁸³

USCIS has taken a number of steps to increase its adjudication capacity and to reduce the affirmative asylum application backlog. One significant step, announced

³⁸³ Information provided by USCIS (Feb. 22, 2019); https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsJan2019.pdf (accessed May 17, 2019).

in January 2018, marked the return to last-in, first-out (LIFO) processing in order to reduce the number of non-qualified applicants who file for asylum presumably to obtain work permits.³⁸⁴ USCIS recently reported that affirmative asylum receipts have fallen by approximately 30 percent since LIFO processing was put in place.³⁸⁵

Figure 3.1: Affirmative Asylum Backlog³⁸⁶



In addition to affirmative asylum filings, the USCIS Asylum Division is responsible for conducting credible fear³⁸⁷ and reasonable fear³⁸⁸ screenings. A USCIS asylum officer conducts these screenings (interviews) when U.S. Customs and Border Protection (CBP) apprehends an individual claiming credible or reasonable fear and refers the person to USCIS. These CBP

³⁸⁴ USCIS Press Release, “USCIS to Take Action to Address Asylum Backlog,” January 31, 2018; <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog> (accessed May 9, 2019).

³⁸⁵ Information provided by USCIS (Feb. 22, 2019).

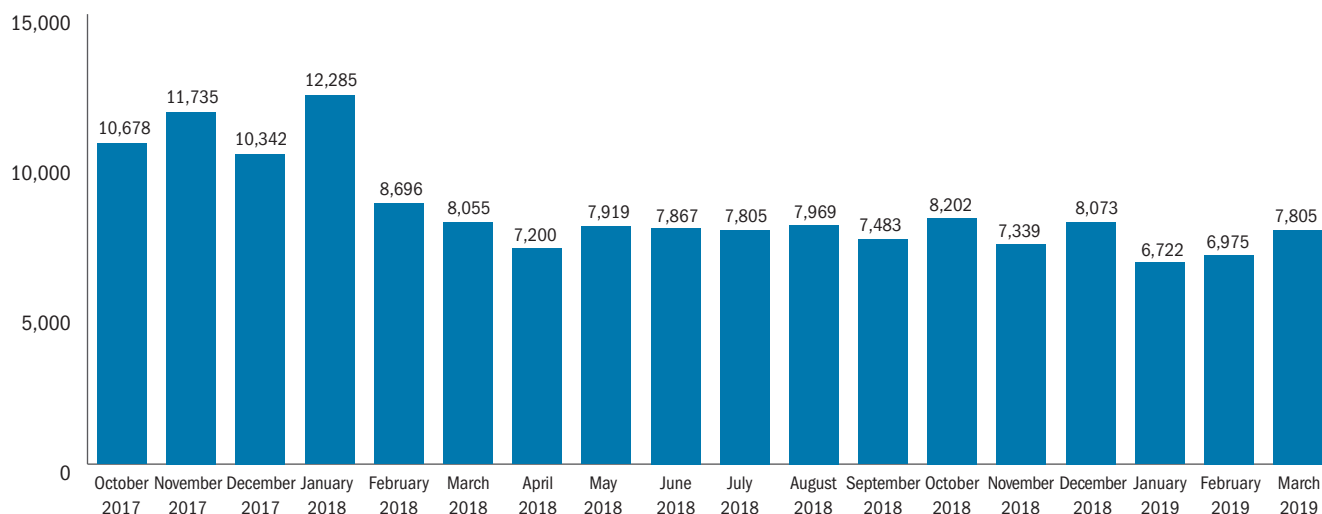
³⁸⁶ USCIS Web pages, “Asylum Office Workload, March 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsymylumOfficeWorkloadMarch2018.pdf; “Asylum Office Workload, April 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/AffirmativeAsylumStats_April2018.pdf; “Asylum Office Workload, May 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/AffirmativeAsylumStats_May2018.pdf; “Asylum Office Workload, June 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/AffirmativeAsylumStats_June2018.pdf; “Asylum Office Workload, July 2018;” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsJuly2018.pdf>; “Asylum Office Workload, August 2018;” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsAugust2018.pdf>; “Asylum Office Workload, September 2018;” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsSept2018.pdf>; “Asylum Office Workload, October 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsOct2018.pdf; “Asylum Office Workload, March 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsNov2018.pdf; “Asylum Office Workload, December 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsDec2018.pdf; “Asylum Office Workload, March 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsJan2019.pdf; “Asylum Office Workload, March 2018;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsFeb2019.pdf; “Asylum Office Workload, March 2019;” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf (accessed Jun. 11, 2019).

³⁸⁷ An individual who seeks admission to the United States without proper entry documents or who has otherwise not been admitted is subject to immediate return, a process referred to as expedited removal. If an individual who is subject to expedited removal makes a claim of fear of persecution upon return to his or her home country, he or she is detained by CBP and receives a credible fear screening from a USCIS asylum officer. If the individual establishes a “significant possibility” that he or she can prove the elements of a full asylum or torture claim before an immigration judge, the applicant is referred to the immigration court for a full hearing. Individuals who do not meet the “significant possibility” threshold, and who do not request a review of this decision, are removed from the United States by U.S. Immigration and Customs Enforcement (ICE). INA § 235(b)(1); 8 U.S.C. § 1225(b)(1); *see also* USCIS Webpage, “Questions and Answers: Credible Fear Screening” (Jul. 15, 2015); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (accessed May 15, 2019).

³⁸⁸ An individual who has unlawfully reentered the United States after being ordered removed or granted voluntary departure, and/or is subject to an administrative order of removal as an aggravated felon, but who expresses a fear of persecution upon return, is detained by CBP and referred for a reasonable fear screening interview by a USCIS asylum officer. If the individual establishes that there is a “reasonable possibility” that he or she will be persecuted on account of a protected characteristic or tortured, he or she is referred to the immigration court for a full hearing. Individuals who do not meet the “reasonable possibility” threshold and who do not request a review of this decision are removed from the United States by ICE. 8 C.F.R. § 241.8; *see also* USCIS Webpage, “Questions and Answers: Reasonable Fear Screening” (Jun. 18, 2013); <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings> (accessed May 15, 2019).

referrals are generally called receipts and usually, with some exceptions, result in screenings. The number of credible fear receipts received by USCIS increased notably in FY 2018 to 99,035,³⁸⁹ a 20 percent increase over the FY 2017 total of 78,475.³⁹⁰ Similarly, the number of reasonable fear receipts also rose from 10,273³⁹¹ cases in FY 2017 to 11,101³⁹² cases in FY 2018.

Figure 3.2: Affirmative Asylum Applications Filed by Month³⁹³



³⁸⁹ Information provided by USCIS (Nov. 26, 2018).

³⁹⁰ Information provided by USCIS (Nov. 3, 2017). (The figure reported in the Ombudsman's 2018 Annual Report was a partial year figure.)

³⁹¹ *Id.*

³⁹² Information provided by USCIS (Nov. 26, 2018).

³⁹³ USCIS Web pages, "Asylum Office Workload, October 2017;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsOctober2017.pdf; "Asylum Office Workload, November 2017;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsNovember2017.pdf; "Asylum Office Workload, December 2017;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsDecember2017.pdf; "Asylum Office Workload," January 2018; https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsJan2018.pdf; "Asylum Office Workload, February 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsFeb2018.pdf; "Asylum Office Workload, March 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2018.pdf; "Asylum Office Workload, April 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsApr2018.pdf; "Asylum Office Workload, May 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/AffirmativeAsylumStats_May2018.pdf; "Asylum Office Workload, June 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/AffirmativeAsylumStats_June2018.pdf; "Asylum Office Workload, July 2018;" <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsJuly2018.pdf>; "Asylum Office Workload, August 2018;" <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsAugust2018.pdf>; "Asylum Office Workload, September 2018;" <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsSept2018.pdf>; "Asylum Office Workload, October 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsOct2018.pdf; "Asylum Office Workload, November 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsNov2018.pdf; "Asylum Office Workload, December 2018;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsDec2018.pdf; "Asylum Office Workload, January 2019;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsJan2019.pdf; "Asylum Office Workload, February 2019;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsFeb2019.pdf; "Asylum Office Workload, March 2019;" https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf (accessed Jun. 11, 2019).

Figure 3.3: Credible Fear Receipts³⁹⁴

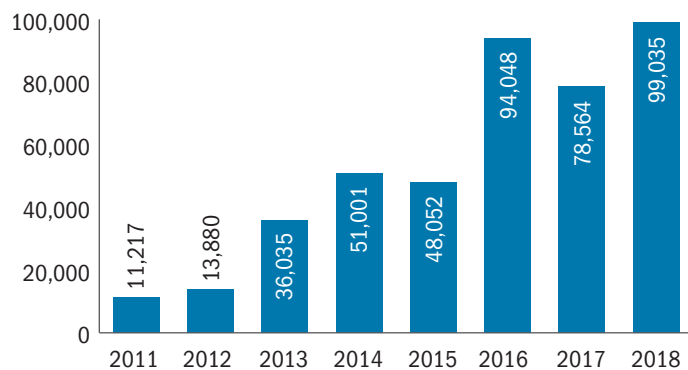
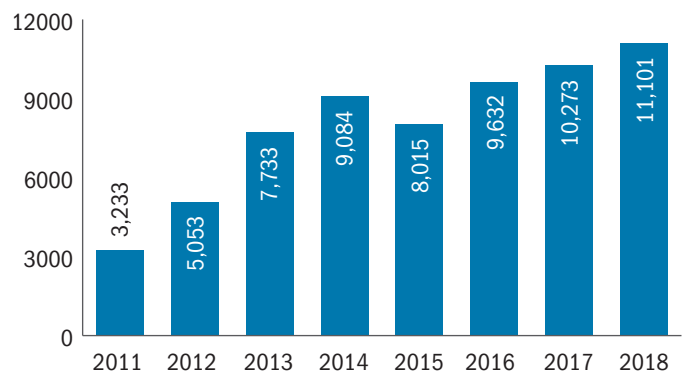


Figure 3.4: Reasonable Fear Receipts³⁹⁵



Establishment of the Asylum Vetting Center

In 2015, the U.S. Government Accountability Office (GAO) issued recommendations outlining a need for both DHS and DOJ to take additional actions to assess and address asylum fraud risks.³⁹⁶ That report contained a recommendation for USCIS to pre-screen all asylum applications for fraud indicators “to the extent that it is cost-effective and feasible.”³⁹⁷ USCIS concurred in the recommendations, including the recommendation for a national pre-screening program, and began planning for a centralized pre-screening center for asylum adjudications

³⁹⁴ USCIS Web pages, “Credible Fear Workload Report Summary, FY 2018 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf; “Credible Fear Workload Report Summary, FY 2017 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf; “Credible Fear Workload Report Summary, FY 2016 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf; “Credible Fear Workload Report Summary, FY 2015 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Credible_Fear_Workload_Report_Summary_POE_and_Inland_Caseload_through_2015-09.pdf; “Credible Fear Workload Report Summary, FY 2014 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Credible_Fear_and_Reasonable_Fear_FY14_Q4.pdf; “Credible Fear Workload Report Summary, FY 2013 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/Asylum-CredibleFear-ReasonableFear-FY13.pdf>; “Credible Fear Workload Report Summary, FY 2012 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Credible-Reasonable-workloadsFY12.pdf>; “Credible Fear Workload Report Summary, FY 2014 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/CredibleFearandReasonableFearWorkload.pdf> (accessed June 11, 2019).

³⁹⁵ USCIS Web pages, “Reasonable Fear Workload Report Summary, FY 2018 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf; “Reasonable Fear Workload Report Summary, FY 2017 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf; “Reasonable Fear Workload Report Summary, FY 2016 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf; “Reasonable Fear Workload Report Summary, FY 2015 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Reasonable_Fear_Caseload_and_Monthly_Report_by_Office_through_2015-09.pdf; “Reasonable Fear Workload Report Summary, FY 2014 Total Caseload,” https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Credible_Fear_and_Reasonable_Fear_FY14_Q4.pdf; “Reasonable Fear Workload Report Summary, FY 2013 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/Asylum-CredibleFear-ReasonableFear-FY13.pdf>; “Reasonable Fear Workload Report Summary, FY 2012 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Credible-Reasonable-workloadsFY12.pdf>; “Credible Fear Workload Report Summary, FY 2014 Total Caseload,” <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/CredibleFearandReasonableFearWorkload.pdf> (accessed June 11, 2019).

³⁹⁶ U.S. Government Accountability Office Report, “Asylum: Additional Actions Needed to Assess and Address Fraud Risks,” GAO-16-50, December 2015, at 75; <https://www.gao.gov/assets/680/673941.pdf> (accessed May 13, 2019).

³⁹⁷ *Id.*

in 2017. Although initially conceived to improve the coordination and scope of the activities of the Fraud Detection and National Security (FDNS) Directorate, the center has evolved to include several adjudication support functions, as USCIS has determined there are significant process-efficiency benefits to establishing a centralized intake and pre-screening facility.

The Asylum Vetting Center (AVC) will eventually be the receipting center for affirmative filings of Form I-589, *Application for Asylum and for Withholding of Removal*, replacing the Nebraska Service Center (NSC) in that capacity. Its functions will include:

- Responsibility for pre-screening all new asylum filings for public safety and national security threats;
- Support for national large-scale fraud investigations, scanning and using technology to review text analytics data from asylum filings to identify national fraud trends and patterns; and
- Coordination of national backlog reduction efforts, centralizing management of all files for backlogged cases, distribution of cases and review of post-adjudication asylum termination requests, and establishing a timely records distribution system to support improved asylum field office adjudication efficiencies.

The AVC presently has 38 asylum and FDNS staff and is expected to add capacity in several phases until it is fully operational in March 2021, with capacity for approximately 250 federal employees and 100 contract employees.³⁹⁸ USCIS plans to operate the AVC with 30 to 40 asylum officers in addition to FDNS and support staff.

A Key Role in Fraud Detection

Currently, affirmative asylum applications are receipted at a service center and forwarded to the regional asylum office having jurisdiction over the applicant's place of residence. Because service centers do not staff asylum officers, applications are not pre-screened and are forwarded to asylum offices once receipted.³⁹⁹

Once the AVC is fully functional, centralized receipting and initial processing of asylum applications will allow its asylum officers to conduct all of the pre-adjudication

screening and vetting. The shift is expected to enhance consistency and compliance in the application of security check procedures. This model will allow the USCIS Asylum Division to implement and centralize the GAO's recommendation that all cases be pre-screened by FDNS prior to the asylum interview.⁴⁰⁰ Further, this redistribution will make available adjudication time for asylum officers stationed in field offices who will receive these files after all of the initial vetting has been completed.

More specifically, it is anticipated that the AVC will allow for more robust early vetting, including identifying aliases, for example, and initiating vetting on those names early in the process to identify and address national security and public safety concerns. Further, the AVC will have the capability to scan all incoming applications and use text analytics to look for boilerplate language and other patterns or anomalies to flag potentially fraudulent applications. Cases with possible fraud or other concerns will therefore be flagged before they are forwarded to the asylum office for interview.

The AVC will also promote coordination and information sharing with the National Vetting Center.⁴⁰¹ For example, it will enhance USCIS' ability to address fraud concerns that come to light after it has granted asylum to an applicant. Currently, each asylum office has a small staff of FDNS officers whose responsibilities include conducting termination investigations if fraud has been

⁴⁰⁰ U.S. Government Accountability Office Report, "Asylum: Additional Actions Needed to Assess and Address Fraud Risks," GAO-16-50, December 2015, at 75; <https://www.gao.gov/assets/680/673941.pdf> (accessed May 13, 2019).

⁴⁰¹ Established pursuant to National Security Presidential Memorandum (NSPM)-9, "Optimizing the Use of Federal Government Information in the Support of the National Vetting Enterprise," the National Vetting Center (NVC) is an interagency effort to provide collaboration on threats to national security, border security, homeland security, or public safety through the immigration system. The National Vetting Center is meant to strengthen, simplify, and streamline "the complex way that intelligence, law enforcement, and other information is used to inform operational decisions and allow departments and agencies to contribute their unique information, all while ensuring compliance with applicable laws and policies and maintaining robust privacy, civil rights, and civil liberties protections." CBP Webpage, "National Vetting Center," <https://www.cbp.gov/border-security/ports-entry/national-vetting-center> (accessed May 13, 2019).

³⁹⁸ Information provided by USCIS (Feb. 14, 2019).

³⁹⁹ Instructions for Form I-589, *Application for Asylum and for Withholding of Removal*; <https://www.uscis.gov/i-589> (accessed May 15, 2019).

uncovered.⁴⁰² Once the AVC is fully operational, asylum termination work will be centralized there and local asylum offices will play a part only if an interview is required during the termination process.

By centralizing key FDNS functions at the AVC, USCIS aims to address the concerns highlighted by the GAO report as well as Executive Order 13767, enhance the operational capacity of FDNS, and prevent the entry of malicious actors, thus enhancing the security of the American people.⁴⁰³

Gaining Case Processing Efficiencies

The transition to a service center model for asylum cases is expected to provide a number of processing efficiencies. The AVC will house all backlogged asylum files to facilitate vetting before cases are scheduled for interview, allowing the asylum program to identify more complex cases requiring more adjudicatory resources. Likewise, there will be an opportunity to filter out certain types of cases before the interview stage, therefore reducing the backlog and conserving resources. For example, cases involving applicants who are already in immigration proceedings and therefore ineligible to file affirmatively for asylum will be identified and removed from the queue.

Announced in February 2018, the Asylum Division has begun a pilot program where applicants who entered the United States more than 10 years before filing for asylum are given an opportunity to voluntarily waive the asylum interview and be given a Notice to Appear (NTA) in immigration court to request relief from removal.⁴⁰⁴ As of February 2019, USCIS mailed approximately 6,500 such notices, reporting that approximately 20 percent of these applicants accepted the option to waive the interview.⁴⁰⁵ Removing these cases from the affirmative asylum application inventory when the case is sent to the immigration court for further proceedings reduces the number of backlogged asylum cases pending with USCIS (albeit adding to cases in the immigration court system). It is expected that this pilot program will become permanent and will be centralized at the AVC.⁴⁰⁶

Conclusion

Although the operations are in their initial stages, the AVC is fulfilling a coordinated effort to address systemic fraud issues and streamline processing, moving forward cases and making available resources to work through more of the asylum backlog.

⁴⁰² “A grant of asylum does not convey a right to remain permanently in the United States and may be terminated ... Fraud in the application pertaining to eligibility for asylum at the time it was granted is grounds for termination regardless of the filing date. If the asylum application was filed on or after April 1, 1997, USCIS may terminate asylum if USCIS determines that the applicant: No longer meets the definition of a refugee; ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; constitutes a danger to the community of the United States, if convicted of a particularly serious crime; committed a serious nonpolitical crime outside the United States prior to arriving in the United States; is a danger to the security of the United States, including terrorist activity; may be removed, to a country (other than the country of the applicant’s nationality or last habitual residence) in which the applicant’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, where the applicant is eligible to receive asylum or equivalent temporary protection; has voluntarily availed himself or herself of the protection of the country of nationality or last habitual residence by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or has acquired a new nationality and enjoys the protection of the country of his new nationality.” USCIS Policy Manual, Chapter 6—Termination of Status and Notice to Appear Considerations. <https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-6> (accessed May 15, 2019).

⁴⁰³ Executive Order 13767, “Border Security and Immigration Enforcement Improvements,” signed January 25, 2017, called for an end of “the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.”

⁴⁰⁴ Information provided by USCIS (Feb. 22, 2019).

⁴⁰⁵ *Id.*

⁴⁰⁶ Information provided by USCIS (Feb. 14, 2019).



Transitioning from Transformation to eProcessing

Responsible Offices: Management Directorate, Office of Information Technology; Immigration Records and Identity Services, Service Center Operations, and Field Office Directorates

Key Facts and Findings

- eProcessing represents the agency's initiative to modernize the administration of immigration benefit requests, using lessons learned alongside its current systems and technology.
- USCIS' efforts to automate the inventory of immigration benefits processing has been a significant concern for well over a decade, encountering a variety

of technical challenges that have in turn resulted in significant programming delays, major shifts in architecture and development, and costly mistakes.

- The challenge of converting paper-based systems to digital ones has always been enormous, given the size and breadth of the information USCIS handles and the records it maintains, as well as the collections it ingests to adjudicate immigration benefits.
- The former USCIS Director's challenge to the agency is to become paperless by December 2020. Despite the previous decade of activity towards accomplishing this goal, there is still a lot of work to be done to reach this target.

- The agency has amassed a wealth of experience that has informed its most recent decisions on eProcessing, including the development of its Electronic Immigration System (ELIS). USCIS currently adjudicates a relatively small number of forms electronically; however, these forms represent a significant volume of work for the agency.
- While USCIS has made significant progress on eProcessing this year, more work must be done before eProcessing can be mandated. System functionality, outreach to filers, and technical support all must be robust to service the millions of applicants, petitioners, and other stakeholders.

Background

In October 2018, former USCIS Director L. Francis Cissna announced the launch of the agency's eProcessing initiative to shift from a paper-based environment to a digital end-to-end filing, adjudication, and storage process by the end of 2020.⁴⁰⁷ Earlier efforts to automate benefits processing encountered a variety of challenges that led to significant delays and cost overruns.⁴⁰⁸ It is yet to be seen if this new drive to complete the initiative will be successful, but the use of existing technologies and lessons learned from a decade of development offers cautious optimism.

Citing the H-1B lottery process, former Director Cissna stated the agency's paper-based system "is just holding us back like a sea anchor, but the minute we can cut that thing off, we'll be in a much better place."

⁴⁰⁷ Laura D. Francis, "Paperless Intake Is Immigration Agency Director's Top Priority," *Daily Labor Report* (October 18, 2018); <https://news.bloomberglaw.com/daily-labor-report/paperless-intake-is-immigration-agency-directors-top-priority> (accessed Apr. 25, 2019).

⁴⁰⁸ In 2016, referring to why his office prepared its most recent report on the agency's efforts to shift to a digital environment, the DHS Inspector General stated: "We undertook this audit to answer a relatively simple question: after 11 years and considerable expense, what has been the outcome—right now—of USCIS' efforts to automate benefits processing? We focused on benefits processing automation progress and performance outcomes. The answer, unfortunately, is that at the time of our field work, which ended in July 2015, little progress had been made." See DHS Office of the Inspector General, "USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery," at 2, 22 (Mar. 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Apr. 25, 2019).

Unlike previous iterations of this initiative, USCIS' eProcessing effort is not intended to retire the agency's many legacy systems (such as CLAIMS 3) and replace them with an entirely new case management system, but instead to integrate existing systems across the agency for filing, adjudication, and storage⁴⁰⁹ of all petitions and applications.⁴¹⁰

To better understand the immensity of the challenge, one should consider USCIS' enormous and complex workload. On an average day, USCIS processes more than 30,000 applications for 60 immigration-benefit types; issues 8,000 or more permanent resident cards; adjudicates more than 250 refugee applications; and naturalizes nearly 3,000 new citizens.⁴¹¹ With some exceptions, USCIS currently processes most immigration benefit requests through its intake and review of 90 different paper-based forms.⁴¹² Furthermore, USCIS maintains more than 100 million active paper records for individuals who have had contact with the agency within the last 12 years, a number that its chief information security officer called "staggering."⁴¹³

USCIS began its effort to move the agency into the digital age in 2005, and to date, has spent approximately \$3.1 billion on those efforts in its "Transformation

⁴⁰⁹ USCIS stores submitted material in a physical file associated with the individual, known as an Alien File or A-File. The legacy Immigration and Naturalization Service (INS) opened or consolidated A-Files for every immigrant who arrived after April 1, 1944 or naturalized after April 1, 1956, and for immigration law enforcement matters. A-Files are identified by an individual's Alien Registration Number (A-Number), a unique eight- or nine-digit number generally assigned to a noncitizen at the time their A-File is created. See USCIS Webpage, "A-Files Numbered Below 8 Million" (Feb. 9, 2016); <https://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million> (accessed Apr. 25, 2019).

⁴¹⁰ Information provided by USCIS (Apr. 12, 2019).

⁴¹¹ DHS Office of the Inspector General, "USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery," OIG-18-23 (Nov. 30, 2017) at 1; <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf> (accessed Apr. 25, 2019).

⁴¹² These exceptions include: Form G-28 (*Notice of Entry of Appearance as Attorney or Accredited Representative*) (in connection with an established *myUSCIS* client account); Form I-90 (*Application to Replace Permanent Resident Card*); Form N-336 (*Request for a Hearing on a Decision in Naturalization Proceedings Under Section 336 of the INA*); Form N-400 (*Application for Naturalization*); Form N-565 (*Application for Replacement Naturalization/Citizenship Document*); Form N-600 (*Application for Certificate of Citizenship*); Form N-600K (*Application for Citizenship and Issuance of a Certificate Under Section 322*); and Form I-539 (*Application to Extend/Change Nonimmigrant Status*).

⁴¹³ Amelia Brust, "USCIS optimistic eProcessing will work to cut down paper records," *Federal News Network* (Nov. 27, 2018); <https://federalnewsnetwork.com/application-services/2018/11/uscis-optimistic-e-processing-will-work-to-cut-down-paper-records/> (accessed Apr. 25, 2019).

Program.”⁴¹⁴ In 2012, USCIS officially branded the backbone and public-facing component of the Transformation Program, dubbed “ELIS,” its Electronic Immigration System.⁴¹⁵

In its first iteration, ELIS was capable of ingesting three immigration-related forms: Form I-539, *Application to Extend/Change Nonimmigrant Status*; Form I-526, *Immigrant Petition by Alien Entrepreneur*; Form I-90, *Application to Replace Permanent Resident Card*, as well as payment of the Immigrant Fee required by arriving immigrants for the cost of producing the permanent resident card (Form I-551).⁴¹⁶ By March 2015, USCIS launched a new cloud-based version of ELIS.⁴¹⁷

Notwithstanding what outwardly appeared as progress, just 3 months later, in June 2015, USCIS found it necessary to re-baseline its entire Transformation Program. This meant the agency failed to timely deliver project requirements within budget, rendering it in breach⁴¹⁸ of its acquisition and development plan under governing federal rules and policies.⁴¹⁹

From both a public and an agency perspective, this represented a significant setback. Stakeholders lost the ability to file two forms online (Forms I-526 and I-539) online.⁴²⁰ The re-baselining also resulted in the agency reordering and delaying its planned rollout of future online filing capabilities. Accordingly, as of June 30, 2015, only two transactions could be initiated online: filing Form I-90⁴²¹ and paying the Immigrant Fee to USCIS to produce a green card for foreign nationals who received immigrant visa overseas.⁴²² However, it should be recognized that one benefit to re-baselining the Transformation Program was that it allowed the agency to work with a more flexible, cloud-based architecture.⁴²³

Approximately a year later, USCIS added Form N-400, *Application for Naturalization* to ELIS.⁴²⁴ USCIS

⁴¹⁴ The Transformation Program began in 2005 as a massive undertaking to modernize the processing of all 90 immigration benefit form types. DHS Office of the Inspector General (OIG), “USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery,” OIG-18-23 (Nov. 2017) at 4; <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf> (accessed Apr. 25, 2019). Prior Ombudsman reporting on USCIS’ Transformation Program and ELIS may be found in the Ombudsman’s Annual Report 2017, pp. 51–55, Annual Report 2016, pp. 41–42, and Annual Report 2015, pp. 86–88.

⁴¹⁵ USCIS News Release, “USCIS Launches Online Immigration Systems, USCIS ELIS” (May 22, 2012); <https://www.uscis.gov/archive/archive-news/uscis-launches-online-immigration-system-uscis-elis> (accessed Apr. 25, 2019). ELIS was introduced by USCIS as the main component of its Transformation Program providing new case management functionality. ELIS relies on and interfaces with other systems that provide additional capabilities, such as user authentication and scheduling, to deliver end-to-end processing. As of July 2016, the system was expected to interface with at least 30 other systems, ranging in function from fraud detection to law enforcement and online payment. See generally U.S. Government Accountability Office Report, “Immigration Benefits System: Significant Risks in USCIS’s Efforts to Develop its Adjudication and Case Management System,” GAO-17-486T (Mar. 2017); <https://www.gao.gov/products/GAO-17-486T> (accessed Apr. 25, 2019).

⁴¹⁶ Specifically, this refers to immigrants who process for an immigrant visa at a U.S. consular office overseas.

⁴¹⁷ U.S. Government Accountability Office Report, “Immigration Benefits System: Significant Risks in USCIS’s Efforts to Develop Its Adjudication and Case Management System,” GAO-17-486T (Mar. 2017) at 8; <https://www.gao.gov/products/GAO-17-486T> (accessed Apr. 25, 2019).

⁴¹⁸ *Id.*

⁴¹⁹ See generally Federal Acquisition Regulation, 48 C.F.R. § 34.2; and Executive Office of the President, Office of Management and Budget (OMB), Memorandum for Chief Information Officers (M-10-27), “Information Technology Investment Baseline Management Policy (June 28, 2010),” https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_m10-27.pdf (accessed May, 22, 2019).

⁴²⁰ DHS OIG, “USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery OIG-18-23 (Nov. 2017) at 4; <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf> (accessed Apr. 25, 2019).

⁴²¹ *Id.*

⁴²² DHS Office of the Inspector General, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” OIG-16-48 (Mar. 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Apr. 25, 2019).

⁴²³ USCIS then reengineered its ELIS infrastructure, moving from its original concept of hosting all digital operations on dedicated servers that it would lease or own, to a cloud-based infrastructure to better suit its deployment of future forms. The advantage of a cloud-based infrastructure is that the agency can quickly bring new capacities online on demand as needed, scale down when not needed, and avoid the need to purchase and maintain hardware, theoretically increasing application performance and reliability, and lowering operating costs. See Optimoz, “US Citizenship and Immigration Services (USCIS) – Department of Homeland Security, TICS Contract,” <https://optimoz.com/case-study-tics-contract/> (accessed Apr. 25, 2019).

⁴²⁴ DHS Office of the Inspector General, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” OIG-16-48 (Mar. 2016); <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Apr. 25, 2019).

also introduced *myUSCIS*,⁴²⁵ an online portal enabling individuals and employers to establish and manage user accounts, monitor the progress of online filings, and interact with the agency electronically—functionalities that are necessary to the ultimate success of eProcessing.

Immediately after its release, use of the electronic N-400 was marred by numerous glitches and system outages, leading to processing inefficiencies, delays in timely completions, and an increase in a mounting N-400 backlog. USCIS suspended N-400 filing and processing within ELIS.⁴²⁶ In December 2017, USCIS enabled stakeholders to file an N-400 electronically through *myUSCIS*,⁴²⁷ and as of December 2018, the agency was taking in approximately 50 percent of its N-400 applications electronically.⁴²⁸

On May 22, 2019, USCIS re-enabled the capacity for a limited group of applicants to electronically file Form I-539, specifically business visitors (B-1), visitors for pleasure (B-2), and foreign students and their dependents (F-1, F-2, M-1, M-2) who were admitted with a fixed expiration date.⁴²⁹

Taken together, USCIS currently receives and adjudicates approximately 40 percent of all agency transactions online through the digital processing options it offers.⁴³⁰ The agency's Chief Information Officer (CIO) and eProcessing initiative leadership believe that the introduction of new immigrant benefit types into eProcessing will be slow initially, but will accelerate as the agency leverages the experience and refinement of prior releases.⁴³¹

What Exactly Is USCIS' eProcessing Initiative?

eProcessing represents the agency's initiative to modernize the administration of immigration benefit requests by using available technology, enabling individuals to file petitions and applications online, and allowing USCIS to electronically process, manage, and store these filings. Through eProcessing, USCIS expects to eliminate paper filing, reap operational efficiencies, and provide requestors increased transparency over their filings.

How Does eProcessing Differ from "Transformation" and ELIS?

In 2005, USCIS started its "Transformation Program," and by 2010 began to create a single, all-encompassing system to replace its legacy data systems. The first step in this process was the introduction of ELIS, which was intended to be a single system that would replace the myriad of existing databases. However, after the difficulties encountered in the ELIS rollout, the agency adopted a strategy of electronically linking the existing systems across the enterprise to enable electronic filing, adjudication, and storage.⁴³²

In terms of its goals, eProcessing is "quite simply just a move away from paper."⁴³³ To accomplish eProcessing by December 2020, the agency is leveraging its existing systems and infrastructure, including ELIS, to ingest and

⁴²⁵ To accomplish eProcessing, individuals and employers associated with a benefit request are required to create an individual online account. In addition, derivative beneficiaries, sponsors, and civil surgeons are also required to create an account to complete and/or certify forms associated with a submitted benefit request. Using online accounts, both USCIS and public users can track case development and progression for the entire processing timeline. In this way, online accounts enhance communication, transparency, and coordination. Individual user accounts provide the channel through which all steps associated with benefit requests can occur online, including filing requests, receiving communications, submitting additional evidence, and receiving notices of decision. The online portal also adds value by providing users with on-demand access to case information and additional functionality available through the accounts. Requestors and representatives can view estimated processing times for submitted forms, view the current status and next milestones of submitted forms, view previously submitted benefit requests and documents, and securely communicate with Immigration Services Officers. Beyond the benefit request process, users may use the online portal to check their eligibility, manage client-representative relationships, access tools and information relevant to a pending or recently approved request, and update profile information such as an email or mailing address.

⁴²⁶ DHS Office of the Inspector General, "USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery," OIG-18-23 (Nov. 2017) at 19; <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf> (accessed Apr. 25, 2019).

⁴²⁷ Ombudsman's Annual Report 2018, p. 24.

⁴²⁸ Information provided by USCIS (May 10, 2019).

⁴²⁹ USCIS News Release, "USCIS Accelerates Transition to Digital Immigration Processing," <https://www.uscis.gov/news/news-releases/uscis-accelerates-transition-digital-immigration-processing-0> (accessed May 22, 2019) and USCIS Webpage, "Check Your Eligibility to File Form I-539 Online," <https://www.uscis.gov/i539online> (accessed May 22, 2019).

⁴³⁰ Statement of Mariela Melero, former Chief of Citizenship and Applicant Information Services, External Affairs Directorate, reported in Bridget Johnson, "USCIS Leader Eager for Smart Technology to be 'Force Multiplier' at Agency," *Homeland Security Today*; <https://www.hstoday.us/federal-pages/dhs/uscis-dhs-federal-pages/uscis-leader-eager-for-smart-technology-to-be-force-multiplier-at-agency/> (accessed May 8, 2019).

⁴³¹ Information provided by USCIS (May 10, 2019).

⁴³² DHS Privacy Impact Assessment, "USCIS Electronic Immigration System (USCIS ELIS)," p. 1 (Dec. 3, 2018); <https://www.dhs.gov/sites/default/files/publications/pia-uscis-elis056a-december2018.pdf> (accessed May 23, 2019).

⁴³³ Amelia Brust, "USCIS optimistic eProcessing will work to cut down paper records," *Federal News Network* (Nov. 27, 2018); <https://federalnewsnetwork.com/application-services/2018/11/uscis-optimistic-eprocessing-will-work-to-cut-down-paper-records/> (accessed Apr. 25, 2019).

process immigration benefit requests electronically. As stated by the USCIS Chief Information Security Officer, the key to accomplishing this vision is to link existing systems together in a very efficient, clean manner “so that we can still continue to modernize in the background without affecting the front end.”⁴³⁴

What Expected Gains Will Petitioners and Applicants Realize Through eProcessing?

eProcessing will provide each applicant or petitioner a secure, person-centric account via *myUSCIS*, where an interactive information collection process will enhance the accuracy, quality, and completeness of submitted benefit requests. More specifically, eProcessing is expected to reduce USCIS rejections for missing signatures or incorrect fee amounts, requests for additional evidence, and denials due to filing deficiencies (missing information and required evidence). Ideally, electronic filing may allow only those actually eligible to submit applications, avoiding unnecessary denials.

Through eProcessing, *pro se* applicants and petitioners will enter their own information, and, as a result, data-entry errors that sometimes occur when the agency transfers data from paper into its systems will largely be eliminated. While applicants cannot be protected from their own data entry errors, avoiding agency errors will mitigate the loss of time, money, and the many hardships that can otherwise occur when mail is lost, documents need to be corrected, and benefits are delayed or suspended.

Additionally, it is expected that eProcessing will yield both tangible and intangible gains, as USCIS intends to communicate exclusively with benefit filers through its *myUSCIS* web-based account portal. This direct process of communication is expected to substantially reduce USCIS mail handling and mailing costs, as well as the incidence of lost mail, missed appointments, non-receipt of Requests for Evidence (RFEs) and RFE responses, etc. In turn, eProcessing should cut down hours of nonproductive time now expended by both filers and USCIS as they seek to resolve such problems.

What Gains Will USCIS Realize Through eProcessing?

According to USCIS, eProcessing will help to ensure that filers provide all information and documentation necessary

to adjudicate in the first instance, thereby reducing the issuance of rejections, RFEs, and denials. eProcessing is also designed to reduce agency overhead by eliminating the intake, file transfer, and storage of millions of paper files every year, thereby decreasing the risk of mishandled, misplaced, damaged, delayed, and occasionally lost paper files. Rather than shipping files for adjudication, eProcessing will enable USCIS to easily redistribute electronic files among offices located in different regions.

Furthermore, eProcessing will enhance USCIS’ ability to detect fraud or malfeasance as the agency will eventually have the ability to use algorithms to perform fraud analysis across the full array of benefit types, cross-referencing and comparing information submitted on benefit requests to identify trends, detecting fraud that might otherwise go unnoticed.

Current and Potential eProcessing Challenges

Referring to eProcessing at a technology event in 2018, the former Chief of the Office of Citizenship and Applicant Information Services at USCIS stated: “This endeavor is a huge corporate lift, but each division has a clear path,” adding that she “can’t stress how hard the teams are working...”⁴³⁵ The Ombudsman takes this opportunity to identify the most significant challenges facing the agency as it moves to complete its digital path.

Potential Technology Failures. USCIS managers and adjudicators report that they periodically encounter technology and productivity problems attributable to network issues.⁴³⁶ Both ELIS and DHS’s OneNet (its single wide area network (WAN) technology) have occasionally been incapacitated for periods of time.⁴³⁷

While network downtime can impact any agency or business, this problem has a particularly significant implication where mission execution is dependent on network connectivity. Currently, when adjudicators cannot move forward with adjudication due to technological problems, they can temporarily revert

⁴³⁵ Bridget Johnson, “USCIS Leader Eager for Smart Technology to be ‘Force Multiplier at Agency,’” *GTSC Homeland Security Today*, Oct. 15, 2018; <https://www.hstoday.us/federal-pages/dhs/uscis-dhs-federal-pages/uscis-leader-eager-for-smart-technology-to-be-force-multiplier-at-agency/> (accessed Apr. 25, 2019).

⁴³⁶ Information provided by USCIS (Feb. 14, 2019).

⁴³⁷ DHS Office of the Inspector General, “USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery,” *OIG-16-48* (Mar. 2016), at 15; <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Apr. 25, 2019).

⁴³⁴ *Id.*

to paper processing, but doing so consumes precious resources as adjudicators must subsequently backfill data electronically. Alternatively, when processing with paper is either not possible or impractical, scheduled adjudications and appointments are delayed or rescheduled, resulting in production and performance challenges for adjudicators, as well as inconveniences to applicants and petitioners.

The agency is, however, working to augment its infrastructure to minimize such disruptions. Much of the infrastructure for the majority of the new systems, such as ELIS and *myUSCIS*, and the integration of these systems with the legacy systems, is being developed in the cloud. According to USCIS, leveraging cloud infrastructure provides opportunities for mobility, stability, and improved performance.⁴³⁸ ELIS availability has dramatically improved since the N-400 introduction, with a current availability baseline of 99.95 percent.⁴³⁹ In addition, USCIS' own individual WANs are being enhanced over the next year with architectural changes to provide increased bandwidth and redundancy to key sites to further avoid system capacity issues and to further enhance cloud access.⁴⁴⁰

Mandatory eProcessing. USCIS ultimately plans to work toward eliminating paper filings and require future filings of immigration benefits online, perhaps exclusively.⁴⁴¹ It is likely the agency will phase in mandatory online filing as new immigration benefits are introduced, and the system is deemed stable within its eProcessing environment. However, USCIS should prove that it has a demonstrated capacity with multiple forms and multiple user environments before making electronic submission of all immigration benefits mandatory.

Robust Technical Support Will Be Needed. Various government reviews have outlined the information technology (IT) deficiencies related to the rollout of ELIS.⁴⁴² For example, the DHS Inspector General reported

that USCIS deployed ELIS in 2012 without an adequate plan for providing technical support to end users.⁴⁴³ Similarly, it reported complaints from USCIS personnel that “when ELIS was first released to their service center[s], there was no process for requesting technical assistance with routine system issues or specific problems with electronic case files.”⁴⁴⁴ The Inspector General also reported that USCIS lacked technical support channels resourced with IT personnel familiar with the system into 2015.⁴⁴⁵

For eProcessing to be successfully implemented internally and adopted externally, USCIS must learn from this experience and provide robust technical support service to *both* internal users (adjudicators and management) and externally to its public filers. The agency has taken steps to provide increased USCIS internal user support. For the public, USCIS currently has an IT support desk that operates from Overland Park, Kansas. These IT support representatives take tickets on technology problems received by Tier 1 and Tier 2 representatives at the Contact Center.⁴⁴⁶ Filers can also receive eProcessing technical support through email or over the phone by:

- Sending *myUSCIS* an email directly;
- Sending USCIS a message online, unauthenticated, but in a web form;
- Sending a secure message once they have a case in draft; or
- Calling the toll-free number, 1-800-375-5283.⁴⁴⁷

The Contact Center will triage technical inquiries the same way substantive issues are addressed.⁴⁴⁸ Moving forward, the key challenge for USCIS will be to scale up support resources as eProcessing, and especially e-filing, capacity increases. Use of the Contact Center resources in connection with IT support may impact the ability of filers to receive timely assistance, given the current volume of calls directed at the Contact Center.⁴⁴⁹ IT support

⁴³⁸ See generally Office of Information Technology presentation, “2018 Industry Day” (Jun. 14, 2018); <https://www.govevents.com/details/28056/2018-uscis-oit-industry-day/> (accessed Jun. 6, 2019).

⁴³⁹ *Id.* This means that ELIS is available at a level of 99.95 percent capacity to users, both internal and external.

⁴⁴⁰ *Id.*

⁴⁴¹ See OMB, Office of Information and Regulatory Affairs, “Electronic Processing of Immigration Benefit Requests,” DHS Unified Agenda and Regulatory Plan, RIN 1615-AC20; <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1615-AC20> (accessed Apr. 25, 2019).

⁴⁴² See Ombudsman’s Annual Report 2017, “The Continuing Challenge of Transformation,” pp. 53–54 (footnotes 326 and 327) for the full listing of prior reports.

⁴⁴³ Department of Homeland Security Inspector General, “USCIS Automation of Immigration Benefits Processing Remains Ineffective,” OIG-16-48, (Mar. 2016) at 17; <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed Apr. 25, 2019).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ Information provided by USCIS (May 10, 2019).

⁴⁴⁷ Information provided by USCIS (May 6, 2019).

⁴⁴⁸ *Id.*

⁴⁴⁹ Stakeholders report lengthy wait times to reach assistance, being on hold for up to 3 hours. Information provided by stakeholders on May 16, 2019.

personnel may accordingly need to identify and document that an applicant or petitioner was unable to take a time-sensitive action due to a system failure.

Engaging Third-Party Case Management/Forms Vendors. Most immigration law service providers use electronic forms preparation and client account management systems purchased from third-party vendors. In the past, to the extent that USCIS coordinated with such vendors, it was to provide a timeline for the release of new forms, leaving it to the vendors to determine how they would incorporate the forms into their products.⁴⁵⁰ Based on input from vendors, and as confirmed by USCIS, the agency did not engage them through its initial ELIS rollouts.⁴⁵¹ USCIS reports that it is committed to working with such vendors, but also advises that it does not want to do so prematurely as the development of eProcessing systems is not yet stabilized enough for vendors to build an application program interface (a set of routines, protocols, and tools used to build software applications that can interact with another system) with ELIS.⁴⁵²

Public Engagement. USCIS must also commit substantial resources to engage and educate the public on the benefits of eProcessing and using *myUSCIS*. This will facilitate public acceptance rather than resistance. Further, USCIS needs to be readily available and accepting of feedback from the public on implementation problems, so that the agency will be both nimble and responsive in solving such problems.

Systems Maintenance. Unlike the agency's initial Transformation Program, USCIS' eProcessing initiative will be operating and relying upon its aging legacy databases and architecture into the foreseeable future.⁴⁵³ As the agency must maintain and upgrade these systems for years, it is vital that it retains a sufficient cadre of individuals with technical competencies within each of the

underlying legacy systems. Recognizing this challenge, USCIS must regularly make investments in these systems and, with respect to personnel, also make a deliberate effort to transfer technical expertise and mentor new hires to ensure that the agency will have the capacity to repair and update the legacy systems into the future as the need arises.

Conclusion and Recommendations

In addition to those recommendations above, the Ombudsman has the following specific recommendations as the agency implements eProcessing:

- 1. Conduct public-user feedback sessions and publish summaries on a rolling basis as each new benefit product is released.** Doing so will ensure that problems uncovered “in real life” are reported back quickly for resolution; feedback loops will inform the development and rollout of future immigration benefits filing through eProcessing. Increased outreach is also needed to educate the public that the agency is committed to building and delivering a first-rate product that the public will want to use.
- 2. Expand and fully staff an IT support office that external users can access specifically for technical assistance.** USCIS currently has an IT support desk for filers that operates from Overland Park, Kansas. These IT support representatives currently take tickets on technology problems received by Tier 1 and Tier 2 representatives at the Contact Center. However, to appropriately handle the increased volume of inquiries that will accompany eProcessing when it is fully functional (and eventually mandatory), investment and planning will need to begin now. IT support staff need to be available on a continual basis to address technology issues in which timeliness is critical to secure a benefit.
- 3. Clearly identify, track, and measure system disruptions** with respect to their impact in terms of productivity losses, and determine and take any steps necessary to mitigate them.

⁴⁵⁰ Information provided by stakeholders on May 9, 2019.

⁴⁵¹ *Id.*

⁴⁵² Notes of remarks made by USCIS officials during “USCIS Day” with the Government Technology & Services Coalition on October 18, 2018, and made by USCIS officials during a panel entitled “The Evolution of eProcessing and the 2020 Initiative” at the Ombudsman 8th Annual Conference on November 16, 2018.

⁴⁵³ However, according to the GAO, “these legacy systems must remain operational to allow USCIS to perform its mission until an alternative option is available—thus, preventing the associated savings from being realized. For example, in fiscal year 2014, the total cost of maintaining systems that could have been decommissioned if USCIS ELIS had been fully operational [was estimated to be] approximately \$71 million.” U.S. Government Accountability Office, “Immigration Benefits System: Significant Risks in USCIS’s Efforts to Develop Its Adjudication and Case Management System,” GAO-17-486 (Mar. 2017), at 10; <https://www.dhs.gov/sites/default/files/publications/pia-uscis-elis056a-december2018.pdf> (accessed Apr. 25, 2019).

4. **Accelerate the engaging of immigration forms/ case management vendors whose systems are used by immigration service providers.** For individuals who seek legal representation when applying for immigration benefits, those services are often supported by vendors that create forms and case management systems. As described above, vendors have for several years expressed concern that they have not been included in the planning process. Engaging them in the eProcessing development process sooner will offer legal providers and their clients a smoother transition to eProcessing.

UNITED STATES OF AMERICA

EMPLOYMENT AUTHORIZATION CARD

Department of Homeland Security
Texas Service Center
P.O. Box 851488
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**U.S. Citizenship
and Immigration
Services**

Challenges Facing Timely Adjudication of Employment Authorization Documents

Responsible Offices: Immigration Records and Identity Services Directorate; Service Center Operations and Field Office Directorates; Management Directorate, Document Management Division, Office of Intake & Document Production, Post Office Non-Deliverables Unit

Key Facts and Findings

- In 2018, USCIS produced approximately 4.4 million secure documents, nearly half of which (just over 2 million) were Employment Authorization Documents (EADs).
- Between FY 2010 and FY 2018, the number of EAD applications filed with USCIS grew 63 percent.
- This growth is largely attributable to increased filing in three categories: asylum, Deferred Action for Childhood Arrivals (DACA), and Temporary Protected Status (TPS).
- The increase in EAD filings, combined with insufficient staffing resources and technology challenges, has contributed to longer processing times.

- Some EAD applicants experienced additional problems in obtaining EAD documents, including those lost in the delivery process, or issued with substantive errors, such as misspellings, which render them useless.

Background

An EAD is a secure identity document (also known as Form I-766) issued by USCIS to a foreign national, which serves as evidence that the holder is authorized to work in the United States. To apply for an EAD, an applicant files a Form I-765, *Application for Employment Authorization*, with USCIS.

EADs came into existence in 1986 with the enactment of Section 274A of the Immigration and Nationality Act (INA), which makes it unlawful for employers to hire aliens not authorized to work in the United States.⁴⁵⁴ USCIS subsequently promulgated regulations specifying the various categories of aliens authorized to work, and under what conditions and/or limitations. For example, some aliens have work authorization tied to a specific employer, such as an L-1A Intra-Company Manager admitted into the United States following the approval of the employer's Form I-129 (*Petition for Nonimmigrant Worker*).⁴⁵⁵ Individuals tied to a specific employer (including those who enter as the principal beneficiary of E, H, I, L, O, P, Q, and R visa petitions) are not required to apply for an EAD, as their employment authorization is considered "incident to status."⁴⁵⁶ For all other foreign nationals, including those who apply for and are awaiting the approval of a green card, the Immigration and Nationality Act (INA) authorizes the government to issue EADs, provided the applicants meet specified eligibility requirements.⁴⁵⁷

There are 36 different employment eligibility categories, most of which provide unrestricted, albeit time-limited, work authorization. For most categories, an approved EAD is typically valid for 1 year.⁴⁵⁸ However, USCIS may shorten the EAD validity period to align with the

admission end-date or for other reasons. EADs issued to DACA beneficiaries generally have a 2-year validity period. TPS beneficiaries generally receive EADs that are valid for 18 months.

Applicants may file Form I-765 by mailing an application to USCIS, carefully following instructions to determine whether to send it to a USCIS Lockbox or Service Center.⁴⁵⁹ Currently, most EAD applicants must submit a \$410 application filing fee,⁴⁶⁰ and all applicants must submit supporting documents relating to the specific eligibility category.⁴⁶¹ Currently, applicants seeking to adjust to permanent residence status pay the EAD application fee as part of a bundled filing fee and applicants can file renewal applications without a fee.⁴⁶²

All applicants may file to renew their EADs up to 180 days in advance of an expiring card.⁴⁶³ If approved, the start date of the validity period is typically the date USCIS adjudicates the Form I-765, regardless of whether the EAD is an initial document or a renewal.⁴⁶⁴

Before adjudicating a Form I-765, USCIS Information Services Officers (ISOs) must first, pursuant to standard operating procedure, confirm the identity of the applicant, review the current immigration status of record, and perform background and security checks to determine

⁴⁵⁹ USCIS Webpage, "Direct Filing Addresses for Form I-765, Application for Employment Authorization," <https://www.uscis.gov/i-765-addresses> (accessed Apr. 25, 2019).

⁴⁶⁰ The filing fees for Form I-765 (excluding biometrics) increased from \$100 in 1998, to \$120 in 2002, \$175 in 2004, \$180 in 2005, \$340 in 2007 and \$380 in 2010. See Final Rule, "U.S. Citizenship and Immigration Services Fee Schedule," 81 Fed. Reg. 73292 (Oct. 24, 2016) (accessed Apr. 25, 2019). Certain aliens will also need to file an \$85 biometrics fee. Renewals of (c)(9) EADs filed subsequent to an earlier fee-paid Form I-485 (Application to Register Permanent Residence or Adjust Status) may be filed without fee. See USCIS, "Instructions for Form I-765," <https://www.uscis.gov/i-765> (accessed May 26, 2019). If certain hardship criteria are satisfied, an applicant may request an EAD fee waiver. See USCIS Webpage, "Additional Information on Filing a Fee Waiver," <https://www.uscis.gov/feewaiver#Eligibility> (accessed Apr. 25, 2019).

⁴⁶¹ Initial evidence generally required with all filing filings includes a copies of the applicant's Form I-94 (or a print out of the electronic Form I-94), passport or other travel document, the last prior issued EAD (if applicable), and two identical passport-style photos.

⁴⁶² USCIS Webpage, "I-765, Application for Employment Authorization," <https://www.uscis.gov/i-765> (accessed Jun. 19, 2019).

⁴⁶³ Final Rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 Fed. Reg. 82398 (Nov. 18, 2016). Note that this refers to renewal applications, and does not apply to initial applications, including but not limited to F-1 students seeking Optional Practical Training (OPT).

⁴⁶⁴ Per its current I-765 Standard Operating Procedure (SOP), the validity period start date will be the date USCIS adjudicates Form I-765, not the end of a previous validity period. Information provided by USCIS (April 29, 2019).

⁴⁵⁴ Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603 (Nov. 6, 1986).

⁴⁵⁵ 8 C.F.R. § 247a.12(b)(12).

⁴⁵⁶ *Id.*

⁴⁵⁷ INA § 274A(b)(1)(B)(ii). This latter group includes certain dependent nonimmigrant spouses; fiancé(e)s admitted in K-1 status; individuals granted deferred action; individuals granted TPS; foreign students seeking curricular and/or optional practical training; those who filed to obtain permanent resident status; asylees; and others.

⁴⁵⁸ See generally Interim Final Rule, "Employment Authorization Documents," 69 Fed. Reg. 45555 (Jul. 30, 2004) (accessed Apr. 25, 2019).

whether there are any criminal, national security, or other issues that must be resolved before reviewing the substantive benefit request.⁴⁶⁵ Once the required checks are complete, and assuming there is no derogatory information, adjudicators then determine if the submission includes all required eligibility evidence as set forth in the Form I-765 Instructions, and as contained in its “National Form I-765 Standard Operating Procedure (SOP).”⁴⁶⁶

The I-765 SOP separately identifies the required documentation for each of the 36 different EAD eligibility categories.⁴⁶⁷ If the applicant has submitted all required documents, and they appear genuine and consistent with information in other Department of Homeland Security (DHS) databases, the Form I-765 is approvable. If evidence is missing, USCIS will either issue a Request for Evidence (RFE), or deny the application if the initial documentation submitted is incomplete, or the applicant is otherwise ineligible.⁴⁶⁸

USCIS produces nearly all EAD cards at its facilities in Corbin, Kentucky and Lee’s Summit, Missouri.⁴⁶⁹ In FY 2018, USCIS produced approximately 4.4 million secure identity documents, 46 percent of which were EADs.⁴⁷⁰ USCIS production facilities can produce over 60,000 secure documents a week.⁴⁷¹

Before USCIS mails the EAD to an applicant, the Office of Intake and Document Production (OIDP) performs both automated and manual quality assurance routines.⁴⁷² OIDP is not tasked with, and does not have the capacity to, detect name, gender, birth date, and address errors attributable to the applicant or the agency, which are usually identified only after the applicant receives the document.⁴⁷³

EADs by the Numbers

USCIS experienced increased EAD filings through most of this decade, with much of the increase due to changes in immigration law, regulation, and policy. Specifically, I-765 application receipts increased steadily from FYs 2011 through 2017, with a drop in FY 2014 of almost 22 percent, which is most likely attributable to a drop in DACA filings (see Figure 5.1 below). Beginning in FY 2015, the number of EAD filings began increasing again through FY 2017, when the number of EAD applications hit a peak of 2,360,000.⁴⁷⁴ In FY 2018, EAD filings dropped 9.3 percent to 2,140,000. This last downturn in FY 2018, unlike FY 2014, coincides with an overall 7.6 percent decrease in all immigration benefit receipts. (See Figures 5.1 and 5.2 below.)

Figure 5.1: EAD Receipts as a Percentage of All Benefit Request Receipts, FY 2010–FY 2018⁴⁷⁵

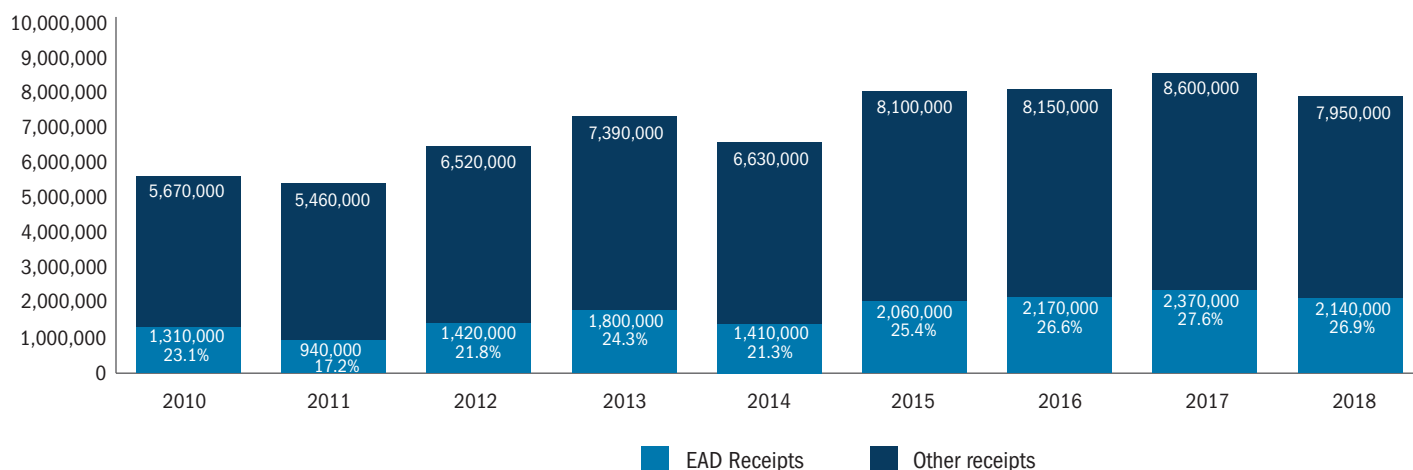
Fiscal Year	EAD Receipts	Total Receipts	% EAD
2010	1,310,000	5,670,000	23.1%
2011	940,000	5,460,000	17.2%
2012	1,420,000	6,520,000	21.8%
2013	1,800,000	7,390,000	24.3%
2014	1,410,000	6,630,000	21.3%
2015	2,060,000	8,100,000	25.4%
2016	2,170,000	8,150,000	26.6%
2017	2,370,000	8,600,000	27.6%
2018	2,140,000	7,950,000	26.9%

Source: USCIS (Jun. 28, 2019).
Note: Per USCIS request, data has been rounded. Due to rounding, numbers presented may not add up precisely to the totals provided and percentages may not precisely reflect the absolute figures.

⁴⁶⁵ Information provided by USCIS (Apr. 25, 2019).
⁴⁶⁶ *Id.*
⁴⁶⁷ *Id.*
⁴⁶⁸ USCIS, Policy Memorandum, “Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b) PM-602-0163 (July 13, 2018); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf (accessed Apr. 25, 2019).
⁴⁶⁹ Organizationally, both facilities are under the Office of Intake and Document Production (OIDP), which falls within USCIS’ Management Directorate. See USCIS Webpage, “USCIS Organizational Chart,” <https://www.uscis.gov/about-us/directorates-and-program-offices/lockbox-intake/office-intake-and-document-production> (accessed Apr. 25, 2019).
⁴⁷⁰ Information provided by USCIS (Jun. 27, 2019).
⁴⁷¹ Information provided by USCIS (May 10, 2019).
⁴⁷² Information provided by USCIS (Apr. 3, 2019).
⁴⁷³ *Id.*

⁴⁷⁴ Information provided by USCIS (Jun. 28, 2019).
⁴⁷⁵ *Id.*

Figure 5.2: EAD Filings as a Percentage of All Benefit Request Receipts, FY 2010–FY 2018⁴⁷⁶



Source: USCIS (Jun. 28, 2019).

Note: Per USCIS request, data has been rounded. Due to rounding, numbers presented may not add up precisely to the totals provided and percentages may not precisely reflect the absolute figures.

The growth in EAD applications is largely due to the addition, or expansion, of EAD eligibility categories over the last several years, as well as increases in receipts in existing categories. This includes the creation of DACA;⁴⁷⁷ a surge in asylum filings;⁴⁷⁸ the extension of TPS to natives of newly designated countries;⁴⁷⁹ changes to and increases in the F-1 student population seeking optional practical training (OPT);⁴⁸⁰ and the promulgation

of a regulation authorizing the employment of certain H-4 spouses.⁴⁸¹

Looking closer, the data reveal that some categories of EADs, such as adjustment of status-related Forms I-765 and student EADs, have essentially continued to rise, especially after 2013. Other categories reflect their cyclical issuance, such as DACA and TPS, with TPS reflecting additional categories of eligible countries (South

⁴⁷⁶ *Id.*

⁴⁷⁷ DACA eligibility began on June 15, 2012 through the issuance of a Memorandum by Janet, Napolitano, Secretary of Homeland Security, entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (accessed Apr. 25, 2019). The program went into effect in late FY 2013. Renewals on a 2-year cycle account, at least in part, for EAD increases in FYs 2015 and 2017.

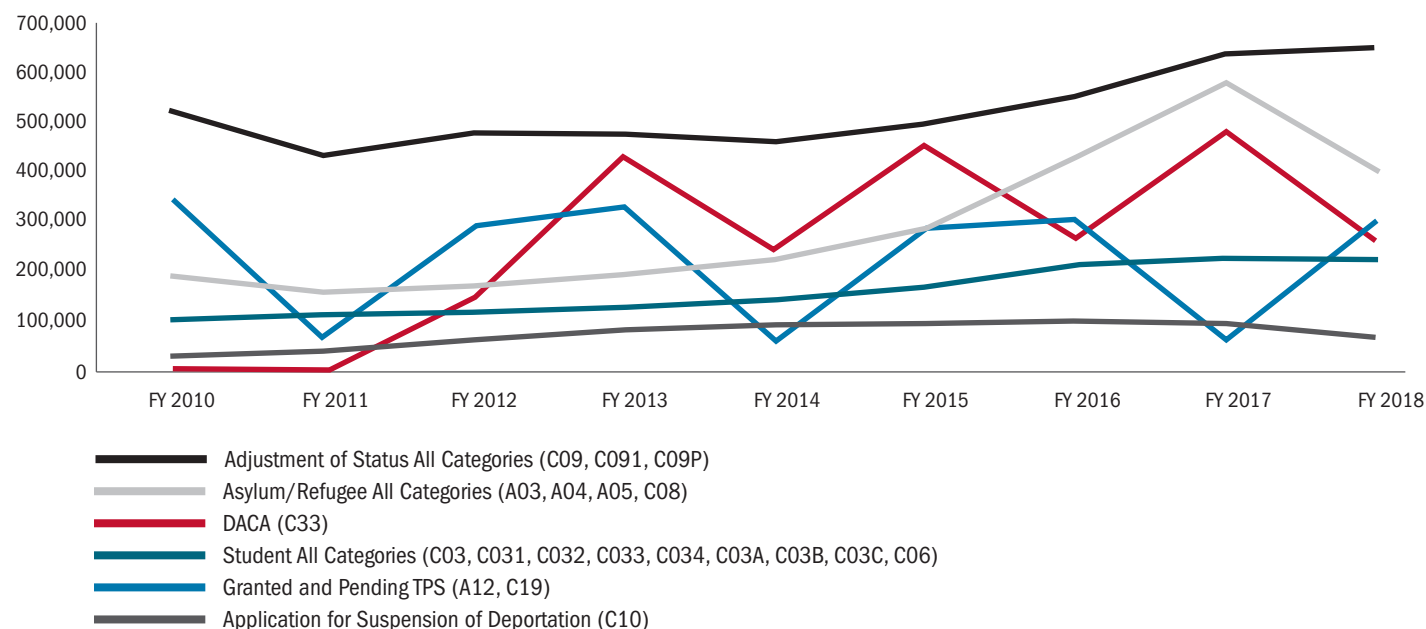
⁴⁷⁸ See generally Philip Bump, “The surge in migrants seeking asylum, explained,” *The Washington Post* (Apr. 9, 2019); https://www.washingtonpost.com/politics/2019/04/09/surge-migrants-seeking-asylum-explained/?utm_term=.09f0339fe711 (May 28, 2018).

⁴⁷⁹ Nepal and Yemen designated in 2015. See USCIS Webpage, “Temporary Protected Status,” <https://www.uscis.gov/humanitarian/temporary-protected-status> (Apr. 25, 2019).

⁴⁸⁰ Neil G. Ruiz and Abby Budiman, “Number of Foreign College Students Staying and Working in U.S. After Graduation Surges,” Pew Research Center (May 10, 2018); <https://www.pewglobal.org/2018/05/10/number-of-foreign-college-students-staying-and-working-in-u-s-after-graduation-surges/> (Apr. 25, 2018).

⁴⁸¹ “Employment Authorization for Certain H-4 Dependent Spouses designated in 2015,” 80 Fed. Reg. 10283 (Feb. 25, 2015).

Figure 5.3: Top EAD Receipt Categories by Volume, FY 2010–FY 2018



Source: Chart based on information provided by USCIS (Jun. 28, 2019).

Note: Per USCIS request, data has been rounded. Due to rounding, numbers presented may not add up precisely to the totals provided and percentages may not precisely reflect the absolute figures.

Sudan and Syria⁴⁸² and Nepal and Yemen in 2015)⁴⁸³
Figure 5.3 above also reflects the growth in asylum filings made by nationals of Central America (mainly El Salvador, Guatemala, and Honduras).⁴⁸⁴

⁴⁸² See USCIS Webpages, “Temporary Protected Status Designated Country: South Sudan,” <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-south-sudan> (accessed Jun. 13, 2019) and “Temporary Protected Status Designated Country: Syria,” <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-syria> (accessed Jun. 13, 2019).

⁴⁸³ USCIS Webpages, “Temporary Protected Status Designated Country: Nepal,” <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nepal> (accessed Jun. 13, 2019) and “Temporary Protected Status Designated Country: Yemen,” <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen> (accessed Jun. 13, 2019).

⁴⁸⁴ Pew Research Center Report, “Rise in U.S. Immigrants From El Salvador, Guatemala and Honduras Outpaces Growth From Elsewhere” p. 16 (Dec. 7, 2017); <https://www.pewhispanic.org/2017/12/07/rise-in-u-s-immigrants-from-el-salvador-guatemala-and-honduras-outpaces-growth-from-elsewhere/> (accessed Jun. 13, 2019). (“The three Central American nations accounted for 37% of all asylum applications filed with two U.S. government agencies in fiscal 2015 and 2016. That amounted to 112,151 applications. In fiscal 2014, 24% of asylum seekers came from the three Northern Triangle nations.”) See also DHS, 2017 Yearbook of Immigration Statistics, Table 17, “Individuals Granted Asylum Affirmatively by Region and Country of Nationality: Fiscal Years 2015 to 2017,” <https://www.dhs.gov/immigration-statistics/yearbook/2017/table17> (El Salvador, Guatemala and Honduras are three of the top five countries from which affirmative asylees arrive; the other two are the People’s Republic of China and Egypt).

The table below depicts the year-over-year increases and decreases in receipt volume within the top EAD categories from FY 2010 through FY 2018. The variation in DACA-related I-765s is likely attributable to the agency’s issuance of 2-year EAD cards to this category of beneficiaries. Also notable is the sizeable increases in asylum-related filings in 4 of the 7 years reported, with 2016 and 2017 especially significant.

The top five EAD categories for each of the past 9 years are shown in the charts below. Adjustment of status-related EADs consistently remain the most voluminous application. Three of the top five I-765s receipted by category remained the same in 2017 and 2018; specifically, and in order, they are: pending Applications for Adjustment of Status, asylum-related filings, and filings based on DACA. See Figures 5.4 and 5.5.

Figure 5.4: Top EAD Categories by Volume and Percentage, FY 2010–FY 2018

Fiscal Year	Adjustment of Status	Asylum	DACA	Student, including OPT	TPS	Suspension of Deportation	All Other	Total EAD Receipts
2010	517,000 39.5%	191,000 14.6%	—	102,000 7.8%	347,000 26.5%	30,000 2.3%	121,000 9.2%	1,310,000
2011	433,000 46.1%	161,000 17.1%	—	112,000 11.9%	67,000 7.1%	44,000 4.7%	126,000 13.4%	940,000
2012	479,000 33.7%	172,000 12.1%	153,000 10.8%	119,000 8.4%	294,000 20.7%	66,000 4.6%	136,000 9.6%	1,420,000
2013	476,000 26.4%	196,000 10.9%	431,000 23.9%	130,000 7.2%	331,000 18.4%	84,000 4.7%	155,000 8.6%	1,800,000
2014	460,000 32.6%	224,000 15.9%	243,000 17.2%	144,000 10.2%	58,000 4.1%	92,000 6.5%	186,000 13.2%	1,410,000
2015	493,000 23.9%	294,000 14.3%	453,000 22.0%	172,000 8.3%	290,000 14.1%	95,000 4.6%	259,000 12.6%	2,060,000
2016	555,000 25.6%	431,000 19.9%	266,000 12.3%	215,000 9.9%	304,000 14.0%	104,000 4.8%	291,000 13.4%	2,170,000
2017	633,000 26.7%	579,000 24.4%	481,000 20.3%	229,000 9.7%	64,000 2.7%	97,000 4.1%	289,000 12.2%	2,370,000
2018	645,000 30.1%	404,000 18.9%	262,000 12.2%	227,000 10.6%	303,000 14.2%	69,000 3.2%	232,000 10.8%	2,140,000

Source: Information provided by USCIS (Jul. 2, 2019).

Note: Per USCIS request, data has been rounded. Due to rounding, numbers presented may not add up precisely to the totals provided and percentages may not precisely reflect the absolute figures.

Figure 5.5: Top Five EAD Categories Ranked by Receipts, FY 2010–FY 2018

Fiscal Year 2010 (1,310,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	517,000
2	TPS	347,000
3	Asylum	191,000
4	Student, including OPT	102,000
5	Suspension of Deportation	30,000

Fiscal Year 2011 (940,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	433,000
2	Asylum	161,000
3	Student, including OPT	112,000
4	TPS	67,000
5	Suspension of Deportation	44,000

Fiscal Year 2012 (1,420,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	479,000
2	TPS	294,000
3	Asylum	172,000
4	DACA	153,000
5	Student, including OPT	119,000

Fiscal Year 2013 (1,800,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	476,000
2	DACA	431,000
3	TPS	331,000
4	Asylum	196,000
5	Student, including OPT	130,000

Fiscal Year 2014 (1,410,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	460,000
2	DACA	243,000
3	Asylum	224,000
4	Student, including OPT	144,000
5	Suspension of Deportation	92,000

Fiscal Year 2015 (2,060,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	493,000
2	DACA	453,000
3	Asylum	294,000
4	TPS	290,000
5	Student, including OPT	172,000

Fiscal Year 2016 (2,170,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	555,000
2	Asylum	431,000
3	TPS	304,000
4	DACA	266,000
5	Student, including OPT	215,000

Fiscal Year 2017 (2,370,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	633,000
2	Asylum	579,000
3	DACA	481,000
4	Student, including OPT	229,000
5	Suspension of Deportation	97,000

Fiscal Year 2018 (2,140,000 Total Received)

Rank	Category	Receipts
1	Adjustment of Status	645,000
2	Asylum	404,000
3	TPS	303,000
4	DACA	261,000
5	Student, including OPT	227,000

Source: Information provided by USCIS (Jul. 2, 2019).

Note: Adjustment of Status includes categories C09, C091, and C09P. Asylum includes categories A03, A04, A05, C08. Student includes categories C03, C031, C032, C033, C034, C03A, C03B, C03C, and C06. TPS includes categories A12 and C19.

Note: Per USCIS request, data has been rounded. Due to rounding, numbers presented may not add up precisely to the totals provided and percentages may not precisely reflect the absolute figures.

EAD Processing Times

EAD processing times can vary widely. However, processing times for EADs have steadily grown since 2012. USCIS strove to meet the regulatory requirement that imposed a deadline of 90 days for processing most EADs. On January 17, 2017, however, USCIS rescinded this regulation.⁴⁸⁵ At the same time, the agency implemented a new regulatory provision that authorizes an automatic 180-day employment authorization extension for EAD applicants in 16 eligibility categories who timely file to renew their expiring employment authorization cards.⁴⁸⁶

⁴⁸⁵ Until January 2017, USCIS regulation required the agency to adjudicate most EAD applications within 90 days. In rescinding this regulatory provision, USCIS also removed from the regulations another long-defunct provision that permitted EAD applicants to obtain an “interim” employment authorization document at their local office if the agency failed to meet the 90-day adjudication mandate. Final Rule, “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 81 Fed. Reg. 82398, 82459-82460 (Nov. 18, 2016).

⁴⁸⁶ USCIS Web page, “Automatic Employment Authorization Document (EAD) Extension (Feb. 1, 2017):” <https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension> (accessed Jun. 28, 2019).

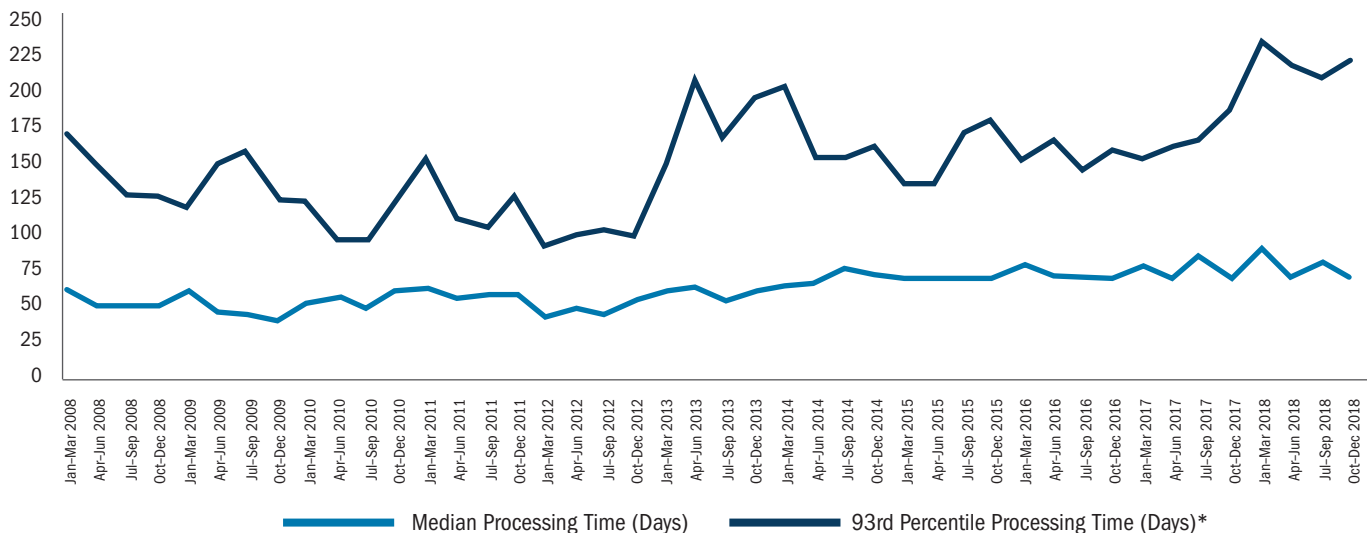
When it eliminated the regulatory processing mandate, USCIS noted that it remained “committed to the current 90-day processing goal, as well as the current policy of prioritizing application processing where applications are pending for at least 75 days,” and would be “unable to adjudicate applications within 90 days in only a small percentage of cases.”⁴⁸⁷

Figure 5.6 below shows EAD processing times agency-wide over the 10-year period of FYs 2008–2018. EAD processing times dropped in FY 2008, increased significantly between FY 2012 and FY 2013, and fluctuated thereafter, increasing over time.

The National Benefits Center (NBC), which is part of the Field Office Directorate (FOD) processes a significant portion of USCIS’ overall EAD receipts. These generally consist of EADs related to applications and petitions that are sent to field offices for an interview, including initial employment-based and family-based applications

⁴⁸⁷ Notice of Proposed Rulemaking, “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 80 FR 81899, 81929 (Dec. 31, 2015).

Figure 5.6: Processing Time in Days for All EAD Categories, FY 2008–FY 2018

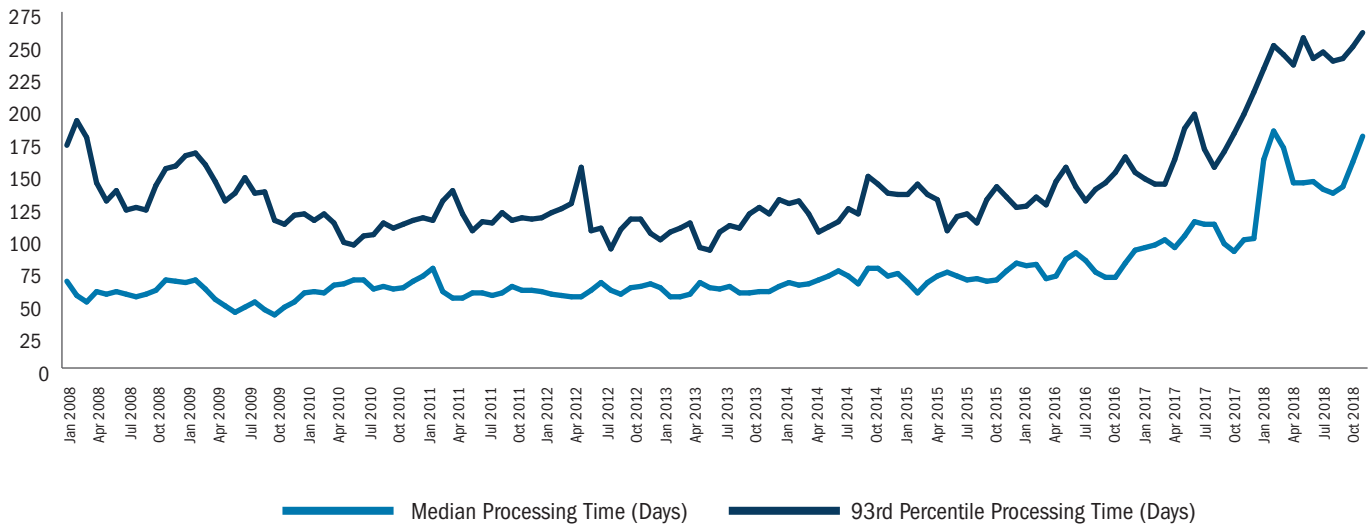


*The 93rd percentile represents when, statistically, 93 percent of I-765 filings have been adjudicated.

Source: Information provided by USCIS (May 10, 2019).

Note: Quarterly averaged processing time for all EAD categories in days.

Figure 5.7: NBC Processing Times in Days for Initial I-485 Based EADs, CY 2008–CY 2018



Source: Information provided by USCIS (May 10, 2019).

for permanent residence. Figure 5.7 above depicts the processing times from 2008 through 2018 for adjustment applicants whose initial EAD applications were processed at the NBC.

As of June 18, 2019, the NBC reported that processing times for initial EADs based on an adjustment application (Form I-485) were between 6.5 to 8.5 months.⁴⁸⁸

USCIS Service Centers adjudicate all EAD applications not sent to the NBC, including: renewals of adjustment-based applicants; EADs for asylum applicants or asylees; refugees, EADs for initial TPS applicants or those renewing TPS; EADs for DACA applicants; EADs for non-immigrant spouses (L-2s, H-4s, etc.); those granted withholding of deportation, and many other categories. Service Center processing times fluctuate depending on the category and vary from Service Center to Service Center, but USCIS attempts to equalize the processing times by transferring workloads among the Service

Centers.⁴⁸⁹ Take, for example, the processing of EADs for initial asylum applicants, which by regulation USCIS must process within 30 days.⁴⁹⁰ As of June 18, 2019, the Nebraska Service Center (NSC) reported that processing times for initial asylum-based EADs stood at a low of 2 weeks to 3 months. In contrast, the Potomac Service Center (YSC) reported asylum-based EAD applications at 4 weeks to 3 months.⁴⁹¹ To provide another example, YSC and the Texas Service Center (TSC) were both reporting processing times for student-based EADs at 1 to 5 months.⁴⁹²

To better understand Service Center processing times over the last decade, Figure 5.8 represents the aggregate of all I-765 processing times at USCIS' five Service Centers.

⁴⁸⁹ See generally USCIS Webpage, "Workload Transfer Updates" (May 15, 2019); <https://www.uscis.gov/workload-transfers> (accessed Jul. 1, 2019).

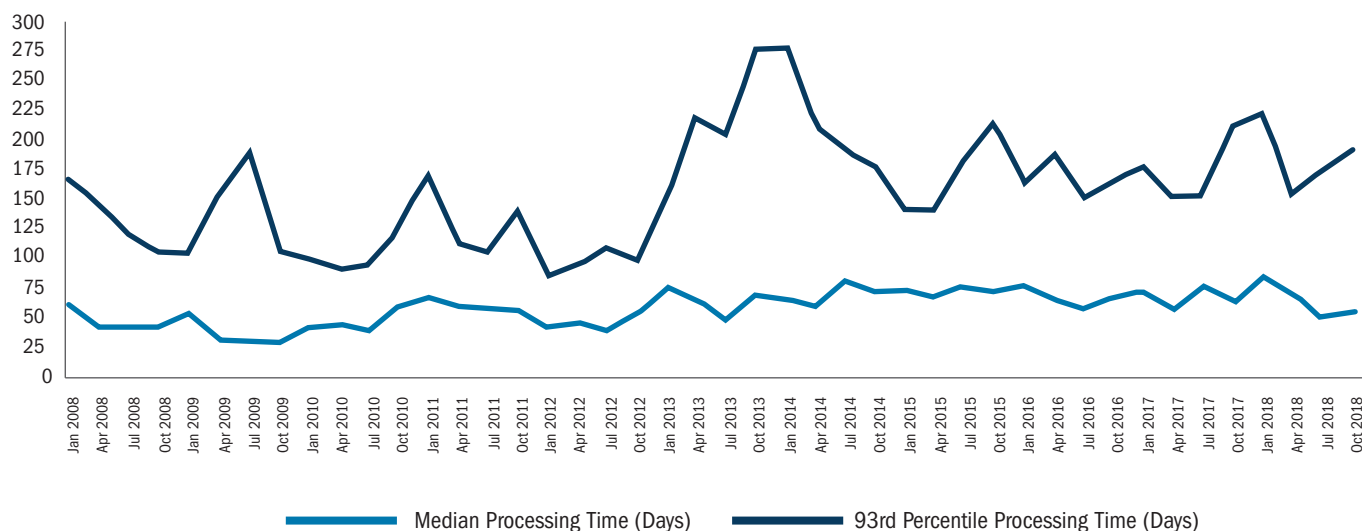
⁴⁹⁰ 8 C.F.R. § 208.7(a)(1).

⁴⁹¹ USCIS Webpage "Check Case Processing Times," <https://egov.uscis.gov/processing-times/> (accessed Jun. 18, 2019).

⁴⁹² *Id.*

⁴⁸⁸ USCIS Webpage "Check Case Processing Times," <https://egov.uscis.gov/processing-times/> (accessed Jun. 18, 2019).

Figure 5.8: Service Center Processing Time in Days for All EAD Categories, CY 2008–CY 2018



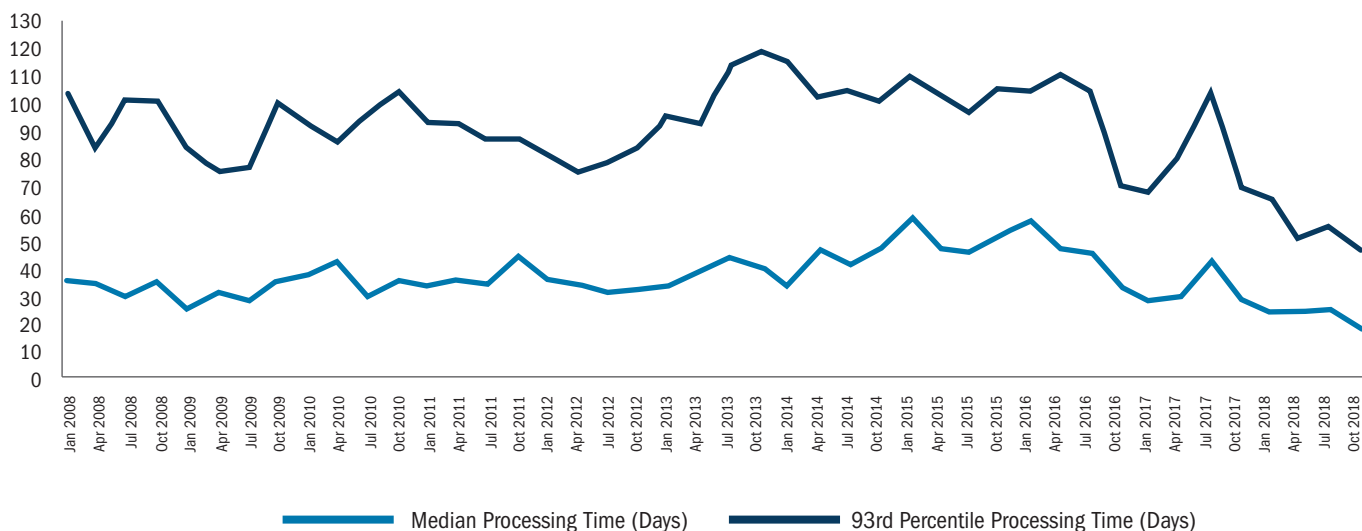
Source: Information provided by USCIS (June 13, 2019).

Asylum-based EADs are only processed at USCIS’ Service Centers and, as mentioned above, must be processed within 30 days pursuant to regulation.⁴⁹³ Figure 5.9 below

depicts the processing times for initial I-765 applications based on a pending Form I-589 (Application for Asylum and for Withholding of Removal).

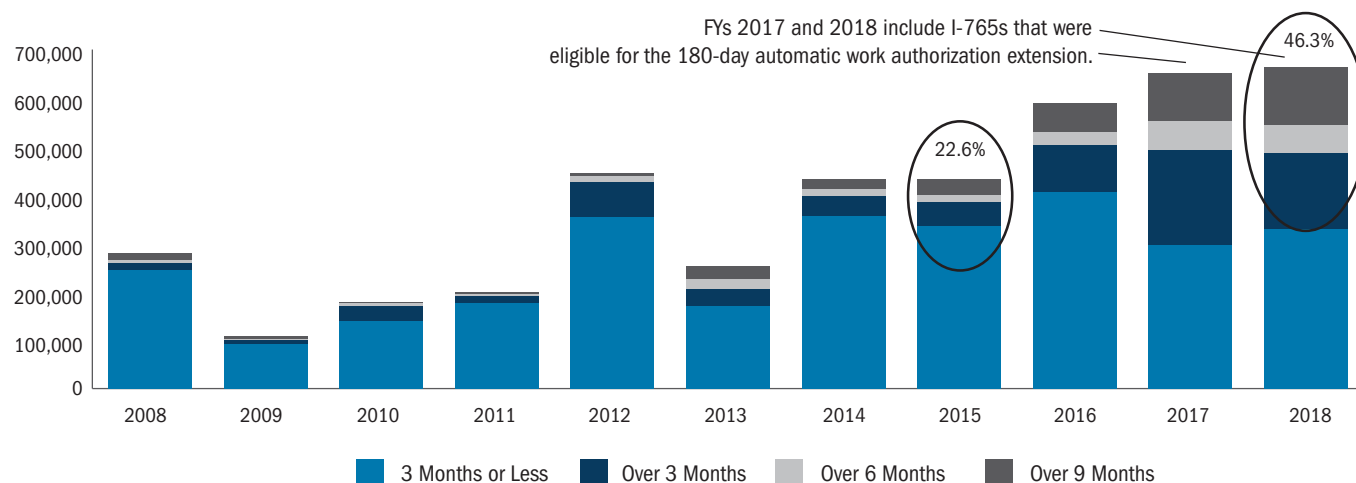
⁴⁹³ 8 C.F.R. § 208.7(a)(1).

Figure 5.9: Processing Time in Days for Asylum-Based (I-589) EADs, CY 2008–CY 2018



Source: Information provided by USCIS (June 13, 2019).

Figure 5.10: Pending I-765 Applications over Time, FY 2008–FY 2018



Source: USCIS I-765 pending inventory data for FY 2008–2018 provided to the Ombudsman (May 10, 2019).

Note: Receipt totals are snapshots taken from December 31 of that calendar year and include October–December totals.

Analysis of EAD Processing Time Data

Based on the analysis of available data, input from stakeholders, and discussions with USCIS about operational challenges, three main factors have converged over the last several years and contributed to growing EAD processing times: (1) increased filing volume; (2) technology challenges; and (3) insufficient staffing.

Since 2011, I-765 filings have increased 63 percent. While there may be multiple reasons for lengthened processing times, the increase in applications alone is a significant cause. This growing inventory can have a “domino” impact on processing times, adding to the amount of time it takes to get to an EAD application, conduct standard operating processes, and ultimately adjudicate any one case. The *prima facie* review of the underlying application, for example, contributes to the processing time on the EAD. Background vetting on applications, including the predicate petitions or applications upon which EAD applications are based, also contribute to EAD processing times. Absent additional resources, these activities—even if not enhanced in any way—performed on a growing number of applications will lead to each taking longer to process.

As filings have grown, the pending inventory of EAD applications has also grown. Figure 5.10 presents a

snapshot of pending EAD inventory as of December 31 of each year, from 2008 through 2018. The data is further broken down into four categories: EAD applications pending 3 months or less, 3 to 6 months, 6 to 9 months, and over 9 months. This visualization captures not only the sheer increase in EAD filings over time, but also reveals that there has been a marked increase in the percentage of unadjudicated filings in inventory pending 3 months or longer since 2016, even before the agency’s elimination of the 90-day adjudication rule.

As of December 31, 2018, 46.3 percent of all Forms I-765 in inventory exceeded the 90-day processing goal. See Figure 5.10.

To compensate in part for the elimination of the 90-day regulatory processing time on EADs, USCIS provided some additional protections to applicants filing EAD extensions; the first was automatic extension of certain EADs for up to 180 days from the date of expiration, as long as certain conditions are met.⁴⁹⁴ Those conditions include: (a) the renewal application is based on the same employment authorization category as the previously issued EAD; (b) the renewal is timely filed prior to the expiration of the EAD; and (c) an independent adjudication

⁴⁹⁴ Final Rule, “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 81 Fed. Reg. 82398, 82455 (Nov. 18, 2016).

of the underlying eligibility is not a prerequisite to the extension of employment authorization.⁴⁹⁵ This includes adjustment applicants and TPS holders eligible for renewals, but not DACA applicants, whose underlying status must be readjudicated prior to consideration of the EAD. The agency deployed the automatic extension to avoid gaps in employment authorization and to enable USCIS to shift resources to concentrate on initial applications and those for which an automatic extension was not available.⁴⁹⁶ In Figure 5.10 above, 118,277 applications exceeded a processing time of 9 months in 2018.

The second protection offered was the availability of filing for renewal up to 180 days in advance of the EAD expiration date.⁴⁹⁷ This is incumbent, of course, upon the filer, who may or may not have sufficient knowledge and/or resources to file 6 months in advance of the expiration of a current EAD. There is also presumably a concern among some filers that renewing an EAD 180 days in advance may be superfluous in light of an impending interview. Others may be concerned about the loss of part of their validity period on the EAD, given that USCIS commences the validity period in most cases upon adjudication and not upon the previous expiration date. USCIS does this to prevent situations where an alien may have two EADs with overlapping validity periods, which could create opportunities for fraud.

By 2017 and continuing through 2018, it was apparent that USCIS did not have sufficient staff to handle the volume in some of the I-765 adjudication lines (perhaps all adjudication lines). Processing times had already slowed in all I-765 categories, including asylum-related filings, when the U.S. Federal District Court for the Western District of Washington issued a nationwide injunction on July 26, 2018, ordering the agency to process initial asylum-based applications within 30 days as required by existing regulation.⁴⁹⁸ Reflecting the severity of the challenge that lay ahead, former USCIS Director L. Francis Cissna acknowledged that the agency was

struggling to keep pace with I-765 filings.⁴⁹⁹ Processing times continued to lengthen in 2018 even as Form I-765 receipts dropped approximately over 9 percent.

USCIS measures the amount of time its ISOs spend on adjudicating EADs and other form types by tracking “production hours.”⁵⁰⁰ As depicted in Figure 5.11 below, the aggregate number of production hours for I-765 adjudications increased substantially at its Service Centers and the NBC, hitting their respective high-marks in FY 2016. In FY 2017, ISO hours fell off at the agency’s Service Centers and the NBC. In FY 2018, production hours continued to drop at the Service Centers but increased at the NBC.⁵⁰¹

Figure 5.11: EAD ISO I-765 Production Hours, FY 2012–FY 2019

Fiscal Year	NBC	SCOPS	Total EAD Hours
2012	66,739.00	197,863.00	264,602.00
2013	69,193.00	254,252.00	323,445.00
2014	77,782.00	245,296.00	323,078.00
2015	107,785.25	366,796.00	474,581.25
2016	159,291.00	463,627.00	622,918.00
2017	109,446.75	442,315.00	551,761.75
2018	115,392.00	426,085.00	541,477.00
2019*	56,929.75*	218,723.00*	275,652.75*

*2019 year to date as of March 31, 2019.

Source: Information provided by USCIS (May 23, 2019 and Jun. 5, 2019).

Furthermore, USCIS also reports that technology problems significantly hampered EAD processing times. Between approximately September 2017 and February 2018, the data management system the NBC uses to process EADs (CLAIMS 3) operated more slowly than usual.⁵⁰² ISOs who were used to completing 4-5 cases per hour often had to wait 10-15 minutes simply to retrieve the EAD file from CLAIMS 3 before they could even begin working

⁴⁹⁵ *Id.* at 82401.

⁴⁹⁶ *Id.* at 82458.

⁴⁹⁷ *Id.* at 82455.

⁴⁹⁸ USCIS is under a U.S. district court order to comply with the regulatory requirement (8 C.F.R. § 208.7(a)(1)) to adjudicate initial asylum-based EADs within 30 days. *Rosario v. USCIS*, No. 2:15-cv-00813-JLR (W.D. Wash.), appeal pending, *NWIRP v. USCIS*, No. 18-35806 (9th Cir.).

⁴⁹⁹ According to the former USCIS Director, litigation has had an impact on processing times. “USCIS is also under an injunction related to Employment Authorization Documents (EAD) for asylum seekers. Due to the surge of asylum applications over the last several years, we cannot keep pace with the regulatory requirement to adjudicate employment authorization requests within 30 days. As a result of the injunction, we have been forced to move adjudicators off other caseloads to comply with the order and expedite processing of employment authorization documents for those who seek asylum.” Letter from L. Francis Cissna, former Director, USCIS, to the Honorable Thom Tillis, Senator, May 23, 2019.

⁵⁰⁰ Information provided by USCIS (Jun. 17, 2019).

⁵⁰¹ Information provided by USCIS (May 23, 2019 and Jun. 13, 2019).

⁵⁰² Information provided by USCIS (May 17, 2019).

on it. This slowed EAD processing considerably at the NBC. USCIS solved this problem through a long-planned conversion of the CLAIMS 3 database known as CLAIMS 3 Modernization. The conversion occurred in late February 2018, which provided immediate relief in terms of time-savings on EAD adjudications.⁵⁰³ However, the NBC had collected a considerable backlog prior to the conversion, which took some time to reverse.⁵⁰⁴

Other EAD Issues

Cards Containing Errors. Despite the good-faith intentions of applicants, their authorized representatives, and USCIS, sometimes information entered into a USCIS form or a USCIS data system is incorrect when an ISO orders production of the card. Such errors include, for example, incorrect names, birth dates, addresses, gender, and photographs.⁵⁰⁵

When applicants receive a defective card, USCIS directs them to return the card together with a new Form I-765, additional photos, and another set of required support documents.⁵⁰⁶ If the applicant establishes to the satisfaction of USCIS that the defect was attributable to “service error,” the applicant may submit the corrective I-765 filing without a fee.⁵⁰⁷ Otherwise, the agency requires the applicant to pay a new filing fee. Additionally, if the defective card is not attributable to “service error,” USCIS generally will not expedite its adjudication, putting the new application at the end of the adjudication queue. If an EAD is lost or misdelivered, or is otherwise incorrect due to “service error,” the applicant should provide evidence supporting this claim, and should make a request for expedited processing of the replacement EAD.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ Other “service errors” with EAD cards involve the ordering or production of an EAD card; for example, EADs that were approved but never produced, or EADs that were produced but never mailed.

⁵⁰⁶ USCIS directs applicants who request the replacement of a defective card to submit a new Form I-765 and related documents and fees, where applicable, to the Service Center or the NBC, whichever facility adjudicated the EAD. See USCIS Webpage, “Employment Authorization Document” (Apr. 5, 2018); <https://www.uscis.gov/greencard/employment-authorization-document> (accessed Apr. 25, 2019).

⁵⁰⁷ While this is true, the Ombudsman is aware of instances where a USCIS Lockbox or Service Center will reject a submitted Form I-765 to correct a clear “service error” because the applicant failed to attach a filing fee. USCIS has advised the Ombudsman that to avoid erroneous rejections, the most prudent course is to file the corrective Form I-765 with the fee, but to present evidence of the service error, and request a refund.

Mailing Issues. Every year, USCIS sends out millions of letters and other documents to applicants and petitioners by first class mail. While the large majority of mailings proceed without incident, thousands of such mailings, including receipt notices, interview appointment notices, and secure identity documents are lost, misdelivered, or returned to USCIS each month as non-deliverable.⁵⁰⁸ At times, these errant mailings are traceable to applicant error, for example, failing to timely notify USCIS of a change of address, or providing a mailing address that the U.S. Postal Service’s (USPS’s) automated sorting machines do not recognize. Other mailing errors fall wholly outside of the applicant’s control. Examples include data entry errors; mailings sent to a prior address even after the agency timely received notification of a change of address; and mailing problems attributable to USPS, i.e., returns to USCIS, misdeliveries, and lost mail even when the address is correct.

When an EAD is mailed to the applicant’s address of record and USPS did not return it as non-deliverable, USCIS policy generally requires an applicant to file a new Form I-765 and pay a new filing fee. For example, when an applicant receives a receipt notice for an I-765 submission, but later does not receive the EAD, the applicant will need to reach out to USCIS to fix the problem.⁵⁰⁹ In these situations, unless an applicant can prove that the non-delivery is attributable USCIS or USPS error (i.e., generally this is done through USPS’s issuance of a letter), the individual must pay a filing fee, unless exempt (such as those whose applications are “bundled” into a single fee).⁵¹⁰ USCIS states that it must charge the applicant as it has already incurred all adjudication and production costs in producing the first card. Additionally, the agency also contends that the second fee payment requirement also serves as an important fraud deterrent.⁵¹¹

In attempting to address these issues, USCIS introduced its Secure Mail Initiative (SMI) in 2011.⁵¹² Through SMI, the agency discontinued its use of first-class mail service

⁵⁰⁸ Information provided by USCIS (Apr. 3, 2019).

⁵⁰⁹ See Ombudsman’s Annual Report 2015, pp. 79-83.

⁵¹⁰ USCIS Webpage, “Employment Authorization Document” (Apr. 5, 2018); <https://www.uscis.gov/greencard/employment-authorization-document> (accessed Apr. 25, 2019).

⁵¹¹ See generally, 11 USCIS Policy Manual, Ch. 3 - Reissuance of Secure Identity Documents; <https://www.uscis.gov/policy-manual/volume-11-part-a-chapter-3> (accessed May 15, 2019).

⁵¹² USCIS Webpage, “USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative” (May 2, 2011); <https://www.uscis.gov/archive/archive-news/uscis-improves-delivery-immigration-documents-through-secure-mail-initiative> (accessed Apr. 25, 2019).

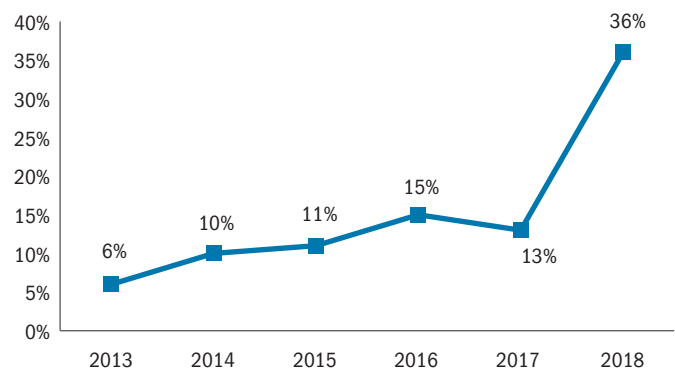
for mailing secure identity documents and began using USPS Priority Mail with Delivery Confirmation for those documents.⁵¹³ While this was a positive step, applicants continue to report non-deliveries; CY 2018 data indicates that the USPS returned nearly 78,000 secure identity documents to USCIS as non-deliverable.⁵¹⁴

USCIS is continuing its efforts to mitigate non-delivery problems. In April 2018, the agency announced its intention to upgrade to a more closely tracked USPS service, Priority Mail with “Signature Confirmation Restricted Delivery.”⁵¹⁵ This premium mailing service restricts delivery to only to the addressee or a representative whose authorization is on file with USPS.⁵¹⁶ USCIS advises it will use this upgraded service to send all secure identity document mailings after the next Filing Fee Rule goes into effect—likely later this year or in early 2020.⁵¹⁷ Once implemented, the number of lost or misdelivered secure identity documents should be significantly reduced, which in turn should result in fewer individuals having to refile and reduce the draw on scarce agency resources to address such misfires. For now, USCIS is piloting this service for a limited set of mailings for SMI documents returned to the agency as non-deliverable.⁵¹⁸

Ombudsman EAD Requests for Case Assistance Received in 2018. In addition to inquiring with USCIS, applicants frequently contact the Ombudsman and/or their Congressional representatives to seek help with delayed EADs or to request expedited processing of their filings.⁵¹⁹ In 2018, the Ombudsman received 4,064 EAD-

related requests for case assistance.⁵²⁰ This represents the single largest category of casework for the Ombudsman, over a third of the 2018 total number of cases. (See Figure 5.12 below.)

Figure 5.12: Ombudsman’s EAD-Related Case Assistance as a Percentage, CY 2013-CY 2018



Source: 2018 Case Assistance Data extracted from CAADI, the Ombudsman’s database management system.

As the EAD-related requests for case assistance grew, the Ombudsman reached out to USCIS and the public, to obtain updates on lengthening EAD processing times and the impacts they were having on individuals, families and employers. In addition to soliciting comments during public engagements throughout the year, the Ombudsman held a public teleconference on EAD processing on February 27, 2018, and hosted a subsequent EAD teleconference on March 28, 2019. During these teleconferences, the Ombudsman listened to individuals and employers from all walks of life and industry sectors detailing hardships, lost opportunities, and other life impacts that spring from lengthening processing times, defective cards, and mailing problems.

Conclusion and Recommendations

Assuming no legislative or regulatory changes regarding EAD eligibility, and assuming USCIS seeks to retain, at a minimum, its current standard operating procedures for EAD adjudication, the Ombudsman makes the following recommendations:

⁵²⁰ A deeper look at the EAD requests for case assistance the Ombudsman received in 2018 reveals that 1,530 inquiries were because the submission was outside of the agency’s posted processing times, and 1,815 were eligible for “expedited” processing of their EAD, due to various exigencies.

⁵¹³ *Id.*

⁵¹⁴ Information provided by USCIS (Apr. 3, 2019).

⁵¹⁵ USCIS Webpage, “USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative” (May 2, 2011); <https://www.uscis.gov/archive/archive-news/uscis-improves-delivery-immigration-documents-through-secure-mail-initiative> (accessed Apr. 25, 2019).

⁵¹⁶ USPS Webpage, “Insurance and Extra Services” (2019); <https://www.usps.com/ship/insurance-extra-services.htm> (accessed Apr. 25, 2019).

⁵¹⁷ Information provided by USCIS (Apr. 3, 2019).

⁵¹⁸ USCIS Webpage, “USCIS to Begin Using More Secure Mail Delivery Service” (Apr. 27, 2018); <https://www.uscis.gov/news/news-releases/uscis-begin-using-more-secure-mail-delivery-service> (accessed May 15, 2019).

⁵¹⁹ Currently published USCIS expedite criteria include: 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 in the national interest; USCIS error; or compelling interest of USCIS. See <https://www.uscis.gov/forms/expedite-criteria>. In response to casework inquiries the Ombudsman made, USCIS has stated that job loss alone does not constitute adequate evidence of a need to expedite an EAD. See also USCIS Policy Manual, Ch. 5 - Requests to Expedite Applications or Petitions (Jun. 6, 2019); <https://preview.uscis.gov/policy-manual/volume-1-part-a-chapter-5> (accessed Jul. 1, 2019).

1. **Augment USCIS’ staffing resources to enable the NBC and Service Centers to devote more production hours to EAD processing.** Augmenting staffing resources is preferable to simply realigning existing staffing resources—as USCIS has done previously from time to time to addresses surges in workload—as there are already backlogs in processing other form types.
2. **Accelerate the incorporation of the Form I-765 into eProcessing,** which could reduce the number of steps in EAD adjudication, reducing processing times and improving overall efficiency. While this may be a formidable task given the number of EAD types adjudicated and the sheer volume of EAD filings, even selecting only one type for eProcessing (such as adjustment of status related applications) could accelerate the adjudication of these forms and pave the way to testing the eProcessing system across the agency.
3. **Implement a public education campaign to encourage applicants to file I-765 renewal applications up to 180 days before the expiration of their current EAD** to reduce the impact of longer processing times.
4. **In tandem with this public education recommendation, USCIS should also emphasize that petitioners and applicants verify the addresses provided (for all forms filed with USCIS)** by USPS’s “Look Up a Zip Code” checker; doing so confirms the address is correctly formatted and serviced by USPS.
5. **Consider establishing a uniform process to identify and expedite processing of Form I-765 resubmissions filed due to “service error,”** and operationalize the use of express mail courier service (e.g., USPS Express Mail, UPS, Federal Express, etc.) to speed up the delivery of corrected or replacement documents in such situations.

Appendices

Recommendations Update

The Ombudsman has a unique relationship with USCIS. When the Ombudsman makes formal recommendations to USCIS to improve the delivery of immigration services and benefits, the USCIS Director, pursuant to statute, has 3 months to respond in writing.⁵²¹ But before an issue rises to the level of a formal recommendation, there are many opportunities for the Ombudsman to review, discuss, and deliberate the need for change. The Ombudsman engages in discussions with USCIS at all levels—local, operational, and at headquarters—through meetings and in writing. The discussions help the Ombudsman understand the reasons behind agency decisions. They also provide the Ombudsman an opportunity to share with USCIS the practical implications of its actions, some of which are not always readily apparent.

Due to resource constraints, the Ombudsman did not issue any formal recommendations in 2018. However, informal recommendations and inquiries were made to USCIS on several issues, including the following:

- Advance Parole denials
- Suspension of H-1B Premium Processing
- H-2B processing time delays
- Processing times for combination cards for Employment Authorization and Advance Parole
- Naturalization application delays and filing concerns
- Unpaid 245(i) supplemental fees
- Special Immigrant Juvenile adjudication issues and processing times
- Disparities in processing times between Service Centers
- InfoMod pilot program and nationwide implementation
- EAD processing times
- USCIS' use of text messages to contact applicants
- Errors in SEVIS and CLAIMS impacting students
- Implementation of the new NTA Policy
- Negative O-1 advisory consultation letters

⁵²¹ Homeland Security Act (HSA) of 2002, HSA § 452, 6 U.S.C. § 272 (c), (f).

Tenacity and Partnership Leads to Change in Advance Parole Processing

More than a year ago, an opportunity for an informal partnership presented itself. The Ombudsman learned that, in some instances, USCIS was denying applications to renew advance parole. The applicants were traveling outside the United States with valid advance parole documents that were still valid upon return. However, these applicants had already submitted renewal applications to USCIS because the documents would soon expire. When the applicants returned, they received notice from USCIS that their requests for renewals had been denied.

The denials were the result of the official parole application instructions, which clearly state that “if you leave the US during the pendency of the application you will be deemed to have abandoned it.” Under USCIS regulations, these instructions have the force of law (8 C.F.R. § 103.2(a)(1)). However, USCIS had not previously denied advance parole in these situations, despite the fact that the instructions had read this way for years. Why were the denials occurring now?

Sitting down to discuss the issue with USCIS, our staff soon understood the operational reasons for the denials. USCIS adjudicators are now consistently using the information from the Arrival and Departure Information System (ADIS), the CBP-managed arrival and departure database. USCIS could actually now identify those filing advance parole applications who then depart, triggering the denials.

Knowing the reason for the change, however, did not end our inquiry. Listening to stakeholders, we learned there were inconsistencies in the way USCIS was enforcing the instructions. While the Service Center Operations Directorate was issuing denials, the Field Operations Directorate still approved renewal applications where the applicants had traveled abroad as long as they returned to the United States with previously approved and still valid advance parole documents. This led to additional confusion.

Furthermore, there were practical implications to the new practice of denying these renewals of advance parole. Applicants were inconvenienced, to be sure, but could re-file the parole application—in many cases without a fee. Not surprisingly, thousands of advance parole applications were re-filed, resulting in more work for the agency. In addition, if an individual did not receive a decision on the re-filed advance parole before a planned trip (processing times could take 6 months), the applicant would appear at a local USCIS field office to apply for emergency advance parole.

In the end, USCIS was expending substantial resources to deny and re-adjudicate parole applications for: (1) individuals who it had already determined were eligible for an original advance parole document; and (2) were in fact traveling with authorization under the original parole document that was still valid upon return.

The Ombudsman’s Office met numerous times with USCIS over the course of a year to discuss these issues surrounding advance parole. Our staff made the case that the denials, while authorized by law, did not make operational sense and did not in reality further the spirit of the policy encapsulated by the instructions.

Finally, in November 2018, former Director Cissna approved a change in policy that upheld the original interpretation while giving meaning to the instructions: “If you file Form I-131, *Application for Travel Document*, to request an advance parole document and depart the United States without possession of an advance parole document that is valid for the entire time you are abroad, your Form I-131 will be considered abandoned. At times, an individual may have an approved advance parole document while a second one is pending. Individuals may travel on the approved advance parole document, provided the document is valid for the entire duration of their time abroad. The pending Form I-131 will not be considered abandoned in this situation.”

Former Director Cissna was gracious enough to announce the change during the Ombudsman’s Eighth Annual Conference here in Washington, D.C., and our office was pleased that our tenacity, coupled with a strong partnership with our colleagues at USCIS, helped the Ombudsman’s Office make a meaningful impact on the stakeholders in our immigration system.

Below is an update on recent actions taken that relate to past Ombudsman recommendations.

Recommendation No. 61—Strengthen Efficiency, Safety, Accessibility, and Overall Effectiveness of the Central American Minors (CAM) Refugee/Parole Program (December 21, 2016)
USCIS Response: pending—due March 21, 2017.

- USCIS, in coordination with DOS, should increase the volume of interviews and associated Refugee Access Verification Unit processing of CAM cases.
- USCIS should permit access to counsel in CAM interviews.
- USCIS, in coordination with DOS, should create a plain language, comprehensive CAM “Information Guide.”
- USCIS, in coordination with DOS, should publish and regularly update CAM processing times.

Update: USCIS stopped offering parole through the CAM program on August 16, 2017, stopped accepting new CAM refugee applications on November 9, 2017, and stopped interviewing CAM refugee applicants on January 31, 2018.⁵²² It rescinded the conditional paroles of all who had been granted conditional parole but who had not yet entered the United States prior to the program’s termination. On June 13, 2018, the International Refugee Assistance Project sued in a class action to set aside the termination; the judge found in December 2018 that the rescission of the conditional approvals granted prior to the termination of the program violated the Administrative Procedure Act. On April 12, 2019, the Administration entered into an agreement to process the approximately 2,700 applicants who had been conditionally approved to enter the United States under the program prior to its termination. USCIS submitted to the court that it would begin to notify those whose conditional paroles had been rescinded beginning in June, 2019.⁵²³

Recommendation No. 60—Implement Parole for U Visa Principal and Derivative Eligible Petitioners Residing Abroad (June 16, 2016); USCIS Response: September 29, 2016.

- 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.

- USCIS should allow for concurrent filings of the U visa petitions and requests for parole.
- Cases should be adjudicated at the VSC to ensure consistent and effective adjudication.

Update: Though USCIS initially concurred with the below recommendations, pursuant to Executive Order 13767, it revised its policies on parole and no longer plans to offer parole for principal and derivative petitions abroad. Parole continues to be available on a case-by-case basis.

Recommendation No. 59—Ensure Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications (December 11, 2015); USCIS Response: April 19, 2016.

- USCIS should centralize Special Immigrant Juvenile (SIJ) adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations.
- USCIS should take into account the best interests of the child when applying criteria for interview waivers.
- USCIS should issue final SIJ regulations that fully incorporate all statutory amendments.
- USCIS should interpret the consent function consistently with the statute by according greater deference to state court findings.

Update: The DHS Spring 2019 Unified Regulatory Agenda, the most recent agenda available as this Report was being finalized, does not include SIJ program regulations.

Recommendation No. 58—To Improve the Quality and Consistency in Notices to Appear (June 11, 2014); USCIS Response: September 30, 2016.

- USCIS should provide additional guidance for Notice to Appear (NTA) issuance with input from ICE and EOIR.
- USCIS should require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training.

⁵²² See USCIS Web page, “In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM);” <https://www.uscis.gov/CAM> (accessed May 17, 2019).

⁵²³ See International Refugee Assistance Project Web page, “Central American Minors (CAM): Restarting Program for Certain Applicants;” <https://refugeerights.org/cam-resources/> (accessed May 17, 2019).

- USCIS should create a working group with representation from ICE and EOIR to improve tracking, information sharing, and coordination of NTA issuance.

Update: On June 28, 2018, USCIS issued a new Notice to Appear policy memorandum providing guidance on when USCIS may issue Form I-862, *Notice to Appear*. On October 1, 2018, USCIS began issuing NTAs on denied status-impacting applications. On November 19, 2018, USCIS began issuing NTAs based on denials of various humanitarian forms, including requests for U, T, or SIJ status. USCIS has so far not implemented the NTA Policy Memo with respect to employment-based petitions.

Recommendation No. 57—Employment Eligibility for Derivatives of Conrad State 30 Program Physicians (March 24, 2014); USCIS Response: June 24, 2014.

- USCIS should publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program

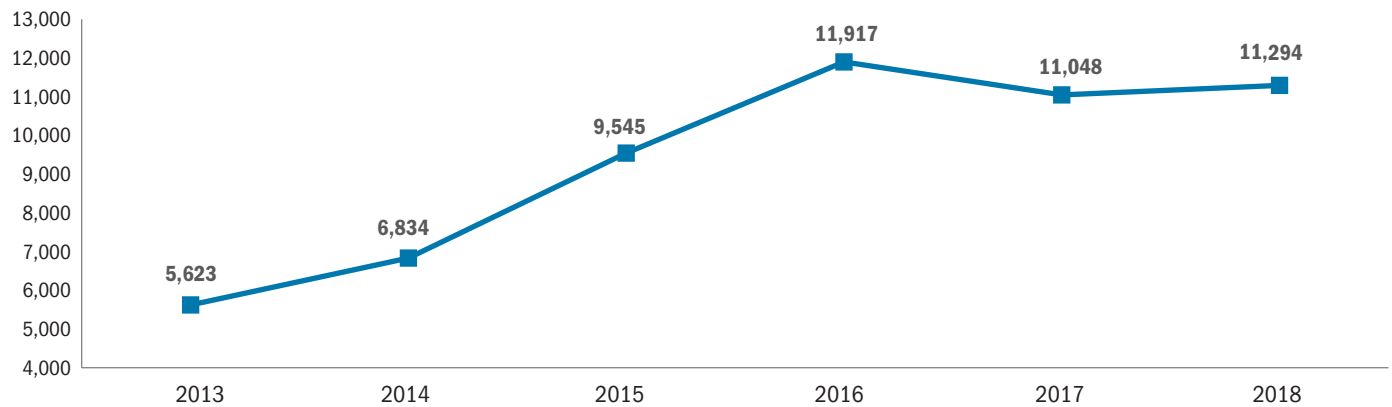
waiver to change to other employment-authorized nonimmigrant classifications.

- USCIS should 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.

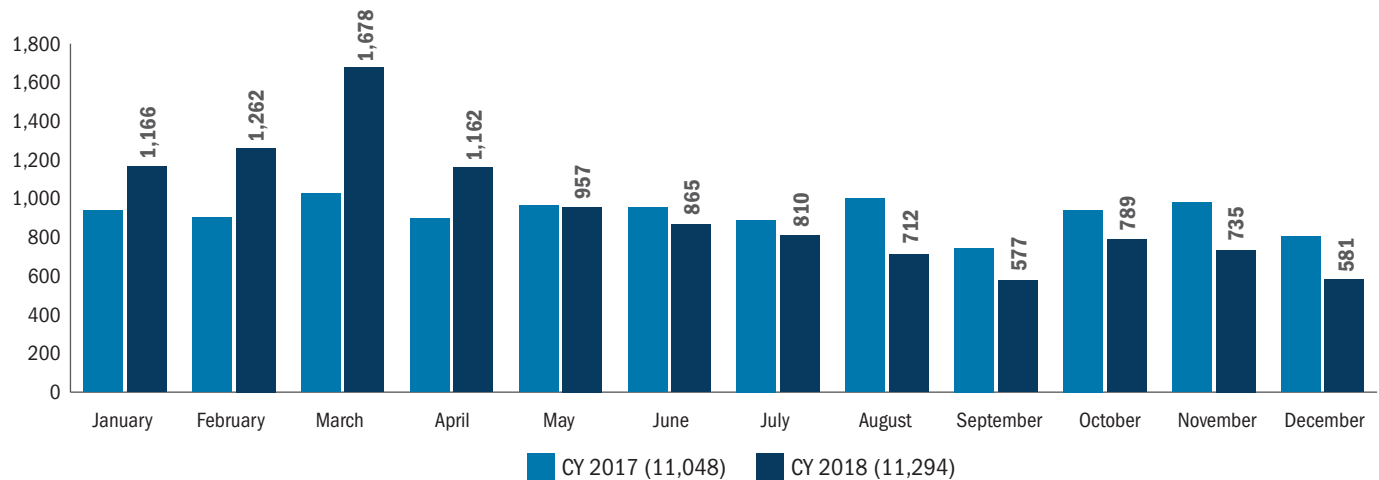
Update: There has been no change since last year's report.

The Ombudsman by the Numbers

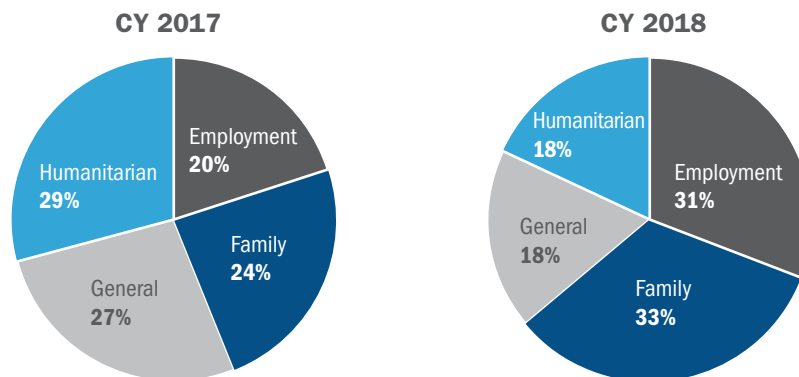
Ombudsman Requests for Case Assistance Received by Calendar Year



Ombudsman Requests for Case Assistance Received by Month for Calendar Years 2017 and 2018



Ombudsman Requests for Case Assistance—Submission by Category





CIS Ombudsman Top Forms Requesting Assistance Compared to USCIS Top Form Submissions, 2018


CIS Ombudsman Top Form Types 2018	# Received	% of Total
I-765, Application for Employment Authorization	4,064	36%
I-485, Application to Register Permanent Residence or Adjust Status	1,893	17%
N-400, Application for Naturalization	1,084	10%
I-130, Petition for Alien Relative	982	9%
I-131, Application for Travel Document	264	2%
I-751, Petition to Remove Conditions on Residence	235	2%
I-140, Immigrant Petition for Alien Workers	198	2%
I-589, Application for Asylum and for Withholding of Removal	190	2%
I-821D, Consideration of Deferred Action for Childhood Arrivals	189	2%
I-90, Application to Replace Permanent Resident Card	176	2%


USCIS Top Form Types 2018	# Received	% of Total
I-765, Application for Employment Authorization	1,890,171	25%
I-130, Petition for Alien Relative	844,282	11%
N-400, Application for Naturalization	817,146	11%
I-90, Application to Replace Permanent Resident Card	731,526	10%
I-129, Petition for Nonimmigrant Worker	533,384	7%
I-485, Application to Register Permanent Residence or Adjust Status	502,285	7%
I-131, Application for Travel Document	376,529	5%
I-821D, Consideration of Deferred Action for Childhood Arrivals	296,474	4%
I-821, Application for Temporary Protected Status	252,946	3%
I-539, Application to Extend/Change Nonimmigrant Status	231,096	3%


Top Ten States Where Applicants Reside and the Top Five Primary Form Types


California		
Requests Received: 1,908		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	742	39%
I-485, Application to Register Permanent Residence or Adjust Status	305	16%
I-130, Petition for Alien Relative	126	7%
N-400, Application for Naturalization	114	6%
I-140, Immigrant Petition for Alien Workers	61	3%


New York		
Requests Received: 1,282		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	435	34%
I-485, Application to Register Permanent Residence or Adjust Status	274	21%
N-400, Application for Naturalization	165	13%
I-130, Petition for Alien Relative	126	10%
I-751, Petition to Remove Conditions on Residence	37	3%


Texas		
Requests Received: 1,318		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	524	40%
I-485, Application to Register Permanent Residence or Adjust Status	218	17%
I-130, Petition for Alien Relative	129	10%
N-400, Application for Naturalization	125	9%
I-821D, Consideration of Deferred Action for Childhood Arrivals	34	3%


Florida		
Requests Received: 775		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	262	34%
I-485, Application to Register Permanent Residence or Adjust Status	133	17%
N-400, Application for Naturalization	91	12%
I-130, Petition for Alien Relative	76	10%
I-131, Application for Travel Document	29	4%


Illinois		
Requests Received: 597		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	177	30%
I-485, Application to Register Permanent Residence or Adjust Status	129	22%
I-130, Petition for Alien Relative	82	14%
N-400, Application for Naturalization	55	9%
I-751, Petition to Remove Conditions on Residence	17	3%

Virginia		
Requests Received: 404		
		
Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	92	23%
I-765, Application for Employment Authorization	88	22%
N-400, Application for Naturalization	50	12%
I-130, Petition for Alien Relative	48	12%
I-751, Petition to Remove Conditions on Residence	20	5%

Maryland		
Requests Received: 441		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	115	26%
I-485, Application to Register Permanent Residence or Adjust Status	110	25%
I-130, Petition for Alien Relative	52	12%
N-400, Application for Naturalization	48	11%
I-589, Application for Asylum and for Withholding of Removal	18	4%

Georgia		
Requests Received: 386		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	161	42%
N-400, Application for Naturalization	62	16%
I-485, Application to Register Permanent Residence or Adjust Status	48	12%
I-130, Petition for Alien Relative	29	8%
I-751, Petition to Remove Conditions on Residence	16	4%

New Jersey		
Requests Received: 438		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	193	44%
I-485, Application to Register Permanent Residence or Adjust Status	70	16%
N-400, Application for Naturalization	33	8%
I-130, Petition for Alien Relative	27	6%
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	21	5%

Washington		
Requests Received: 275		
		
Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	126	46%
I-485, Application to Register Permanent Residence or Adjust Status	38	14%
I-130, Petition for Alien Relative	27	10%
N-400, Application for Naturalization	17	6%
I-821D, Consideration of Deferred Action for Childhood Arrivals	9	3%

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

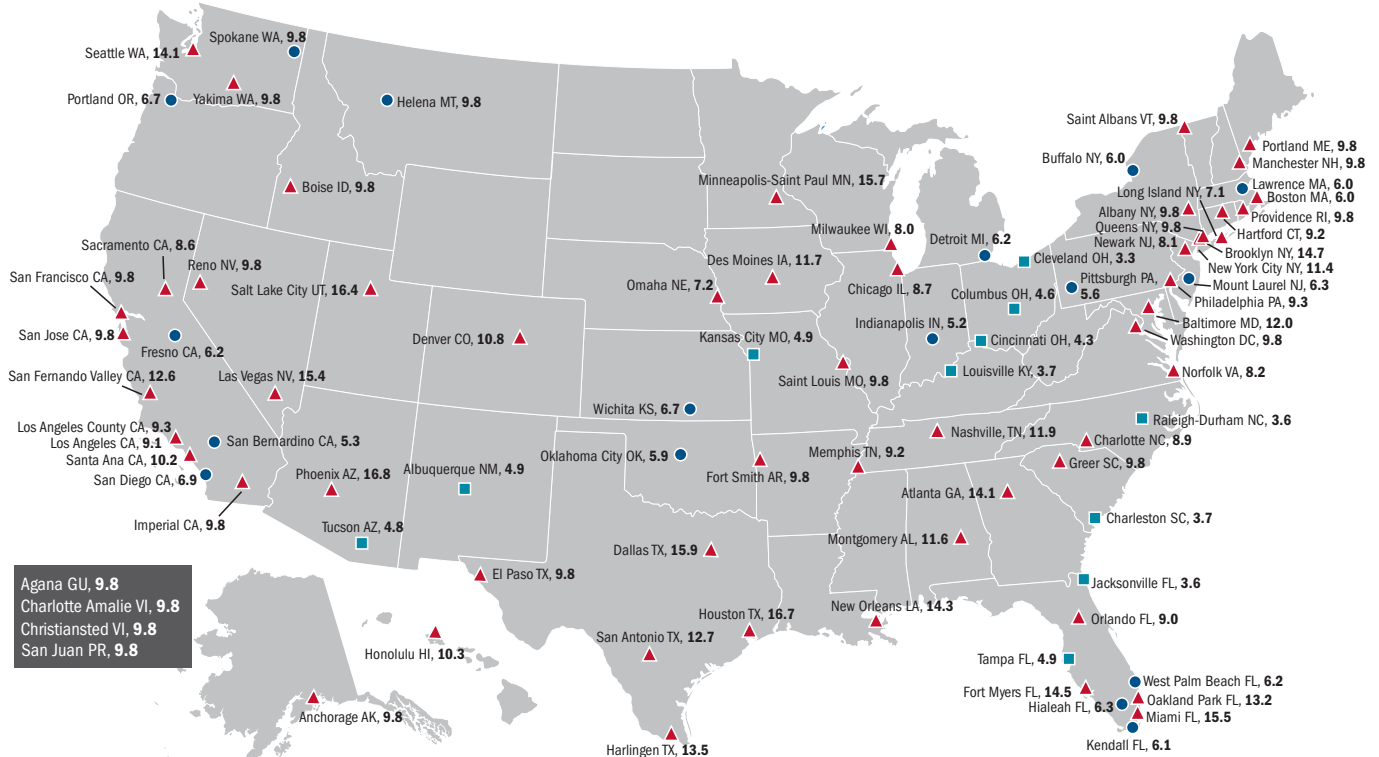
Processing Times for USCIS Field Offices for Form N-400, *Application for Naturalization*

December 2018 (FY 2018 4th Quarter)

■ = 0-5 months

● = 5-7 months

▲ = 7+ months



Source: Information provided by USCIS.

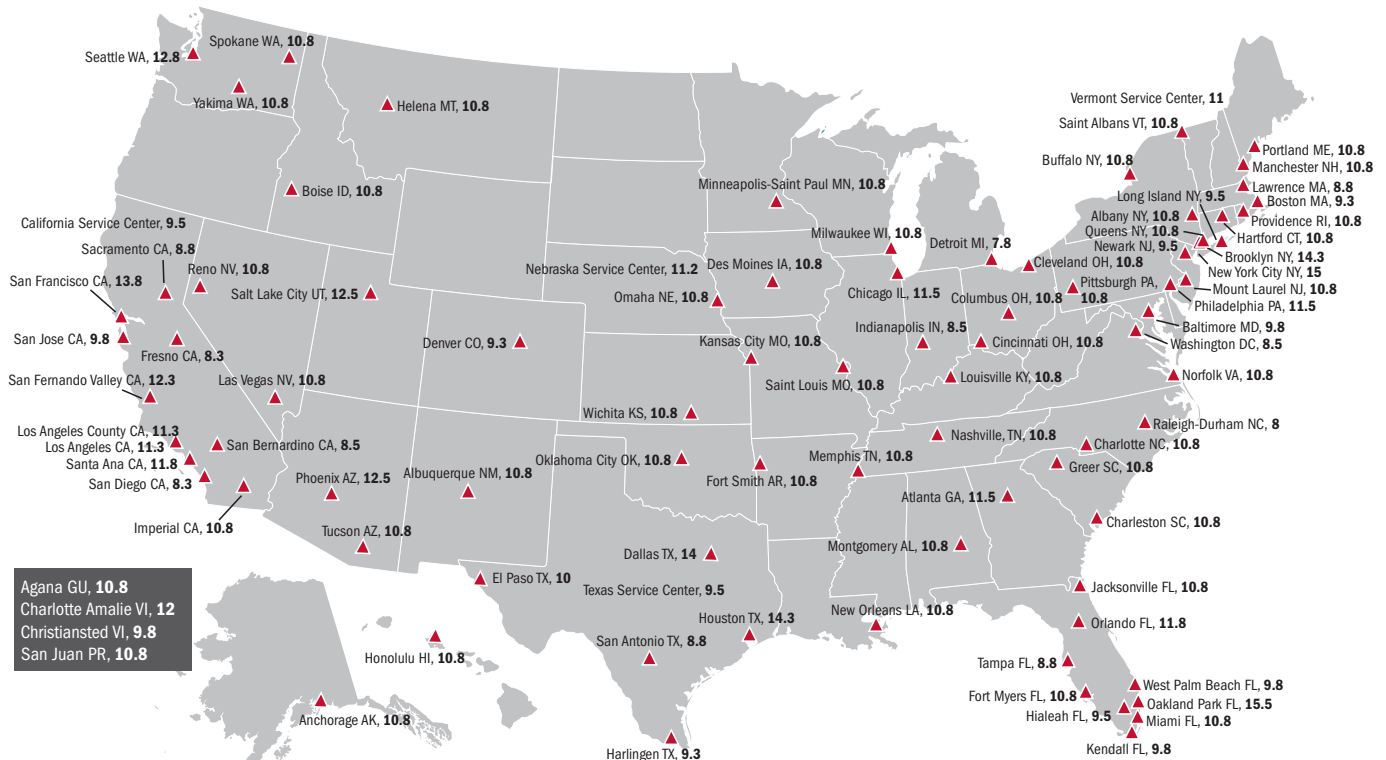
Processing Times for USCIS Field Offices for Form I-485, *Application to Register Permanent Residence or Adjust Status*

December 2018 (FY 2018 4th Quarter)

■ = 0-5 months

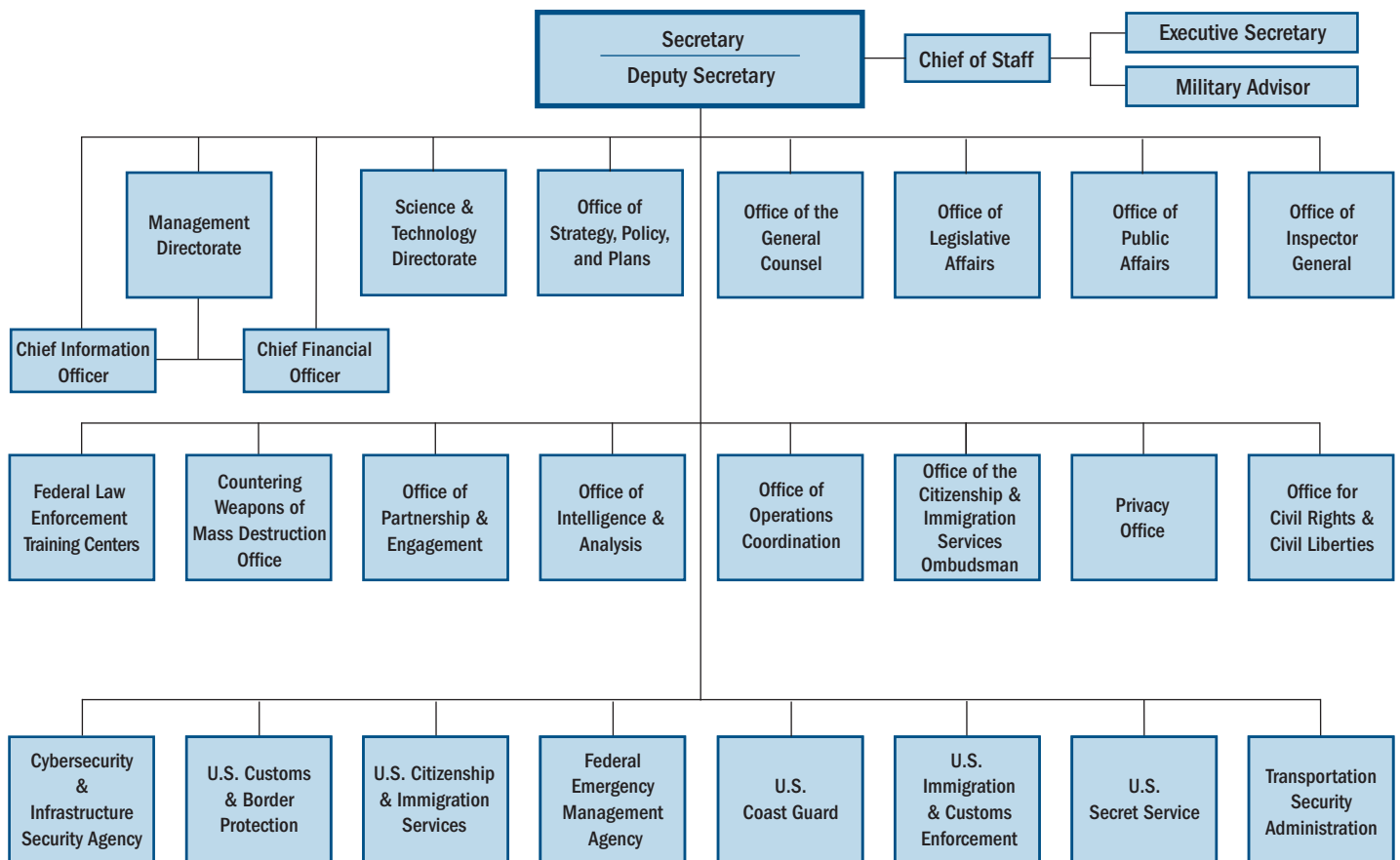
● = 5-7 months

▲ = 7+ months



Source: Information provided by USCIS.

U.S. Department of Homeland Security Organization Chart

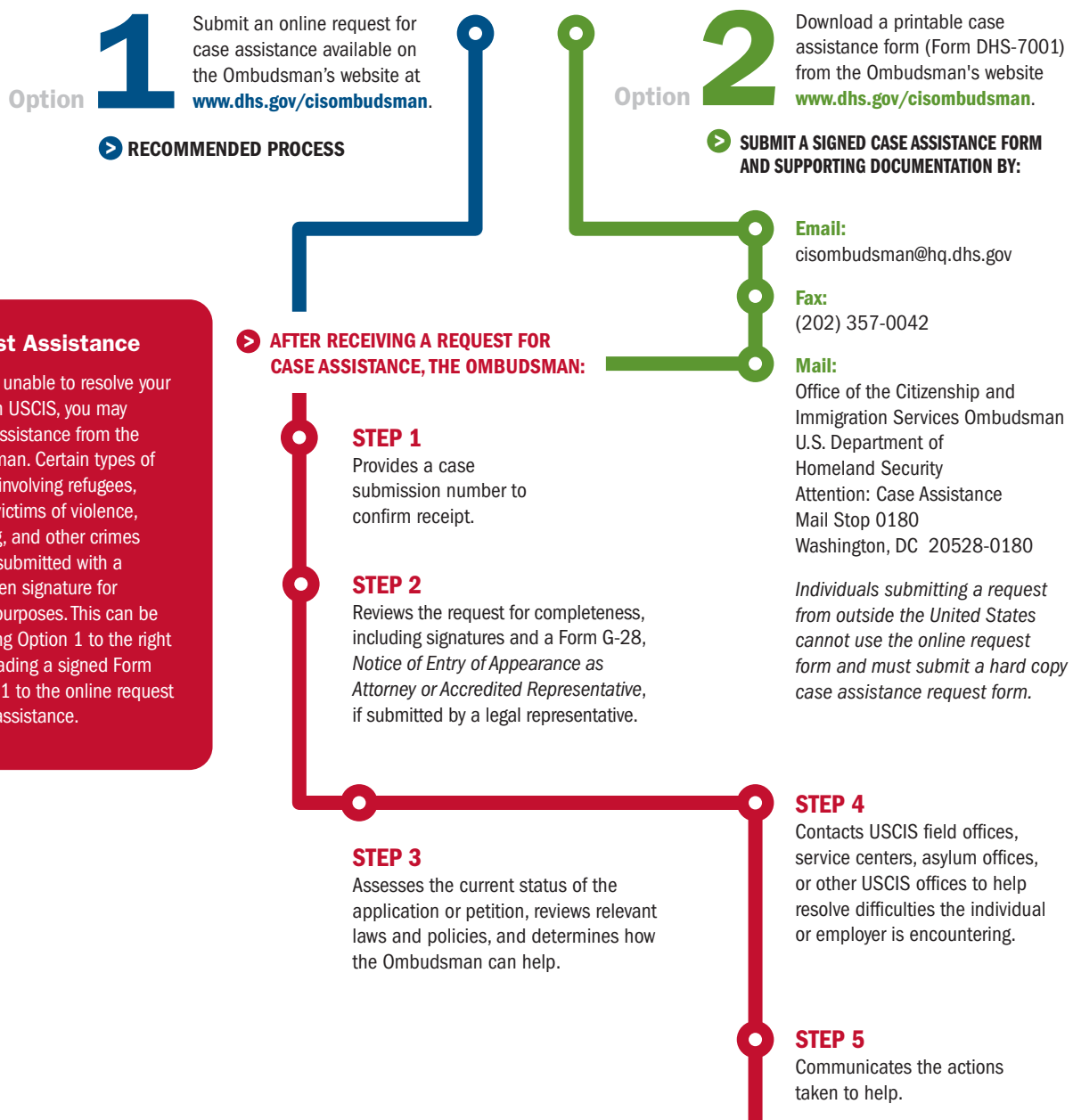


How to Request Case Assistance from the Ombudsman: Scope of Assistance Provided

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:

- Submitting a request through your *myUSCIS* account;
- Submitting an e-Request with USCIS online at <https://egov.uscis.gov/e-Request>; or
- Contacting USCIS for assistance at **1-800-375-5283**.



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

Acronyms

AAO	Administrative Appeals Office	EOIR	Executive Office for Immigration Review
AC21	American Competitiveness in the 21st Century Act	EXA	External Affairs Directorate
ACWIA	American Competitiveness and Workforce Improvement Act of 1998	FAM	Foreign Affairs Manual
ADIS	Arrival and Departure Information System	FDNS	Fraud Detection and National Security Directorate
ADIT	Alien Documentation Identification and Telecommunications	FOD	Field Office Directorate
AFM	Adjudicator’s Field Manual	FY	Fiscal Year
ASVVP	Administrative Site Visit and Verification Program	GAO	U.S. Government Accountability Office
AVC	Asylum Vetting Center	HSA	Homeland Security Act
BAHA	“Buy American and Hire American” Executive Order 13788	ICE	U.S. Immigration and Customs Enforcement
BFCA	Benefit Fraud and Compliance Assessment	IER	Immigrant and Employee Rights Section
BIA	Board of Immigration Appeals	IMMACT90	Immigration Act of 1990
BLS	Bureau of Labor Statistics	INA	Immigration and Nationality Act
CAADI	Case Assistance and Analytic Data Integration	InfoMod	Information Services Modernization Program
CAIS	Citizenship and Applicant Information Services	INS	Immigration and Naturalization Service
CBP	U.S. Customs and Border Protection	IPO	Investor Program Office
CIO	Chief Information Officer	IRCA	Immigration Reform and Control Act of 1986
CLAIMS	Computer-Linked Application Information Management System	IRIS	Immigration Records and Identity Services Directorate
CSC	California Service Center	ISO	Immigration Services Officer
CSD	Customer Service Division	IT	Information Technology
CSPED	Customer Service and Public Engagement Directorate	IVR	Interactive Voice Response
DACA	Deferred Action for Childhood Arrivals	KCC	Kentucky Consular Center
DHS	U.S. Department of Homeland Security	LCA	Labor Condition Application
DOD	U.S. Department of Defense	LIFO	Last-In, First-Out
DOL	U.S. Department of Labor	MOA	Memorandum of Agreement
DOJ	U.S. Department of Justice	MOU	Memorandum of Understanding
DOS	U.S. Department of State	MTINA	Miscellaneous and Technical Immigration and Naturalization Amendments of 1991
DSD	Digital Services Division	NBC	National Benefits Center
EAD	Employment Authorization Document	NCSC	National Customer Service Center
ELIS	Electronic Immigration System	NOID	Notice of Intent to Deny
EO	Executive Order	NPWC	National Prevailing Wage Center
		NRC	National Records Center
		NSC	Nebraska Service Center

NSF	National Science Foundation	SWA	State Workforce Agency
NSPM	National Security Presidential Memorandum	TECS	Treasury Enforcement Communication System
NTA	Notice to Appear	TPS	Temporary Protected Status
NVC	National Visa Center	TSC	Texas Service Center
O*NET	Occupational Information Network	TSVVP	Targeted Site Visit and Verification Program
OES	Occupational Employment Statistics Wage Survey	TVPRA	Trafficking Victims Protection Reauthorization Act
OFLC	Office of Foreign Labor Certification	USCIS	U.S. Citizenship and Immigration Services
OIDP	Office of Intake and Document Production	USPS	U.S. Postal Service
OIG	Office of Inspector General	VAWA	Violence Against Women Act
OMB	The Executive Office of the President, the Office of Management and Budget	VIBE	Validation Instrument for Business Enterprises
OoC	Office of Citizenship	VSC	Vermont Service Center
OOH	Occupational Outlook Handbook	WAN	Wide Area Network
OPT	Optional Practical Training	WHD	Wage and Hour Division
OWL	Online Wage Library		
PIMS	Petition Information Management Service		
POC	Point of Contact		
PONDS	Post Office Non-Deliverables Unit		
PRA	Paperwork Reduction Act		
PSC	Potomac Service Center		
PSD	Public Services Division		
PWD	Prevailing Wage Determination		
QA	Quality Assurance		
RAIO	Refugee, Asylum, and International Operations Directorate		
RFE	Request for Evidence		
SAVE	Systematic Alien Verification for Entitlements		
SCOPS	Service Center Operations Directorate		
SEVIS	Student and Exchange Visitor Information System		
SIJ	Special Immigrant Juvenile		
SMI	Secure Mail Initiative		
SOC	Standard Occupational Classification		
SOP	Standard Operating Procedure		
SRMT	Service Request Management Tool		
STEM	Science, Technology, Engineering, and Mathematics		
SVP	Specific Vocational Preparation		



Homeland
Security

**Citizenship and Immigration Services Ombudsman
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