Annual Report 2021

Citizenship and Immigration Services Ombudsman

June 30, 2021

Homeland Security

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

Homeland Security

June 30, 2021

The Honorable Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jim Jordan
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 2021 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Phyllis A. Coven
Citizenship and Immigration Services Ombudsman

www.dhs.gov/cisombudsman

Message from the Citizenship and Immigration Services Ombudsman

As the seventh Citizenship and Immigration Services Ombudsman recently appointed by the Biden Administration, I am honored to submit this 2021 Annual Report to Congress. This Report, required to be presented each year on June 30, is intended to alert Congress to some of the most pervasive issues affecting the administration of immigration benefits at U.S. Citizenship and Immigration Services (USCIS).

This Report reflects the outstanding efforts of a dedicated team of public servants who provide well-researched, balanced, and actionable recommendations, informed by our office's conduit to the immigration community and a deep understanding of the work of the agency.

I want to thank and acknowledge the talented stewardship of Deputy Ombudsman Nathaniel Stiefel and the work of our agile and capable staff, who seamlessly pivoted operations to a remote environment during the coronavirus (COVID-19) pandemic. Their spirit and commitment allowed the office to continue to thrive in carrying out our statutory three-part mission. This message will outline the major developments and future priorities in these three mission areas.

THE PAST YEAR

Requests for Case Assistance. The unprecedented challenges and uncertainties revolving around seeking and maintaining immigration status during the pandemic underscored the need for the office's continued support to the public as an avenue of last resort. In response to the disruption of services and growing backlogs at USCIS, applicants and others came to us when resolution eluded them with the agency. The CIS Ombudsman received 14,618 requests for case assistance in 2020, with requests escalating sharply in the second half of the year—a 25 percent increase over our annual average, with no corresponding increase in staff or other resources. The surge resulted in delays in our office's ability to respond timely to these requests. Eliminating this backlog and scaling up our capacity to respond to case inquiries are top priorities; we recognize that each request represents a journey interrupted in pursuit of a better life in the United States.

Stakeholder Engagement. Despite the inability to travel due to COVID-19 restrictions, the office engaged with a greater number and more diverse set of stakeholders than ever before. We took advantage of a silver lining: the public's increased comfort with the use of remote meeting platforms and other modalities as a means of effective communication. We held more than 125 stakeholder engagements in 2020—a record high for our small office. These engagements allowed us to feel the pulse of trends and new challenges across the country and, in conjunction with our casework, distill issues and serve as a "canary in the coal mine" for USCIS. We can, and regularly do, bring these issues to the attention of the agency and urge action before problems escalate. A new series of webinars we are hosting with colleagues from USCIS to address pressing COVID-related and other public information needs has enjoyed record attendance and engendered a greater sense of collaboration than ever before. As a result, there is a growing recognition that our office can serve as a force multiplier to the agency's goal of disseminating accurate information and help to set customer expectations. Our work together to identify and address customer service challenges has gained new momentum.

Recommendations. In addition to studying the important and long-standing systemic issues identified in our Annual Report, our Policy Division made suggestions to the agency throughout the year to enhance administrative processing and help both the agency and customers adapt and innovate. The agency responded positively to many of our suggestions, in particular those related to delays in issuing receipt notices at lockbox facilities and the impact of the biometrics requirement for the

extensions of derivatives of H, L, and E visas. The recent implementation of these processing improvements provided relief to thousands of USCIS customers.

THE WAY FORWARD

As detailed in this Report, USCIS faces unprecedented challenges this year on virtually every front—from financial pressures to substantial backlogs across applications and petitions of all types. We applaud the numerous innovations the agency put in place in response to the pandemic—from drive-through oath ceremonies to remote interviews—and urge the agency to continue identifying opportunities for efficiencies without undermining integrity. Encouraging the agency to fully transition to a digital environment and to build upon the innovations created in response to COVID-19 is a theme of this Report. It is my expectation that our office will follow suit in upgrading our own operations.

As we approach Fiscal Year (FY) 2022, we are developing a strategic plan that will guide our efforts to improve our customer service through use of technology and ensure that our services are in sync with the advancements made by the agency. We will set clear expectations with our stakeholders as to when we can help and when we cannot, so that we can maximize our attention on those cases where we can make a difference. We are working to redesign our website to make it easier for the public to submit a request for case assistance and learn about casework trends, engagement activities, and the office's priorities. This effort will also include a revision of our Form DHS-7001, *Request for Case Assistance*.

Another strategic priority will be to improve our case work response time. Those seeking assistance from our office have already exhausted numerous avenues for assistance and often waited months or years for relief. Further, we can only achieve our paramount role in identifying trends and informing the agency about problems if we are current in responding to requests for assistance. Our office should serve as an ambassador for the use of USCIS' electronic tools and help customers successfully navigate their own immigration experience. We also are working diligently to expand access to the office's services, particularly for vulnerable and underserved populations, such as those with limited English proficiency and individuals applying for humanitarian benefits. This will be a continued focus for our office and will greatly enhance our understanding of the issues and their impact on the public.

On the research and policy front, we will be more proactive. We will resume the practice of releasing studies and recommendations throughout the year and increase the cadence by which we share trends with the agency, provide relevant and actionable solutions to problems, and offer help to the agency and our departmental and interagency partners.

President Biden has signaled his intent to make immigration laws and policy work for the betterment of our Nation and to create a more responsive and transparent immigration system. The goals of the Administration's Executive Order 14012, *Restoring Faith in our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, and the express commitment to identify barriers that impede access to immigration benefits—squarely align with our office's mission. The Executive Order invites enhanced collaboration within the agency on many fronts. I look forward to joining the considerable progress already underway and contributing our office's unique strengths and perspectives to this historic effort.

While I am new to the position of CIS Ombudsman, I am no stranger to the complex challenges facing governments dealing with immigration, having worked for USCIS, its predecessor the Immigration and Naturalization Services, the U.S. Immigration and Customs Enforcement, the Department of Justice, the United Nations High Commissioner for Refugees, and the International Organization for Migration. As a public-facing program office that abides by the ombudsman principles of independence, impartiality, and confidentiality, our strength derives from our work with the full range of stakeholders—individuals, employers, advocates, government partners, and Members of Congress—who care deeply about the immigration agenda.

This Annual Report's recommendations are intended to provide both Congress and the public with insights about some of the most pressing challenges within our immigration system and ways to approach them that are constructive, actionable, and reflect the spirit and purpose for which our office was created.

Sincerely,

Phyllis A. Coven
CIS Ombudsman
Office of the Citizenship and Immigration Services Ombudsman
Department of Homeland Security

cisombudsman@hq.dhs.gov

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) 2021 Annual Report covers calendar year 2020, as well as key developments in early 2021, and contains:

- An overview of the CIS Ombudsman's mission and services;
- A review of U.S. Citizenship and Immigration Services (USCIS) programmatic and policy challenges during this reporting period; and
- A detailed discussion of pervasive problems, recommendations, and best practices in the administration of our immigration laws.

KEY DEVELOPMENTS AND AREAS OF FOCUS

USCIS in the Time of COVID-19: A Year Like No Other

The coronavirus (COVID-19) pandemic created unique challenges for USCIS, a public-serving entity that typically conducts thousands of in-person appointments each day. Temporary office closures and a lack of product lines available for end-to-end electronic processing put strains on USCIS' ability to adjudicate remotely. Upon resuming operations at a reduced capacity, USCIS had substantial backlogs of in-person appointments that needed rescheduling. The pandemic also exacerbated USCIS' preexisting financial issues and decimated carryover funding needed to maintain its operations. The agency avoided furloughing its employees through spending cuts, including descoping contracts, ordering all components to reduce their budgets, and imposing a hiring freeze that would last into Fiscal Year (FY) 2021. A court-enjoined fee rule contributed to further fiscal complications. The lingering effects of temporary office closures, insufficient revenue, and budget cuts continue to impact processing times and customer service functions. The pandemic demonstrated the importance of a robust public engagement effort and the need for an adequate emergency preparedness plan. Creative strategies implemented during the pandemic also offer cost-effective long-term solutions for better balancing of workloads and overcoming resource constraints.

NTA Issuance: Problems Persist

USCIS policy guidance establishes the circumstances under which the agency issues Notices to Appear (NTAs), and it typically reflects the enforcement priorities of the Department of Homeland Security (DHS). In 2018, USCIS issued such guidance that made more noncitizens subject to removal proceedings. The 2018 guidance also expanded USCIS' role in preparing and serving NTAs on noncitizens and on the immigration courts directly and without deference to U.S. Immigration and Customs Enforcement (ICE). Although this guidance has been rescinded, and USCIS has reverted to following guidance established in 2011, its implementation accentuated long-standing systemic issues, such as NTA service errors, jurisdictional problems, and an overall lack of transparency in the process. In addition, lengthy USCIS delays in adjudicating collateral benefit requests for those in removal proceedings translate into inefficiencies for immigration courts and a lack of finality for noncitizens. These issues, which create administrative burdens for the government and due process consequences for the noncitizen, require attention regardless of changes made to enforcement priorities. Future guidance should aim to enhance coordination between USCIS, ICE, and the Department of Justice (DOJ) to address operational challenges. USCIS can resolve its own recurring service issues by developing guidance to define when in-person service is not practicable; serving NTAs via certified mail; and updating the appropriate case management system to reflect that an NTA has been issued. To increase administrative efficiency, DHS, in conjunction with DOJ, should consider a regulatory change that would provide immigration judges with authority to adjudicate immediate relative petitions.

The Wedding Bell Blues: Processing of Removal of Conditions for Conditional Permanent Residents Based on Marriage

Congress enacted the Immigration Marriage Fraud Amendments Act of 1986 (IMFA) to deter marriage-based immigration fraud. The law imposes an initial two-year period of conditional residence on certain spouses and dependent children and establishes a procedure for removing the conditions through the filing of the Form I-751, *Petition to Remove Conditions on Residence*. The IMFA also mandated specific processing timeframes for the interview and adjudication of the Form I-751. However, due primarily to competing priorities, USCIS'

current Form I-751 processing times fail to comply with the statutory timeframes. Recent modifications made to the interview waiver criteria and decreased completion rates have exacerbated delays. Current wait times not only contribute to numerous challenges for Conditional Permanent Residents (CPRs), such as lapses in status documentation and delays in naturalization, but they also dilute the legislative intent of the IMFA and have resulted in unintended consequences that Congress had hoped to avoid. There are a variety of actions USCIS could take to increase efficiencies, manage expectations, and minimize the adverse impacts of processing delays, including:

- Lengthen the validity period for temporary evidence of CPR status to ensure CPRs have evidence of status throughout the processing of their Forms I-751;
- Remove the categorical requirement from the interview waiver criteria and rely solely on a risk-based analysis to promote the effective use of USCIS' resources;
- Post processing times for individual field offices to allow petitioners to have a better understanding of the applicable waiting times and to encourage accountability; and
- Improve the processing of concurrently pending Forms I-751/Forms N-400, *Applications for Naturalization*, by aligning the internal adjudicative platforms of these benefit requests; modifying the Form N-400 interview notice; and allowing the National Benefits Center (NBC) to adjudicate interview-waived Form I-751 petitions.

Accessing the Naturalization Starting Block: The Challenges of the Medical Disability Test Waiver Process

The Form N-648, *Medical Certification for Disability Exceptions*, is used by naturalization applicants seeking an exception to the English and/or civics requirements because of a physical or developmental disability or mental impairment. The form must be completed and signed by a licensed medical professional, specifically limited to a medical doctor, doctor of osteopathy, or clinical psychologist. Due to the complexity of the Form N-648 and the associated costs, it is often difficult to locate an affordable medical professional willing to complete the form. Insufficient training provided to both medical professionals and USCIS adjudicators typically results in incomplete information on the Form N-648 and disparate outcomes. Those seeking waivers also face lengthier processing times, and 2018 policy revisions designed to combat fraud have created challenges for legitimate applicants. USCIS should consider the following recommendations to improve Form N-648 processing:

- Pre-adjudicate concurrently filed Forms N-648 at the NBC to foster consistency and efficiency;
- Increase USCIS adjudicators' training to improve consistency;
- Expand the list of authorized medical professionals, such as by including nurse practitioners, to improve access to and raise the quality of information provided; and
- Increase targeted public engagements with authorized medical professionals and legal and community-based organizations that facilitate completion of Form N-648 to ensure effective assistance.

An Update on the Continuing Complications of USCIS' Digital Strategy

More than 15 years after USCIS initiated a transition to a modern digital platform, the agency still receives, transfers, and processes a significant number of immigration benefit requests through an antiquated paper-based system. Incremental progress has been steady, but timely development has been inhibited by several recurrent obstacles, including cost overruns, technical glitches, and missed deliverables. The COVID-19 pandemic and recent fiscal challenges have presented additional challenges. Pursuant to a Congressional mandate, USCIS has drafted a plan to establish electronic filing procedures for all immigration forms and to implement a system to facilitate two-way electronic communications with its customers by FY 2026. The CIS Ombudsman continues to be concerned about insufficient transparency; the selection criteria used to determine prioritization of online filing development; a lack of public engagement; and competing demands for future premium processing fees now that USCIS may use these funds to respond to adjudication backlogs. USCIS can address these concerns by prioritizing the development of high impact/volume immigration benefit filings and re-engaging with the impacted populations. While a full transition to end-to-end electronic processing is the ultimate goal, there are several interim measures USCIS should consider to improve processing, such as increasing the use of electronic communications, establishing a central portal for Form G-28, *Notice of Entry of Appearance as Attorney or Representative*, and expanding the public's ability to make filing fee payments by credit card for all forms.

Grading DHS's Support of International Student Programs

The effective administration of international student programs requires close coordination between multiple government (USCIS and ICE) and non-government entities. Designated School Officials (DSOs), who are responsible for ensuring foreign students remain compliant with immigration regulations, bear the brunt of ineffective collaboration between USCIS and ICE. While USCIS and ICE each have a specific oversight role with respect to students in the immigration system, the inadequate lines of communication and data exchange between these two agencies, and with DSOs, is problematic. The COVID-19 pandemic exacerbated long-standing challenges, including inconsistent guidance from ICE, lengthy USCIS processing times, and the inability to receive timely information from both agencies. Foreign students also experienced substantial delays in obtaining Optional Practical Training (OPT) application receipts from USCIS, which prompted the agency to expand its online filing capabilities. Through extensive stakeholder outreach, the CIS Ombudsman identified the following improvements needed to increase compliance and make government interactions more user-friendly:

- Foster collaboration between USCIS and ICE through the development of a DHS working group designed to: 1) identify and share best practices; 2) develop and issue coordinated guidance to mitigate communication gaps and create a unified data set; and 3) resolve conflicts in program operations;
- Enhance training for DSOs to improve understanding of advanced issues and fraud, including how to report student visa exploitation and national security vulnerabilities; and
- Eliminate communication barriers and address privacy concerns by establishing a process whereby students may authorize DSOs to contact USCIS on their behalf.

KEY FINDINGS: COMMONALITIES AND MOVING FORWARD

During the reporting period, the deleterious impact of the COVID-19 pandemic on USCIS' operations and financial condition underscored the continued need for:

- Expanded electronic filing and processing capabilities;
- Increased outreach with stakeholders; and
- Improved coordination between USCIS and other government agencies.

By focusing on these key objectives moving forward, USCIS will be better positioned to respond to unprecedented challenges and ongoing systemic issues. While USCIS ultimately requires additional revenue to address resource constraints, this year's report contains more immediate, cost-conscious recommendations designed to improve transparency, streamline certain procedures, and minimize the consequences of processing delays. The CIS Ombudsman will continue to engage with USCIS and stakeholders on these issues and put forward practical solutions that will remove barriers and improve the administration of our immigration laws.

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The Office of the CIS Ombudsman: Year in Review

Established by the Homeland Security Act of 2002, the Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) is an independent, impartial, and confidential office within the Department of Homeland Security (DHS). By statute, the CIS Ombudsman reports directly to the Deputy Secretary of DHS and operates independently from U.S. Citizenship and Immigration Services (USCIS). The CIS Ombudsman is responsible for observing, analyzing, and seeking to improve USCIS' processes, practices, and activities.

The mission of the CIS Ombudsman is to:

- Assist individuals and employers in resolving problems with USCIS;
- Identify trends and areas in which individuals and employers have problems dealing with USCIS; and
- Propose changes in USCIS' administrative practices to mitigate identified problems.[1]

The CIS Ombudsman achieves its mission by:

- Evaluating requests for case assistance from individuals and employers with cases before USCIS and, where appropriate, recommending that USCIS take corrective action;
- Facilitating interagency collaboration and conducting outreach with a wide range of public and private stakeholders;
- Working in partnership with USCIS to identify problems and improve responsiveness in the delivery of immigration benefits and services; and
- Reviewing USCIS' operations, researching applicable laws, regulations, policies, and procedures, and issuing recommendations (both formal and informal) to bring systemic issues to USCIS' attention for corrective action.

[1] Homeland Security Act of 2002 (HSA) § 452, Pub. L. No. 107-296, title IV; 6 U.S.C. § 272 (2002).

In 2020, in common with so many throughout the world, these activities and the people who carry them out were tested in unique ways.

The CIS Ombudsman's work continued throughout the pandemic. The CIS Ombudsman, like many other Federal government offices, shuttered its physical location in mid-March 2020 in an effort to "stop the spread" and reconstitute operations in compliance with Centers for Disease Control and Prevention (CDC) protocols. With a fully electronic case intake and management processing system, telework capabilities, and transferable public phone lines, it was a relatively simple transition to initiate fully remote work. Requests for case assistance continued to be handled, meetings were conducted online, and the Annual Report was issued in June 2020 as required by statute. In fact, public engagement actually increased, as appropriations were saved on travel expenses, and more stakeholders became reachable through remote means. Despite the challenges that this pandemic has triggered, the CIS Ombudsman has been able to take advantage of technology to expand its outreach efforts, and it has been successful meeting with a wide variety of stakeholders across the country.

The other activities of the office continued, albeit through the prism of the pandemic. Immigration law analysts, who come to the CIS Ombudsman from all walks of immigration-related areas, research and analyze each case individually, presenting the issues to USCIS and seeking answers until the case is resolved. The pursuit is to ensure that every applicant and petitioner is guaranteed a fair and equitable process. The CIS Ombudsman tries to help USCIS meet its own goals in terms of that processing.

When issues appear to trend, the Policy Division steps in. The CIS Ombudsman investigates those issues that appear to be deviations from accepted practice or procedure and determines whether USCIS needs to be made aware of the problem. It typically makes recommendations to resolve problems that appear contrary to law, policy, or guidance, usually at the lowest level possible to achieve a resolution. One example of this activity in 2020 was the observation of increasing numbers of requests for case assistance in obtaining receipts in early November. This led to specific recommendations to USCIS to contend with the rapidly-increasing "frontlog" of cases not receipted in at its lockboxes. Working with USCIS, the Policy Division

provided suggestions on the most relevant solutions impacting the affected populations. This group also makes formal recommendations that appear in this Annual Report and other places, and serves as the subject matter experts for the CIS Ombudsman in its public engagements and other activities.

The CIS Ombudsman expanded public outreach in 2020. One of the major developments for the CIS Ombudsman in 2020 was the establishment of the Public Engagement Division. The CIS Ombudsman devoted several positions to this new division to enable it to stand on its own. The CIS Ombudsman facilitates open and transparent communication with stakeholders to create awareness about the CIS Ombudsman's mission and gathers feedback on the issues individuals and employers experience while interacting with USCIS. The new division is responsible for:

- Hosting a variety of engagements such as listening sessions and national webinars;
- Expanding access to the CIS Ombudsman, particularly for vulnerable and underserved populations, such as those with limited English proficiency;
- Managing electronic communications and web content; and
- Collaborating with other federal, state, and local government agencies.

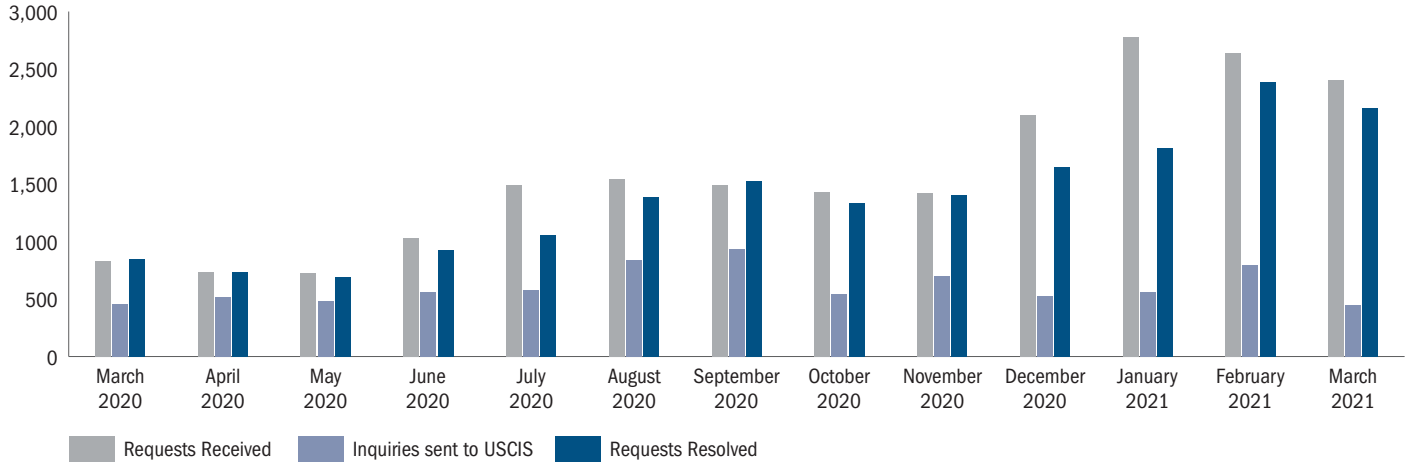
The CIS Ombudsman uses a data-driven approach to identify outreach opportunities and develop new communication strategies. These efforts have enabled the CIS Ombudsman to disseminate timely and relevant information related to immigration through multiple strategic communications channels. In 2020, the CIS Ombudsman hosted 126 engagements, including 10 national webinars with over 5,000 participants, and distributed electronic communications that reached over 209,000 stakeholders.

Following each engagement, the CIS Ombudsman coordinates closely with USCIS to elevate areas of concern, address follow up questions and provide additional resources to participants. In addition, the CIS Ombudsman tracks and analyzes stakeholder feedback on an ongoing basis to identify trends and persistent stakeholder concerns.

The pandemic has had a lasting impact. As discussed elsewhere in the Annual Report, the lasting legacy for USCIS from the pandemic year has been one of significant backlogs and extended inventory. The backlogs under which USCIS labors, however, have not only had an immediate impact on USCIS, but also on the CIS Ombudsman. The pandemic resulted in requests for cases assistance skyrocketing, as applicants sought to unstick cases outside normal processing times, obtain appointments for biometrics that proved elusive, and, increasingly, try to expedite their cases with USCIS. In 2020, the CIS Ombudsman received 14,618 requests for case assistance, well above the typical 10,000 to 11,000 requests received annually; for 2021, the office is already on its way to receiving twice the usual intake of requests. Without having twice the staff with which to process and carry these requests forward, the inevitable result is that it will take a longer time to do so.

Despite increased processing times, USCIS has declined to approve the vast majority of requests to expedite applications or petitions, leaving the CIS Ombudsman with no choice but to close many requests without being able to provide the assistance sought. Figure 1.1 *(CIS Ombudsman Requests for Case Assistance, March 2020–March 2021)*, shows the rapid increase in requests for

Figure 1.1: CIS Ombudsman Requests for Case Assistance, March 2020–March 2021



case assistance, especially through the fall of 2020 and winter of 2020–2021 when USCIS was contending with frontlog delays at its lockbox facilities as well as backlogs of pending applications and petitions well beyond processing goals among its adjudicating directorates. It also demonstrates the corresponding increase in requests in which the CIS Ombudsman could not offer assistance, either because the case was not yet outside of processing times, or relief was not available.

The CIS Ombudsman expedited 4,608 of the total 14,618 requests for case assistance received (32 percent) to USCIS. More than 70 percent of the expedited cases (3,304) related to Form I-765, *Application for Employment Authorization*. Other case types frequently expedited included Form I-485, *Application to Register Permanent Residence or Adjust Status*; Form I-130, *Petition for Alien Relative*; and Form I-539, *Application to Extend or Change Nonimmigrant Status*.

As 2020 ended, CIS Ombudsman requests for case assistance soared as applicants came not only to attempt to expedite existing cases, but also to obtain receipt numbers for applications trapped in the increasing frontlogs at the lockboxes. As mentioned above, the CIS Ombudsman brought these emerging trends to USCIS' attention and worked cooperatively with the agency to implement solutions. Some of the solutions adopted by the agency were those advocated by the CIS Ombudsman, such as the development of electronic filing for Form I-765 and the suspension of biometrics for nonimmigrant derivative populations.

An unknown post-pandemic future. USCIS will continue to grapple with challenges as the pandemic restrictions are lifted; backlogs of monumental proportions will have to be tackled. The agency has developed innovative processes for dealing with some of its biggest challenges, and hopefully those will continue to play a role as it moves into a post-pandemic world.

For its part, the CIS Ombudsman has taken from pandemic operations its own best practices and is planning on ways to improve their use to contend with its own challenges. Plans are underway to reduce our own backlog and accelerate "normal" processing times for our own assistance, with the understanding that USCIS backlogs will continue for quite some time. Our commitment this year has included resources to upgrade our own systems, including our website and instructions to customers to ensure better access to USCIS information and data to inform our work. Our commitment to our statutory mission remains undimmed, and we look forward to continuing to serve those who need our services.

TIPS FOR REQUESTING CASE ASSISTANCE FROM THE CIS OMBUDSMAN

✓ **Check USCIS' posted processing times, paying particular attention to the "Receipt date for a case inquiry" date, before contacting USCIS or the CIS Ombudsman**. Some cases require you look at the predicate application first, and initiate contact only after that date has passed. Among these are concurrently filed I-765s and I-131s (the I-765 date is controlling); I-539s and I-765s filed with them for applicants such as H-4s and L-2s (the I-539 date controls); and I-821D and I-765s (the application for deferred action, in this case for DACA, must be adjudicated first).

✓ **Contact USCIS first**. The CIS Ombudsman is an office of last resort. It is sometimes difficult to access the USCIS Contact Center, but try filing an online request (through *myUSCIS* or eRequest) or through EMMA, the agency's interactive artificial intelligence on its website.

✓ When submitting a request for case assistance to the CIS Ombudsman:

- Provide **basic documentation** such as G-28s (if filed by an attorney or representative), receipt notices, Requests for Evidence or Notices of Intent to Deny, and denial notices. The CIS Ombudsman will contact you if additional documentation is required. Please do not submit an entire petition!
- If you cannot submit the documentation through the online process, e-mail the documentation. Only mail or fax documents if you do not have access to a computer.
- You **must have standing** to submit a request for case assistance. That means you must be the **petitioner, applicant, or representative**. A beneficiary cannot submit a request for case assistance. For example, if you are an adjustment of status applicant, but the underlying immigrant visa petition has not yet been approved, the petitioner must submit the request.
- Submit the request under the **applicant or petitioner's name**, not the name of the law firm, school, or organization representing them.
- Provide a **clear and concise explanation** of the problem, case history, and how you would like the CIS Ombudsman to assist.
- If you are requesting expedited assistance, you must submit **documentary evidence of the urgency or hardship** (medical records, financial documents, letters from employers, etc.) and how you will be unable to withstand the hardship. Please provide specifics.
- If you are protected by **federal confidentiality provisions**, you must submit your "wet" (actual, not electronic) signature on section 12 of the Form DHS-7001 as an attachment. The CIS Ombudsman may communicate via email or telephone with legal representatives who have a properly completed Form G-28 on file with USCIS. The CIS Ombudsman can only communicate with unrepresented individuals protected by these confidentiality provisions *via postal mail* to the address on file with USCIS. **Your current address must be updated in the USCIS system because the CIS Ombudsman can only send mail to that address, not the one provided on the Form DHS-7001.**
- **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. After you have received your case numbers, you can let the CIS Ombudsman know the cases are related and should be worked together by emailing cisombudsman@hq.dhs.gov.
- Because many requests for help relate to mailing issues, please remember to **timely update your current address with USCIS** for every pending application or petition. The easiest way to do so is online at https://egov.uscis.gov/coa/displayCOAForm.do. **You must also submit an updated Form AR-11, *Alien's Change of Address Card* to USCIS to properly change your address.**

U.S. Citizenship and Immigration Services in the Time of COVID-19:

A Year Like No Other

INTRODUCTION

The year 2020 would have tested U.S. Citizenship and Immigration Services (USCIS) resources under any circumstances. Declining receipts and insufficient fees were already impacting the agency as the year began. The COVID-19 pandemic created unprecedented challenges requiring closures of offices that normally depend on face-to-face interaction, increased backlogs in virtually all form types, and a reduction in fee revenue, which thrust the agency into a state of fiscal panic. In this article, we review USCIS actions to mitigate the impact of the pandemic and identify "lessons learned" that can benefit the agency as normal operations return.

USCIS DURING THE COVID-19 PANDEMIC

The measures taken to mitigate the spread of COVID-19 drastically altered the Federal government's operations and management. With little notice, government agencies closed or limited access to offices and pivoted to remote work wherever possible to "stop the spread" and comply with Centers for Disease Control and Prevention (CDC) guidelines. For some Federal entities, particularly those with existing telework options in place, this transition was relatively straightforward. For others, it was far

more challenging and had agencies scrambling to make the shift in line with prior emergency preparedness planning efforts.[2] Like all Federal agencies, USCIS had a "Continuity of Operations" plan that, along with a "Pandemic Infectious and Emerging Diseases Workforce Protection Plan" and approximately 150 local implementation plans, provided the preparedness and operational details to ensure continuity of operations.[3]

Given USCIS operations, many of which rely on face-to-face interaction, the COVID-19 pandemic response created unique challenges. USCIS closed its offices to most employees in mid-March, except for skeletal staff handling true emergencies requiring in-person services.[4] This temporarily eliminated all in-person appointments conducted during a typical day. Scheduled in-person interviews, biometrics appointments, and oath ceremonies were canceled, and no new appointments were issued. USCIS remained open only for emergency in-person appointments obtained through the USCIS Contact Center, such as the provision of emergency advance paroles and Alien Documentation, Identification and Telecommunication (ADIT) stamps (also known as I-551 stamps).

Closures required planning and flexibility. Employees typically conducting in-person interviews in field and asylum offices were quickly reassigned to non-interview work. Although the agency was well-versed in telework and file tracking, the size and scope of the adjudication demands outside the office were unprecedented. Enabling officers tasked with adjudication (Immigration Service Officers, known as ISOs or officers) to access and return paper files in a safe, socially distanced manner presented unique challenges. With only 10 percent of its forms available for online processing (almost 20 percent of all submissions online in FY 2020),[5] this became a substantial operational challenge. With COVID-19, the number of staff needed to perform these necessary file administration and tracking duties was diminished, but the work itself expanded exponentially.

Among the pandemic-related changes, USCIS announced it would use previously submitted biometrics for applicants who had filed Form I-765, *Application for Employment Authorization*, to extend work authorizations.[6] This enabled the agency to continue processing applications for which biometrics were available when few changes had taken place in the applicant's biographical information so validity could be ensured. Petitioners and applicants were given an additional 60 calendar days after the response due date in a Request for Evidence, Notice of Intent to Deny, Notice of Intent to Revoke, or Notice of Intent to Terminate. Initially, this flexibility was extended to those whose request or notice was issued and dated by USCIS between March 1 and May 1, 2020;[7] this flexibility was extended several times. It remains in place for a request, notice, or decision issued between March 1, 2020, and September 30, 2021.[8] USCIS also temporarily amended certain H-2A and H-2B filing requirements to help employers meet workforce needs, allowing "porting" of workers with the filing of a petition rather than its approval (the flexibilities for H-2A workers remain in place).[9]

While USCIS made concessions to the pandemic's impact on applicants and petitioners, there were still adverse impacts on people's ability to make appointments and depart the United States. For example, USCIS published guidance on how to timely apply for an extension of status, reminding the public of the agency's authority to accept late applications. However, USCIS did not institute flexibilities for workers who sought to maintain status when their employers reduced work hours or switched to remote work locations, or for international students who were forced to return home as schools employed distance learning.

A public-serving entity that typically conducts thousands of daily in-person interviews cannot sustain remote work indefinitely. Resuming operations, even at a reduced capacity, was the goal. On April 4, 2020, USCIS

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[2] *See* Paul Kiernan, "Federal Government Urged to Close Offices to Contain Coronavirus," *The Wall Street Journal* (March 30, 2020); https://www.wsj.com/articles/federal-government-urged-to-close-offices-to-contain-coronavirus-11584132886 (accessed Jun. 3, 2021); *see also* Lia Russell, "Growing Pains, Successes in Remote Work During COVID-19," *FCW: The Business of Federal Technology* (Jun. 8, 2020); https://fcw.com/articles/2020/06/08/russell-telework-covid-hud-gsa.aspx (accessed Jun. 4, 2021).

[3] Information provided by USCIS (Jun. 14, 2021).

[4] USCIS News Alert, "USCIS Temporarily Closing Offices to the Public March 18-April 1" (Mar. 17, 2021); https://www.uscis.gov/news/alerts/uscis-temporarily-closing-offices-to-the-public-march-18-april-1 (accessed Jun. 4, 2021).

[5] Calculations performed by the CIS Ombudsman from information provided by USCIS, "2020 USCIS Statistical Annual Report," pp. 2, 22; https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf (accessed May 14, 2021).

[6] USCIS News Alert, "USCIS to Continue Processing Applications for Employment Authorization Extension Requests Despite Application Support Center Closures" (Mar. 30, 2020); https://www.uscis.gov/news/alerts/uscis-to-continue-processing-applications-for-employment-authorization-extension-requests-despite (accessed May 15, 2021).

[7] USCIS Webpage, "USCIS Expands Flexibility for Responding to USCIS Requests" (Mar. 30, 2020); https://www.uscis.gov/news/alerts/uscis-expands-flexibility-responding-uscis-requests (accessed May 15, 2021).

[8] USCIS Webpage, "USCIS Expands Flexibility for Responding to USCIS Requests" (Jun. 24, 2021); https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-5 (accessed Jun. 24, 2021).

[9] "Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency," 85 Fed. Reg. 21739 (Apr. 20, 2020); "Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency," 85 Fed. Reg. 28843 (May 14, 2020). DHS subsequently extended the flexibilities applied to H-2A workers several times; as this Report is being finalized, the flexibilities are in place through June 16, 2021. 85 Fed. Reg. 51304 (Aug. 20, 2020); 85 Fed. Reg. 82291 (Dec. 18, 2020).

announced its intention to begin reopening offices "on or about" June 4, 2020.[10] The intervening time was spent adjusting office operations and reconfiguring space to accommodate social-distancing measures recommended by the CDC. In a tremendous effort encompassing its 88 field offices, USCIS reconfigured public-facing activities for a pandemic. In reestablishing in-person services, such as interviews and naturalization ceremonies, the Field Operations Directorate (FOD) worked closely with USCIS medical professionals to develop procedures that adjusted public facilities to incorporate social distancing and other COVID-19 mitigation efforts into the daily routine. Instructions went to both the workforce and the public needing access, exhorting appropriate mask-wearing, illness monitoring, and limited entry. USCIS instructed visitors in everything from physical approach to time limitations, to recommending applicants bring "their own black or blue ink pens" for signing documents;[11] it was a thorough preparation for reentry into a COVID-altered world.

Reopening with reduced services. In the first few weeks of reopening, field offices cautiously resumed in-person services at 25 percent of capacity.[12] As the agency reopened offices in June and July, it prioritized naturalization ceremonies for those whose applications had been completed before pandemic office closures. The agency also prioritized naturalization interviews over interviews for other filing types (adjustment of status, special immigrant juveniles, those seeking removal of conditions on permanent residence). As of October 2020, USCIS field offices were all open. Services were increased to approximately 50 percent of pre-pandemic levels, although this varied from office to office.[13]

Limited physical space and capacity meant the agency performed fewer activities than normal. While officers could continue other activities (including adjudications) remotely, field office restrictions meant fewer interviews took place, and fewer people participated in naturalization oath ceremonies. This had a cumulative effect, as no office could work at full capacity, and necessary physical interactions—at asylum offices, at field offices, and especially at Application Support Centers (ASCs) that were also returned to partial capacity—could not take place. For example, by the end of August, the agency had naturalized almost all applicants awaiting an oath ceremony since offices had closed in March.[14] However, fewer naturalization interviews had taken place—none, certainly, from March until June, and fewer than normal even as offices staffed up. USCIS soon had a backlog of thousands of in-person appointments to reschedule, and fewer resources with which to conduct these interviews.

Further financial challenges. USCIS was already experiencing fiscal insecurity before the pandemic; its fiscal issues were exacerbated by it.[15] USCIS is a fee-based agency. It relies on a predictable fee revenue and its carryover from the previous year.

Carryover has been significant in previous years. In FY 2019, the carryover was a total of $1.4 billion, with a non-premium processing carryover portion of $802 million and a premium processing carryover of $606 million that, at that time, could only be spent on the agency's digital strategy efforts.[16] By the start of FY 2020, USCIS had reduced its carryover balance to $845 million, of which $414 million was non-premium and could be spent without restraint; the other $431 million was from premium processing funds and thus restricted.[17] For an agency whose dependency on fees is almost absolute, this carryover depletion was a significant problem; the revenue disruption would impede its ability to meet its obligations. The agency ordered all components to reduce their budgets by over 30 percent and imposed a hiring freeze that would last into FY 2021.[18] The volume of receipts did recover to near pre-pandemic levels by the end of FY

[10] USCIS Press Release, "USCIS Offices Preparing to Reopen on June 4" (Apr. 24, 2020); https://www.uscis.gov/news/alerts/uscis-offices-preparing-to-reopen-on-june-4 (accessed May 18, 2021).

[11] USCIS Web Alert, "USCIS Preparing to Resume Public Services on June 4" (May 27, 2020); https://www.uscis.gov/news/alerts/uscis-preparing-to-resume-public-services-on-june-4 (accessed May 12, 2021).

[12] CIS Ombudsman's Webinar Series, "USCIS and CIS Ombudsman Joint Engagement on USCIS' Current State of Operations," November 19, 2020.

[13] *Id*.

[14] "2020 USCIS Statistical Annual Report," p. 2; https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf (accessed May 14, 2021).

[15] The reasons for USCIS' depletion of available monies, especially in light of its increasing processing times, are not the subject of this article. It must be noted, however, that it has been asserted the agency's emphasis on vetting, fraud detection, and other changes in policy in the years preceding FY 2020 are at least partially to blame for the fiscal dilemma in which the agency found itself in FY 2020. *See, e.g.*, C. Rampell, "Trump wasted so much money harassing immigrants that his immigration agency needs a bailout," *Washington Post* (Jun. 11, 2020); https://www.washingtonpost.com/opinions/trump-is-so-set-on-harassing-immigrants-that-his-immigration-agency-needs-a-bailout/2020/06/11/52c2ae06-ac1b-11ea-9063-e69bd6520940_story.html (accessed May 15, 2021).

[16] USCIS Report to Congress, "Immigration Examinations Fee Account: Fiscal Year 2019 Statement of Financial Condition" (Jun. 23, 2020); https://www.uscis.gov/sites/default/files/document/reports/IEFA-FY2019-Statement-of-Financial-Condition-Report-to-Congress.pdf (accessed May 17, 2021).

[17] CIS Ombudsman's Webinar Series, "USCIS and CIS Ombudsman Joint Engagement on USCIS' Fiscal Challenges," October 28, 2020. To compare, the non-premium processing carryover portion increased from $790 million in FY 2018 to $802 million in FY 2019 (a net gain of $12 million). USCIS, "Immigration Examinations Fee Account: Fiscal Year 2019 Statement of Financial Condition" (Jun. 23, 2020); https://www.uscis.gov/sites/default/files/document/reports/IEFA-FY2019-Statement-of-Financial-Condition-Report-to-Congress.pdf (accessed June 22, 2021).

[18] *Id*.

2020.[19] During the months field offices were closed to the public, however, incoming receipts were 32 percent lower compared to the same time period in FY 2019. Ultimately, USCIS received "about 12 percent fewer receipts than projected" in FY 2020, and about 5 percent fewer receipts than in FY 2019.[20] Given the uncertainty of the pandemic, accurately forecasting revenue through FY 2020 was extremely difficult.

A furlough that almost happened (twice). Only 2 months after the office closures, on May 15, 2020, Deputy Director for Policy Joseph Edlow, the acting head of USCIS, notified Congress of a projected pandemic-related budget shortfall and requested emergency funding of $1.2 billion, to be repaid by adding a 10 percent surcharge to new applications.[21] Without this funding, USCIS asserted it would lack sufficient funds to maintain operations through the end of the fiscal year or to carry over into the first quarter of FY 2021. The furlough was initially scheduled to begin on July 20, but the agency identified additional revenue and cost savings to extend the potential furlough date to August 30.[22] Testifying before Congress in July, Deputy Director Edlow announced that, although receipts and revenue had improved, it was insufficient to insulate the agency, and that it had issued furlough notices scheduled to begin August 30, 2020 to "nearly 70 percent of our employees [some 13,000 employees] and informed them that without funding from Congress, we will have no choice but to proceed with large-scale furloughs into the next fiscal year."[23] The agency engaged in furlough preparations, which included determining essential personnel who would remain behind and retraining them to handle essential activities. Furlough preparation efforts were well-documented to the staff, which in turn adversely impacted morale.

Ultimately, a furlough became unnecessary. On August 25, 2020, USCIS announced its avoidance of a furlough "as a result of unprecedented spending cuts and a steady increase in daily incoming revenue and receipts."[24] USCIS transferred those "unprecedented spending cuts" to its operations. Without an infusion of money from Congress, it was "forced to implement severe cost cutting efforts that will have an impact on agency operations and will result in the descoping of contracts and a reduction in the number of contractors who assist our federal workforce."[25] These contract cuts were felt across the agency and continue to adversely impact many of its operations and administrative activities.

A failed fee rule. One of the major reasons for USCIS' fiscal pressures was disclosed in its proposed rule to raise fees published in November 2019: it was processing applications at what was essentially a loss. In that proposed rule, USCIS noted:

> Based on current immigration benefit and biometric services fees and projected volumes, USCIS expects fees to generate $3.41 billion in average annual revenue in FY 2019 and FY 2020. For the same period, the average annual cost of processing those immigration benefit requests and providing biometric services is $4.67 billion. This yields an average annual deficit of $1.26 billion. In other words, USCIS expects projected FY 2019/2020 total operating costs to exceed projected total revenue.[26]

USCIS published the final fee rule on August 3, 2020; it was to become effective 60 days later, on October 2, 2020.[27] The final rule would have increased fees by a weighted average of around 20 percent, imposed new fees, made changes to a number of forms, and limited fee waivers. It was subsequently enjoined nationwide through court action just before its implementation date.[28] This left the agency without the new fees it needed to keep

[19] USCIS, "2020 USCIS Statistical Annual Report," pp. 2–3; https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf (accessed May 31, 2021).

[20] *Id*.

[21] USCIS Press Release, "Deputy Director Statement on USCIS' Fiscal Outlook," June 25, 2020; https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook (accessed May 17, 2021).

[22] USCIS Stakeholder Engagement, "USCIS Offices Resume In-Person Services Engagement" (Jun. 18, 2020); https://www.uscis.gov/outreach/uscis-offices-resume-in-person-services (accessed June 4, 2021).

[23] "Oversight of U.S. Citizenship and Immigration Services," *before the* Subcommittee on Immigration and Citizenship *of the* House Committee on the Judiciary, 116th Cong. 2nd Sess. (Jul. 29, 2020) (statement of Joseph Edlow, Deputy Director for Policy, USCIS); https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=110946 (accessed May 17, 2021).

[24] USCIS News Release, "USCIS Averts Furlough of Nearly 70% of Workforce" (Aug. 25, 2020); https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce (accessed May 17, 2021).

[25] USCIS, "Message from the Deputy Director for Policy—Cancellation of Administrative Furlough" (Aug. 25, 2020)(in the possession of the CIS Ombudsman).

[26] "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. 62280, 62288 (Nov. 14, 2019).

[27] "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788 (Aug. 3, 2020).

[28] *Immigration Legal Resource Center et al. v. Wolf et al.*, 20-cv-05883-JWS (Sept. 29, 2020).

pace with its costs. As the agency noted in the proposed rule, its other choices were to cut back on its projected expenditures or eat further into its shrinking carryover.[29]

Congress did supply a solution, however. On September 30, 2020, the President signed legislation containing language from the Emergency Stopgap USCIS Stabilization Act.[30] It allowed the agency to access premium processing funds, normally dedicated to infrastructure (electronic processing) improvements, for other expenses. More significantly, it raised existing premium processing fees and authorized the agency to expand premium processing to other form types. USCIS quickly took advantage of the increases to raise the premium processing fee for Form I-140, *Immigrant Petition for Alien Worker,* and Form I-129, *Petition for a Nonimmigrant Worker,* from $1,400 to $2,500.

Premium processing, however, is labor-intensive. The agency was already suffering from attrition of employees who could not be replaced as the hiring freeze continued. Dedicating officers to adjudicate premium processing cases would result in longer processing times for non-premium applications and petitions. The unpredictability of the number of applications that might be converted to premium processing also limited USCIS' ability to implement this option. For example, the legislation specifically lists form types the agency can now explicitly premium process; most notably, Form I-765, one of the most commonly filed forms (USCIS receives millions of these applications annually).[31] Without knowing how many filings would be converted into premium processing, the agency cannot accurately predict staffing needs. Accordingly, the agency started out conservatively, adding only E-3 specialty occupation petitioners to premium processing on February 24, 2021.[32] More forms are expected to be available for premium processing, in conformance with the expansion granted by the Emergency Stopgap USCIS Stabilization Act, as the agency works through these issues and prepares a required regulation to implement the provisions.[33]

Limitations of innovative solutions. The agency continued limited in-person services through the summer and fall of 2020. USCIS encouraged field office innovations, particularly as they applied pandemic measures to priorities such as oath ceremonies. This led to different ceremony arrangements: small group ceremonies in existing indoor, outdoor, or off-site settings; individualized ceremonies at existing information counter stations; and curbside ceremonies outside field offices.[34] Other innovations allowed work to continue, such as remote interviews, interviews in the same field office but where the officer is in another room, and broad application of waiver criteria.

The ASC closures, however, have had a tremendous, long-lasting impact on USCIS adjudications. ASCs, which capture biometrics and play a pivotal role in numerous applications, also began to resume operations, but at a limited capacity, subject to social-distancing restrictions. Although USCIS announced the reuse of biometrics where possible, the circumstances under which biometrics can be reused is somewhat limited; to assure validity, key data must match exactly. At the outset of the pandemic, approximately 280,000 appointments were canceled. Even after reopening, the ASCs were operating at 65 to 70 percent capacity at best.[35] ASC appointment backlogs led directly into adjudication backlogs, which have adversely affected the processing times of those pending applications and petitions requiring biometrics.

Once the ASCs reopened in late summer and early fall, USCIS had to reschedule biometrics appointments canceled early in the pandemic and schedule appointments for applications filed in the intervening time. To provide the most efficient adjudications, the Immigration Records and Identity Services Directorate (IRIS), responsible for scheduling these appointments, prioritized the scheduling. The adjudicative directorates (Field Operations Directorate, Refugee, Asylum and International Operations

[29] "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62288 (Nov. 14, 2019).

[30] Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. 116-159, Div. D, Title 1, Sec 4102, as codified at 8 U.S.C. § 1356(u).

[31] In FY 2020, USCIS received 1,999,895 Forms I-765, *Application for Employment Authorization*. USCIS Webpage, "Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type, Fiscal Year 2020;" https://www.uscis.gov/sites/default/files/document/reports/I-765_Application_for_Employment_FY03-20.pdf (accessed May 18, 2021).

[32] USCIS News Alert, "USCIS Expands Premium Processing Service to E-3 Petitioners" (Feb. 24, 2021); https://www.uscis.gov/news/alerts/uscis-expands-premium-processing-service-to-e-3-petitioners (accessed May 18, 2021).

[33] DHS lists a Final Rule on the Spring 2021 Unified Regulatory Agenda, which specifically references the intent to "establish new benefit requests eligible for premium processing and the associated fees made available" in the Emergency Stopgap USCIS Stabilization Act. Office of Management and Budget, "Spring 2021 Unified Regulatory Agenda" (Jun. 11, 2021); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC73 (accessed June 11, 2021).

[34] CIS Ombudsman's Webinar Series, "USCIS and CIS Ombudsman Joint Engagement on USCIS' Fiscal Challenges," October 28, 2020.

[35] CIS Ombudsman's Webinar Series, "USCIS and CIS Ombudsman Joint Engagement on USCIS' Current State of Operations," November 19, 2020.

Directorate, and Service Center Operations Directorate) set the biometric services appointment scheduling priorities based on the inventory of specific benefit request types.[36]

As a result, although biometrics appointment distribution within a benefit type (naturalization, adjustment, extensions of status) was made in first-in, first-out order, USCIS was scheduling biometrics appointments for applications with longer processing times after those whose forms reflect shorter processing times, regardless of filing order. By mid-November, although USCIS was scheduling approximately 10,400 appointments daily, there were approximately 1.3 million applications awaiting biometrics.[37] Biometric appointment delays perpetuated long processing cycles for applications slated as a lower priority for appointments.[38] The backlog continued to grow as the number of applications needing appointments continued to exceed the number of available appointments.

Finally, on May 13, 2021, USCIS announced that it would temporarily suspend the biometrics requirement for the extensions of derivatives of H, L, and E visas, beginning on May 17, 2021.[39] The suspension is expected to last for 2 years. While this greatly reduces the number of applications requiring biometrics, backlogs in scheduling others will continue for some time.

THE FINAL BLOW: MORE BACKLOGS

Backlogs are nothing new to USCIS. In fact, the agency was created while under a backlog oversight plan.[40] In 2019, cases that were outside processing time goals had grown sufficiently for Congress to hold a hearing to review USCIS backlogs.[41]

The pandemic's closures, social-distancing measures, delayed reopenings, the continued hiring freeze, and the corresponding inability to pivot to more premium processing, left the agency vulnerable to rapidly increasing processing times as receipts returned to near pre-pandemic levels. Not surprisingly, those applications and petitions needing in-person contact, in interviews or biometrics, have been more adversely impacted.

Long-lasting impacts. Two additional events have had immediate, far-reaching effects on processing times that have lasted well into FY 2021. First, as mentioned above, USCIS sought a fee increase and, as is typical, applicants and petitioners sought to file ahead of the implementation to avoid the increased fees. Second, a new fiscal year signaled as of October 1, 2020, the introduction of new priority dates for immigrant visas, especially employment-based immigrant visas. Thousands of applicants became eligible to file as their priority dates became current. The result was an inundation of filings at the lockboxes in October. COVID-19 and contractor cuts meant fewer employees available to handle a substantial increase in volume at the lockboxes. This led to a "frontlog" of hundreds of thousands of applications and petitions that for months could not be logged and forwarded for adjudication.

THE POST-COVID ENVIRONMENT

Backlogs continue at record levels. While USCIS grapples with solving its increasing workloads, application filings and adjudication delays continue. The agency must still schedule backlogged biometrics appointments, even though USCIS announced it would temporarily suspend the biometrics requirement for the extensions of certain derivatives of H, L, and E visas.[42] To reduce biometric services appointment wait times, certain ASCs began scheduling appointments during extended hours.[43] Contract cuts and de-obligations have left certain functions, in particular many of the customer service functions, less attended to than ever before, frustrating applicants and petitioners seeking information, appointment adjustments, or emergency services appointments. While the agency recently lifted its hiring freeze, it will take months, if not years, to re-achieve full staffing.

[36] Information provided by USCIS (Oct. 30, 2020).

[37] CIS Ombudsman's Webinar Series, "USCIS and CIS Ombudsman Joint Engagement on USCIS' Current State of Operations," November 19, 2020.

[38] USCIS announced on May 13, 2021, that it would suspend biometrics requirements for certain nonimmigrants (specifically, H-4, L-2 and E visa applicants). USCIS News Alert, USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants (May 13, 2021); https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants#:~:text=Effective%20May%2017%2C%202021%2C%20U.S.,2%2C%20and%20E%20nonimmigrant%20status (accessed May 28, 2021).

[39] USCIS News Alert, "USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants" (May 13, 2021); https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants (accessed May 18, 2021).

[40] USCIS, "Backlog Elimination Report Update: June 16, 2004," https://www.aila.org/File/DownloadEmbeddedFile/44829 (accessed May 18, 2021).

[41] "Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services," *before the* Subcommittee on Immigration and Citizenship *of the* U.S. House of Representatives Committee on the Judiciary, 116th Cong. 1st Sess. (Jul. 16, 2019); https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2273 (accessed May 19, 2021).

[42] USCIS News Alert, "USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants" (May 13, 2021); https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants (accessed May 18, 2021).

[43] USCIS Webpage, "USCIS Response to COVID-19" (May 17, 2021); https://www.uscis.gov/about-us/uscis-response-to-covid-19 (accessed May 21, 2021).

Insufficient revenue. USCIS is still running at a revenue loss. When it proposed new fees in November 2019, the agency admitted it had underestimated the previous fee raises and was running at a deficit.[44] As mentioned, the final rule promulgated in the November 2019 proposal was enjoined in September 2020, on the eve of its effective date. USCIS has announced its intention to issue a new fee rule but has not yet proposed one.[45] Fees that reflect the actual costs of the agency, representing sufficient revenue for current operations, are months, if not years, away. The discretionary budget request submitted by the Administration to Congress on April 9, 2021, includes a request for $345 million "to address naturalization and asylum backlogs, support up to 125,000 refugee admissions in 2022, and allow for systems and operations modernization."[46] Without a significant infusion of funding, whether from customer filings or from Congress, USCIS is not well-placed to overcome its fiscal challenges. The preamble to the 2019 Notice of Proposed Rulemaking acknowledged that even with higher fees, the agency expected it would not have sufficient resources to process workloads and that "it will take several years before USCIS backlogs decrease measurably."[47] The pandemic's impact has not changed that outlook, and instead has reinforced the expectations that insufficient revenue will mean continuing backlogs and lengthening processing times.

CONSIDERATIONS AND RECOMMENDATIONS

While USCIS recovers from pandemic impacts and returns to "normal" processing, lessons learned may mitigate some lingering challenges. The CIS Ombudsman suggests USCIS consider certain measures as it works through its substantial backlogs.

- *The agency cannot rely solely on fees.* USCIS runs its fee-setting calculations on a required cycle, projecting future revenue requirements and expected receipts to create a fee structure that should accurately predict both. There is, however, too much unpredictability to accurately predict future revenue. Despite USCIS' considerable efforts, too many variables exist to accurately capture them. Policy changes or pandemics, or both, can occur in any given fee cycle. The backlogs that now exist at the agency are a direct result of, among other things, the lack of revenue sufficient to account for the actual costs. This lack of predictability not only undercuts its ability to perform its essential mission, it also can have an adverse impact on employee retention and morale. The experiences over the past year underscore the urgency of comprehensively reexamining the agency's funding and staffing models.

- *Continue pandemic best practices into the post-pandemic future.* USCIS offices thought creatively and considered a wide range of approaches to accomplish the mission despite social-distancing guidelines and limited workforce capacity. Many of the activities that resulted—expanded remote work, generous use of interview waiver criteria, drive-through oath ceremonies, biometrics reuse, prioritizing online filing, remote appearances of legal representatives, remote interview pilots—have demonstrated the best of the entrepreneurial creativity of the USCIS workforce and have saved the agency money. The post-pandemic workplace should continue to foster innovation to maximize capacities and resources. Office footprints may shrink, as more interviews are conducted cooperatively across offices, for instance, using workforce capacity to predominate over in-person local adjudications.

- *The agency needs to develop and implement a strategic backlog reduction plan.* Eliminating the backlog will depend not only on additional funding (whether appropriated or through new fees, or both) but on expanding many of the innovative practices fostered during the pandemic and be informed by proposals for regulatory and other changes, including public input. A true strategic approach accounts for the full impact of contemplated policy and regulatory changes and matches operational demands with resources. The strategy must acknowledge that backlogs are the primary impediment to the Administration's stated goal of eliminating barriers to full access to legal immigration benefits. Backlogs often require multiple filings by customers that would otherwise be unnecessary (to maintain status, to travel, to work, etc.), therefore adding further to the backlog, consuming critical resources, and creating diversion of other resources (emergency appointments, expedite requests, Contact Center interactions) that impact customer services. Centralizing some of the most essential

[44] "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. 62280, 62288 (Nov. 14, 2019).

[45] DHS lists a Notice of Proposed Rulemaking for new fees on the Spring 2021 Unified Regulatory Agenda with a proposed publication date of November 2021. Office of Management and Budget, "Spring 2021 Unified Regulatory Agenda" (Jun. 11, 2021); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC68 (accessed June 11, 2021).

[46] Executive Office of the President, Office of Management and Budget, "Summary of the President's Discretionary Funding Request," pp. 15–16 (Apr. 9, 2021); https://www.whitehouse.gov/omb/fy-2022-discretionary-request/ (accessed May 20, 2021).

[47] "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62294.

activities may prove as helpful as decentralizing others. The pandemic created an unprecedented opportunity to streamline the use of agency resources, but USCIS has to pick up and take those innovations further than ever before to successfully resolve this latest backlog situation.

- *USCIS should resist the temptation to divert significant money from the agency's digital strategy*. While Congress provided the ability to use monies obtained through premium processing for items other than technological improvements, and while some of this money may be needed for essential operating costs, the value of USCIS' digital strategy cannot be overstated. The CIS Ombudsman has long observed that electronic filing and processing can improve efficiencies, assist officers, and minimize filer error. Electronic adjudication assists USCIS in maximizing workforce capacity (across directorates and across the country). A year in which files had to be tracked and transferred showed the agency the wisdom of investing in digital conversion of the forms inventory.
- *USCIS should engage in a comprehensive education campaign on its e-tools.* The agency has made many innovations in recent years in e-access and e-tools. These tools are only valuable, however, if they are used by the public. USCIS should advertise in more detail and to more diverse communities those functions applicants can use to help themselves. This would help eliminate duplication of effort, help conserve resources for those truly needing them, but also grant ownership to those most impacted.
- *Getting information to the public is critical*. The past year has shown us that a pandemic brings with it many unknowns. The agency had to keep its workforce apprised of many changes; it also had to ensure the regulated community was fully informed of operational challenges. A robust public engagement effort to anticipate and manage expectations, including the sharing of setbacks, as well as gains, will mitigate at least some of the adverse impact on the filing community as USCIS works to bring itself fully online.

NTA Issuance: Problems Persist

Responsible Directorates: Field Operations Directorate, Service Center Operations Directorate

INTRODUCTION

On January 20, 2021, the Acting Department of Homeland Security (DHS) Secretary David Pekoske rescinded the 2018 guidance for the issuance of Notices to Appear (NTAs), and directed U.S. Citizenship and Immigration Services (USCIS) to revert to its 2011 Policy Memorandum No. 602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*.[48] The scope of the two memoranda and their impact on noncitizens subject to removal differed dramatically, but important systemic issues related to implementation remain unaddressed.

This article examines these ongoing systemic issues and the challenges of coordination between three agencies: USCIS, which has jurisdiction over immigration benefits; U.S. Immigration and Customs Enforcement (ICE), which has lead responsibility for immigration enforcement, and the Department of Justice's (DOJ) Executive Office

[48] DHS Memorandum, "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (Jan. 20, 2021); https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf (accessed Apr. 1, 2021).

for Immigration Review (EOIR), the immigration court system. The article highlights concerns raised to the CIS Ombudsman by stakeholders related to NTA service issues, jurisdictional problems, and the overall lack of transparency in the process. Finally, it discusses specific items that USCIS must consider, in collaboration with ICE and EOIR, as it works to finalize updated NTA guidance.

BACKGROUND

Under the Immigration and Nationality Act (INA), USCIS may initiate a removal proceeding of a noncitizen believed to be erroneously present in the United States by preparing and serving Form I-862, *Notice to Appear*, on a noncitizen and on EOIR.[49] While certain NTAs are required by law,[50] published guidance reflects enforcement priorities and establishes the circumstances under which USCIS also issues NTAs as a matter of discretion. USCIS officers follow the guidance to determine whether they should refer cases to ICE, the agency responsible for litigating and enforcing removal, to determine whether an NTA is appropriate.

On November 7, 2011, USCIS issued Policy Memorandum No. 602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (*hereinafter* 2011 NTA Memo). This guidance aligned with ICE's priorities for removal at the time it was issued,[51] and complemented earlier DHS directives regarding prosecutorial discretion and docket efficiency.[52] The 2011 NTA Memo established review panels to seek ICE's advice in deciding whether to issue an NTA.

On June 28, 2018, USCIS rescinded the 2011 NTA memo and released Policy Memorandum No. 602-0050.1, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (*hereinafter* 2018 NTA Memo).[53] The 2018 NTA Memo significantly expanded the range of circumstances in which USCIS could issue NTAs to noncitizens seeking immigration benefits. The increase in the number of noncitizens requiring an NTA exposed pervasive problems such as: a misalignment between prosecutorial discretion practices and finite government resources;[54] ineffective coordination resulting in agencies working at cross purposes; and persistent jurisdictional issues hindering administrative efficiency.

The rescission of the 2018 NTA memo may result in fewer USCIS-issued NTAs, but coordination and policy considerations still require resolution.

MAJOR CHANGES IN NTA GUIDANCE REFLECT COMPETING POLICY CONSIDERATIONS

The 2018 NTA Memo was guided by expanded enforcement priorities identified within Executive Order 13768, *Enhancing Public Safety in the Interior of the United States.*[55] As a result, it made more noncitizens subject to removal proceedings. The 2018 NTA Memo also made two significant procedural changes: 1) it instructed USCIS officers to issue NTAs to noncitizens and to serve them on EOIR directly and without deference to ICE; and 2) it modified USCIS' process for exercising prosecutorial discretion to not issue an NTA by removing ICE employees from the panels that considered such requests, and by instructing USCIS employees on the panels to exercise discretion in "very limited circumstances." Unlike the 2011 guidance, the default of the 2018 guidance was to issue an NTA.

[49] INA §§ 103(a), 239; 8 U.S.C. §§ 1103(a), 1229; 8 CFR §§ 2.1, 239.1 Immigration and Customs Enforcement and Customs and Border Protection also have authority to issue NTAs. EOIR encompasses the immigration courts. *See* Delegation by the Secretary of the Department of Homeland Security to the Bureau of Citizenship and Immigration Services, Delegation Number 0150.1; Paragraph II(N).

[50] For a list of NTAs currently required by statute or regulation, see USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," p. 2 (Nov. 7, 2011); https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf (accessed Apr. 1, 2021).

[51] *See* ICE Memorandum, "Civil Immigration Enforcement: Priorities for Apprehension, Detention and Removal of Aliens" (Mar. 2, 2011); https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf (accessed Apr. 1, 2021).

[52] *See* ICE Memorandum, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions" (Aug. 20, 2010); https://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf (accessed Apr. 1, 2021); *see also* USCIS Policy Memorandum, "Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings," (Feb. 4, 2011); https://www.uscis.gov/sites/default/files/document/memos/guidance-adjudication-remove-proceedings.pdf (accessed Apr. 1, 2021).

[53] USCIS Policy Memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (Jun. 28, 2018); https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf (accessed Apr. 1, 2021).

[54] As of March 31, 2021, there are 1,293,896 cases pending before EOIR. *See* EOIR Webpage, "EOIR Adjudication Statistics, Pending Cases, New Cases, and Total Completions" (Apr. 19, 2021); https://www.justice.gov/eoir/page/file/1242166/download (accessed May 19, 2021).

[55] Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (Mar. 6, 2017); 82 Fed. Reg. 13209, 13215 (Mar. 9, 2017). On January 20, 2021, Executive Order 13780 was rescinded. *See* Proclamation 10141, "Ending Discriminatory Bans on Entry to the United States" (Jan. 20, 2021); 86 Fed. Reg. 7005 (Jan. 25, 2021).

	2018 NTA Memo	2011 NTA Memo
Enforcement Priorities	· National security cases; · Fraud, misrepresentation, or abuse of public benefits cases; · Criminal cases;[56] · Noncitizens not lawfully present in the United States or subject to other grounds of removability; and · Removable Form N-400 applicants.[57]	· National security cases; · Fraud cases with a statement of findings substantiating fraud; · Criminal cases; and · Removable Form N-400 applicants.
ICE Involvement in NTA Issuance	· USCIS *should* defer to ICE (and CBP) regarding the appropriate timing of any NTA issuances to former Temporary Protected Status (TPS) beneficiaries after the country's TPS designation ends. · USCIS *should* refer Egregious Public Safety (EPS) cases to ICE prior to adjudication (post-adjudication for I-90 applicants and any other adjudications where USCIS has not issued an NTA). · USCIS *should* refer non-EPS cases to ICE prior to final adjudication, where it does not issue an NTA, and the noncitizen appears inadmissible or deportable from the U.S. based on a criminal offense. · For both EPS and non-EPS cases, USCIS *will* issue an NTA against removable noncitizens in all cases if the application or petition is denied and the noncitizen is removable.	· USCIS *will* refer all EPS cases to ICE prior to adjudicating the case. · For non-EPS cases, USCIS *will* complete the adjudication and then refer the case to ICE. · For both EPS and non-EPS cases, ICE will have an opportunity to decide if, when, and how to issue an NTA and/or detain the noncitizen. USCIS *will not* issue an NTA in these cases if ICE declines to issue an NTA.
Exercise of Discretion	· A Prosecutorial Review Panel must be maintained at each office authorized to issue NTAs. · The panel must include a local supervisory officer, and a local USCIS Office of the Chief Counsel (OCC) attorney. · The panel determines whether to recommend the exercise of prosecutorial discretion *not* to issue an NTA. · A Field Office Director, an Associate Service Center Director, the Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations must concur with the recommendation to exercise prosecutorial discretion.	· Each field office must form a Form N-400 NTA Review Panel. · The panel must include a local supervisory officer, a local USCIS OCC attorney, and a district representative. An attorney from ICE's local Office of the Principal Legal Advisor (OPLA) will be invited to participate and will have an advisory role on the panel. · The panel will make the final determination on whether *to* issue an NTA. · If consensus cannot be reached by the panel, the case is elevated to the District Director for a final decision. · USCIS will receive notice before an ICE attorney exercises prosecutorial discretion and dismisses, suspends, or closes a case. The panel will work with ICE to resolve cases where USCIS does not agree with ICE's use of prosecutorial discretion in a particular case.

IMPACT OF 2018 NTA MEMO: BY THE NUMBERS

It was anticipated that the 2018 NTA Memo would result in USCIS issuing more NTAs directly to noncitizens under its jurisdiction. Although the universe of noncitizens subject to receiving an NTA was expanded by the 2018 guidance, which went into effect at the beginning of Fiscal Year (FY) 2019,[58] the number of NTAs that USCIS issued only increased by 0.1 percent from FY 2018 to FY 2019. *See* Figure 2.1 *(NTAs Issued by USCIS per Fiscal Year)*.[59] The expected increase in NTAs that never materialized suggests that individual officers were unable to take on this added responsibility. Similarly, while the agency committed to tracking and publicizing the data on the prosecutorial review panels, this information was never released.[60]

[56] Criminal cases include removable noncitizens convicted or charged with any criminal office, as well as removable noncitizens who committed acts that constitute a chargeable criminal offense. *See* USCIS Policy Memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," p. 6 (Jun. 28, 2018); https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf (accessed Apr. 1, 2021).

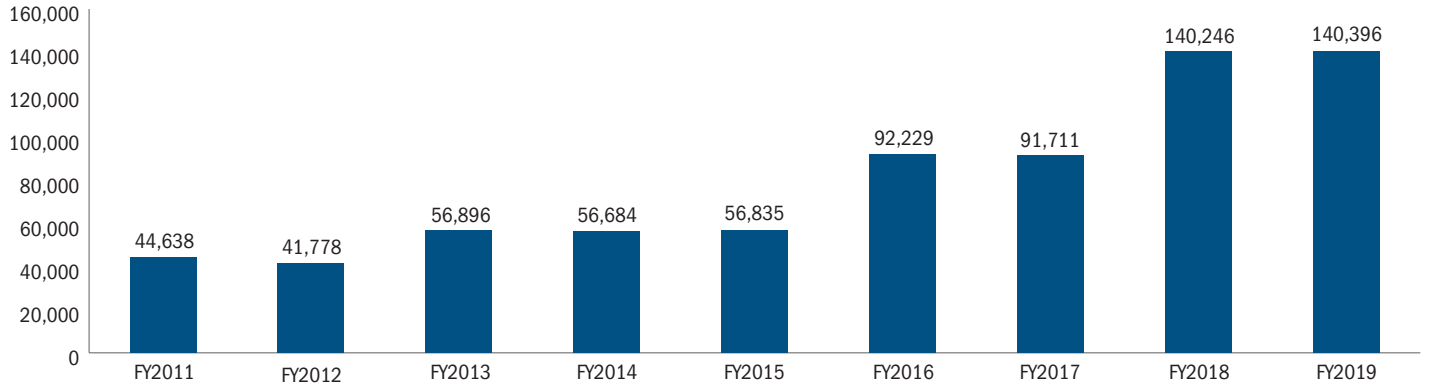
[57] This includes Form N-400 applicants that are: denied for good moral character grounds based on an underlying criminal offense; eligible to naturalize but also deportable under INA § 237 (e.g., convicted of an aggravated felony prior to November 29, 1990); and inadmissible at the time of adjustment of status, thus ineligible under INA § 318 and deportable under INA § 237. *See* USCIS Policy Memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," p. 6 (Jun. 28, 2018); https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf (accessed Apr. 1, 2021).

[58] The memo was signed into effect on June 28, 2018. It gave operational components 30 days to finalize operational guidance. The implementation was then delayed until that guidance could be finalized. USCIS began incremental implementation of the memorandum on Oct. 1, 2018. *See* USCIS Teleconference, "NTA Updated Policy Guidance" (Sep. 27, 2018); https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf (accessed Apr. 1, 2021).

[59] In preparing for this article, the CIS Ombudsman requested certain updated information from USCIS. USCIS declined this request.

[60] USCIS Teleconference, "NTA Updated Policy Guidance," p. 6 (Nov. 15, 2018); https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA_11.15.18.pdf (accessed Apr. 1, 2021).

Figure 2.1: NTAs Issued by USCIS per Fiscal Year



Source: Mike Guo, "Immigration Enforcement Actions: 2019," DHS Office of Immigration Statistics (Sep. 2020); https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf (accessed Jun. 2, 2021).

NTA SERVICE ISSUES CONTINUE TO MAKE TRANSPARENCY DIFFICULT TO ACHIEVE

Direct filing of all USCIS-issued NTAs with EOIR was prone to procedural errors,[61] often exacerbated by the lack of coordination with ICE. Once USCIS determines that an NTA should be issued, it must ensure the NTA is legally sufficient and is properly served on both the noncitizen and the appropriate immigration court. As discussed below, common errors related to service create additional administrative burdens for the government and due process failures for the noncitizen. The overall lack of transparency in the process—from the decision to issue an NTA to the procedural errors that often ensued—compounded the problems and heightened anxiety in stakeholders seeking to avoid the dire consequences that result from immigration proceedings moving forward unbeknownst to the noncitizen. The following section examines some of the most pervasive process issues with respect to USCIS' service of NTAs.

NTAs are on many occasions never filed or are filed improperly with EOIR. Typically, USCIS serves NTAs on EOIR in person or through the U.S. Postal Service. The immigration court does not acquire jurisdiction until the NTA is properly filed with EOIR.[62] In general, EOIR rejects NTAs that are technically and/or legally insufficient. (For example, if the NTA is missing a required element, such as a signature, EOIR will reject the NTA.) Following the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018),[63] EOIR instructed DHS components to include the time-and-place of an initial hearing on all NTAs prior to filing them with the immigration courts.[64] Initially, DHS would insert dates for hearings that had not actually been scheduled to meet this new requirement, which resulted in noncitizens appearing for court dates that did not exist.[65]

[61] Information provided by stakeholders (Dec. 7 and 10, 2020).

[62] 8 C.F.R. § 1003.14(a)

[63] *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In *Pereira*, the U.S. Supreme Court held that a putative NTA that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under §1229(a)" (and accordingly does not trigger the stop-time rule for calculating continuous residence for cancellation of removal relief).

[64] In these cases, stakeholders informed the CIS Ombudsman that EOIR would frequently change the date and time of the initial hearing before the hearing date occurred, typically moving the hearing to an earlier date. However, noncitizens and their legal representatives frequently did not receive the NTA containing the newly scheduled hearing date, which resulted in a failure to appear and an *in absentia* removal order. Stakeholders reported that, as early as July 2020, USCIS had returned to issuing NTAs that do not include a time-and-place for the initial hearing date. Information provided by stakeholders (Dec. 10, 2020). However, on April 29, 2021, the U.S. Supreme Court published its decision in *Niz-Chavez v. Garland*, which held that an NTA sufficient to trigger the stop-time rule is a single document containing, among other items, the time and place of the hearing. Accordingly, in order to comply with this decision, it is expected that USCIS will return to issuing NTAs that contain the date, time, and location of the noncitizen's initial removal hearing.

[65] Catherine E. Shoichet, "100+ immigrants waited in line in 10 cities for court dates that didn't exist," *CNN* (Nov. 2, 2018), https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html (accessed May 24, 2021); Monique O. Madan, "Fake Court Dates Are Being Issued in Immigration Court. Here's Why," *Seattle Times* (Sept. 22, 2019); https://www.seattletimes.com/nation-world/fake-court-dates-are-being-issued-in-immigration-court-heres-why/?utm_source=email&utm_medium=email&utm_campaign=article_inset_1.1 (accessed May 24, 2021); *See* Dianne Solis, "ICE is ordering immigrants to appear in court, but the judges aren't expecting them," *Dallas Morning News* (Sep. 16, 2018); https://www.dallasnews.com/news/immigration/2018/09/16/ice-is-ordering-immigrants-to-appear-in-court-but-the-judges-arent-expecting-them/ (accessed May 24, 2021); Maria Sacchetti & Francisco Alvarado, "Hundreds show up for immigration-court hearings that turn out not to exist," *Washington Post* (Jan. 31, 2019), https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html (accessed May 24, 2021).

In December 2018, EOIR announced it was providing DHS with access to its Interactive Scheduling System to schedule hearings for specific dates and to reflect those scheduled hearings on NTAs.[66] This access allowed USCIS to schedule an initial hearing prior to serving the noncitizen and filing the NTA with EOIR. This order of processing essentially requires USCIS to ensure both the noncitizen and EOIR are served with the NTA before the initial hearing date. If the NTA is not filed timely, EOIR will classify the case as a "failure to prosecute," and it will reject the NTA if there is an attempt to file it after the time and date of the hearing listed on the NTA.[67] USCIS must re-serve the noncitizen and file the new NTA with EOIR to initiate proceedings.[68]

After USCIS' implementation of the 2018 NTA Memo, stakeholders noted recurring service issues, many of which had existed prior to the memo's effective date and which continue to this day. Specifically, stakeholders reported that USCIS officers frequently issue NTAs to noncitizens without subsequently filing the NTA properly with the immigration court.[69] Due to the lack of coordination between USCIS and EOIR, stakeholders are often unable to determine if the NTAs are being rejected by EOIR for specific reasons or if the NTAs are never filed at all. As DHS's challenges with timely filing NTAs with EOIR are well documented,[70] it comes as no surprise that USCIS struggled with this issue as it attempted to assert its independence in filing NTAs with immigration courts pursuant to the 2018 NTA Memo. This processing issue leaves noncitizens with NTAs that do not correspond to active immigration proceedings.

USCIS' inability to properly serve NTAs with the court creates serious administrative burdens and due process concerns. This is particularly true when the NTA does not include an accurate date and time of the proceedings. The noncitizen, who believes the U.S. government has initiated proceedings against them, is often left waiting for a subsequent notice needed to correct a deficient NTA. However, if USCIS fails to properly serve the NTA on EOIR, a hearing will not be scheduled and a corrected notice will most likely never arrive.

NTAs are sometimes never issued to, or are improperly served on, noncitizens. If a noncitizen believes that he or she will be receiving an NTA following the denial of an immigration benefit request, it is reasonable to expect heightened anxiety when the NTA does not arrive timely.[71] Stakeholders do not know if the non-issuance of an NTA is related to a favorable exercise of prosecutorial discretion or a backlog of NTAs awaiting processing. In most cases, the latter has been proven true, as stakeholders report receiving NTAs up to 2 years after the denial of an application or petition.[72] Some stakeholders reverted to calling EOIR's Automated Case Hotline daily to check for any changes in the court system.[73]

In some cases, USCIS issued NTAs before a pending appeal or motion was adjudicated, contrary to the information it provided the public.[74] USCIS informed the public that, if removal proceedings began prior to the end of administrative review, and favorable action was taken on the motion or appeal, it would work with ICE to ensure that "they are aware of the favorable administrative action."[75] In practice, both stakeholders and the CIS Ombudsman, through casework, found that USCIS did not regularly coordinate with ICE to rescind NTAs issued in error.

Since noncitizens who fail to appear for their hearings may be ordered removed *in absentia*, the proper delivery of the charging document is a crucial aspect of due process. If USCIS determines that personal service is not practicable, it may serve an NTA on a noncitizen by first-class mail. Currently, only asylum offices typically issue NTAs in person; when the applicant arrives to retrieve a negative decision on the asylum application, an NTA is often issued

[66] EOIR Policy Memorandum, "Acceptance of Notices to Appear and Use of The Interactive Scheduling System," (Dec. 21, 2018); https://www.justice.gov/eoir/file/1122771/download (accessed Apr. 1, 2021).

[67] *Id.*

[68] *Id.*

[69] Information provided by stakeholders (Dec. 10, 2020).

[70] *See, e.g.*, USCIS Webpage, "Notice of Proposed Settlement and Hearing in Class Action Lawsuit Involving Individuals Who Have Filed, or Will Be Filing, an Asylum Application More Than One Year After Arriving in the United States" (Dec. 22, 2020); https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/notice-of-proposed-settlement-and-hearing-in-class-action-lawsuit-involving-individuals-who-have (accessed April 1, 2021); DHS Office of Immigration Statistics, "2014 Southwest Border Encounters: Three-Year Cohort Outcomes Analysis" (Aug. 2018) (accessed May 24, 2021); https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/Enforcement_Lifecycle/dhs_cohort_outcomes_report.pdf; and U.S. Government Accountability Office (GAO), "DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry," GAO-21-144 (Jan. 2021); https://www.gao.gov/pdf/product/711940 (accessed May 24, 2021).

[71] This anxiety is often fueled by the severe consequences of a noncitizen's failure to appear at a removal proceeding. Specifically, if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided" and that the noncitizen is removable, he shall be ordered removed *in absentia*. *See* INA §240(b)(5)(A); 8 U.S.C. § 1229a(b)(5)(A).

[72] Information provided by stakeholders (Dec. 10, 2020).

[73] *Id*.

[74] USCIS Teleconference, "NTA Updated Policy Guidance" (Nov. 5, 2018); https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA_11.15.18.pdf (accessed Apr. 1, 2021). Stakeholders reported that USCIS also failed to adhere to the extended timeframes for filing motions implemented during the pandemic.

[75] *Id.*

in tandem. Mailing issues continue to plague USCIS,[76] and the CIS Ombudsman continues to receive hundreds of requests for case assistance relating to mailing issues each year.

NTAs that are returned to USCIS as undeliverable are particularly problematic because the immigration file (A-file) is transferred to ICE after the NTA is served to commence removal proceedings. USCIS must take the additional step to communicate the non-delivery issue to ICE. Failure to do so will most likely result in an *in absentia* order of removal. In FY 2019, EOIR issued 90,762 removal orders *in absentia,* a 97 percent increase from the previous fiscal year.[77] Unsurprisingly, stakeholders have reported a corresponding increase in the need to file motions to reopen *in absentia* proceedings with the immigration court due to USCIS error on the NTA (e.g., incorrect address entered on the NTA, failure to timely record a submitted change of address, etc.).[78] This places further burdens on the court system.

ADDRESSING JURISDICTIONAL ISSUES WITHOUT SACRIFICING ADMINISTRATIVE EFFICIENCY

Prior to or during removal proceedings, noncitizens frequently are in the process of pursuing immigration benefit requests before USCIS. The decision on these collateral matters often affect the outcome of their removal proceedings. As is typical with most collateral benefit requests, USCIS has exclusive jurisdiction over Form I-130, *Petition for Alien Relative*. In general, immigration judges must wait for USCIS to adjudicate the I-130 petition before issuing a decision.[79] Insufficient coordination between ICE and USCIS tends to hold up the I-130 adjudication and create unnecessary delays in immigration proceedings. The pendency of a petition or application before USCIS remains among the leading causes of delays in immigration proceedings.[80]

In 2009, a Docket Efficiency Working Group, composed of representatives from USCIS, EOIR, and ICE, began meeting to identify ways to coordinate agency action to increase administrative efficiency.[81] At that time, EOIR identified more than 25,000 cases with petitions pending before USCIS, approximately 70 percent of which involved an I-130 petition.

Accordingly, modifications were made to USCIS' Policy Manual to encourage communication between ICE and USCIS as well as to enable the expedited processing of certain applications or petitions for noncitizens in removal proceedings.[82] This guidance requires ICE to affirmatively notify USCIS of the need for expedited processing of a specific application or petition, but did not establish any expedite processing criteria. Although the purpose of the guidance was to promote increased docket efficiency, the CIS Ombudsman has observed that expedite requests from ICE to USCIS are rare.[83] Even if ICE were to increase the number of expedite requests submitted, it is extremely unlikely that USCIS, due to competing priorities and budgetary constraints, would be able to meet the timeframes established by the guidance or otherwise prioritize the processing of the benefit request.[84]

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[76] *See* Ombudsman's Annual Report 2017, p. 40; Ombudsman's Annual Report 2016, p. 40; and Ombudsman's Annual Report 2015, pp. 58–62. In 2020, the CIS Ombudsman received over 500 requests for case assistance involving USCIS related mailing issues.

[77] *See* EOIR Webpage, "EOIR Adjudication Statistics, *In Absentia* Removal Orders" (Apr. 19, 2021); https://www.justice.gov/eoir/page/file/1243496/download (accessed May 19, 2021).

[78] Information provided by stakeholders (Dec. 2020).

[79] "For example, a respondent who is the first-time beneficiary of *a prima facie* approvable Form I-130 based on a *bona fide* marriage to a U.S. citizen entered into prior to the initiation of removal proceedings and who is otherwise *prima facie* eligible to adjust status within the United States before an immigration judge, including as a matter of discretion, is generally entitled to a continuance until that Form 1-130 is adjudicated by USCIS." EOIR Policy Memorandum, "Use of Status Dockets" (Aug. 16, 2019); https://www.justice.gov/eoir/page/file/1196336/download (accessed Apr. 1, 2021).

[80] *See* GAO Report, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," GAO-17-438 (Jun. 2017) https://www.gao.gov/pdf/product/685022 (accessed May 21, 2021). *See also* DOJ Office of the Inspector General Report, "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review," I-2013-001 (Oct. 2012); https://oig.justice.gov/reports/2012/e1301.pdf (accessed Apr. 1, 2021).

[81] *See* DHS Webpage, "Roundtable 4: Improving Docket Efficiency through Better Communication and Coordination: Roles of USCIS, ICE, and EOIR" (Oct. 20, 2011); https://www.dhs.gov/improving-docket-efficiency-through-better-communication-and-coordination-roles-uscis-ice-and-eoir (accessed Apr. 1, 2021).

[82] *See* 1 USCIS Policy Manual, Pt. E, Ch. 3; https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-3 (accessed Apr. 1, 2021). *See also* USCIS Policy Memorandum, "Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i):AFM Update AD 11-16" (Feb. 4, 2011); https://www.uscis.gov/sites/default/files/document/memos/guidance-adjudication-remove-proceedings.pdf (accessed May 21, 2021). ICE Policy Memorandum, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," (Aug. 20, 2010); https://www.ice.gov/doclib/foia/prosecutorial-discretion/handling-removal-proceedings.pdf (accessed May 7, 2021).

[83] In preparing for this article, the CIS Ombudsman requested to meet with USCIS policy and operational experts to discuss, among other items, the coordination that occurs between USCIS and ICE when a noncitizen is in removal proceedings and has a collateral matter pending before USCIS. USCIS declined this request.

[84] "USCIS attempts to issue a decision on the relevant petition or application within 30 calendar days of receiving the necessary file(s) if the person is detained. If the person is not detained, USCIS attempts to issue a decision within 45 calendar days of receiving the file(s)." 1 USCIS Policy Manual, Pt. E, Ch. 3; https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-3 (accessed Apr. 1, 2021).

Through its casework, the CIS Ombudsman continues to observe how a lack of communication between USCIS and ICE on these collateral matters undermines administrative efficiency. For example, the CIS Ombudsman identified 91 requests for case assistance received in 2020 that related to I-130 petitions where the beneficiary was in removal proceedings. The I-130 petitions were pending for approximately 27 months on average on the date the petitioners contacted the CIS Ombudsman for assistance. Within these requests, several petitioners and their legal representatives noted multiple continuances granted in connection with the immigration proceedings to allow for USCIS to adjudicate the I-130. Of the 91 requests in total, 53 have received a decision as this Report was being finalized; the processing time range for adjudicated petitions was 27 to 52 months.[85] Petitions that are still awaiting a decision have been pending for an average of 34 months. The lengthy delays in adjudicating these I-130 petitions translate into inefficiencies for EOIR and a lack of finality for noncitizens.[86]

CONSIDERATIONS AND RECOMMENDATIONS

Implementation of the 2018 NTA Memo, which called for an increase in NTAs issued by USCIS, underscored long-standing problems. The concerns raised by stakeholders primarily relate to operational challenges that existed prior to the 2018 NTA Memo and will continue to exist beyond any change in enforcement priorities. Future guidance should aim to address these operational issues by improving coordination between the agencies involved and discussing operational aspects specifically to increase transparency in the process. It should also seek to ensure that the process is fair and just. Finally, to increase administrative efficiency, DHS, in conjunction with DOJ, should consider a regulatory change that would provide immigration judges with more authority to adjudicate immediate relative petitions.

The CIS Ombudsman accordingly recommends USCIS consider the following as it works on the implementation of new guidance.

- *USCIS should improve coordination and reconsider its role in the service of NTAs.* Several of the concerns raised by stakeholders can be resolved through better coordination between USCIS, ICE, and EOIR. For cases where an NTA is not required by law, USCIS could involve ICE in the determination whether to issue the NTA since it will be responsible for prosecuting the case before EOIR. This will help to ensure that cases fall within DHS's stated prosecutorial priorities, thus promoting more consistency in the NTAs that are issued and ultimately pursued.

  With respect to the service of the NTA, USCIS and ICE should evaluate the procedural errors and inefficiencies that result from USCIS' role in serving NTAs on EOIR. Since ICE offices are typically co-located with the immigration courts, it may be more logistically feasible to return this responsibility to ICE. This will increase the likelihood of proper service on the court and allow for the required collaboration with EOIR when scheduling a hearing. To the extent that USCIS continues to have a role in this process, it should seek to develop internal procedures to address or otherwise perfect NTAs that are issued to noncitizens but never subsequently filed with the court. Although a technological solution is ideal,[87] the agency can start by implementing a more modest approach, such as weekly audits of EOIR's database to confirm that the NTAs it issued were entered into EOIR's electronic system (i.e., they were properly filed with the court).

  Similarly, concerning the service of NTAs on noncitizens, USCIS and ICE should agree on the most efficient path forward. If ICE resumes filing USCIS-generated NTAs with the immigration courts, it is logical for ICE to also serve NTAs on the noncitizen, especially as data (including most recent addresses, etc.) can be shared across agencies. By removing USCIS from the process entirely, ICE will be better positioned to handle NTAs that are returned as undeliverable and to coordinate with EOIR. This will also help resolve NTAs issued incorrectly by USCIS

[85] Consistent with how USCIS displays processing time information on its website, the CIS Ombudsman has presented the processing times for the adjudicated I-130 petitions as a range. The first number represents the time it took USCIS to complete 50 percent of petitions (the median). The second number represents the time it took USCIS complete 93 percent of cases. For further information on how USCIS displays its case processing times, *see* USCIS Webpage, "Case Processing Times;" https://egov.uscis.gov/processing-times/more-info (accessed Apr. 1, 2021).

[86] USCIS' most recently-articulated processing time goal for adjudicating I-130 petitions is 150 days. *See* Letter from former USCIS Acting Director Ken Cuccinelli II to Senators Chris Van Hollen and Benjamin L. Cardin (Jun. 11, 2019); https://www.uscis.gov/sites/default/files/document/foia/Processing_delays_-_Senator_Van_Hollen.pdf (accessed May 7, 2021). As this Report is being finalized, processing time ranges for immediate relatives at the service centers extend from 2 months (reported as the median processing time at the Nebraska Service Center) to 39 months (the 93rd percentile at the Vermont Service Center). Processing times for petitions other than immediate relatives are generally longer. USCIS Web page "Check USCIS Processing Times;" https://egov.uscis.gov/processing-times/ (accessed May 30, 2021).

[87] For example, on July 19, 2018, EOIR announced that it was launching an electronic filing pilot program through EOIR Courts & Appeals System (ECAS). The goal of this modernization effort is to "phase out paper filing and processing, and to retain all records and case-related documents in electronic format." Ideally, USCIS will align its modernization efforts with EOIR's, which would include filing NTAs with the court electronically. For further information on ECAS, see EOIR Webpage, "EOIR Launches Electronic Filing Pilot Program" (Jul. 19, 2018); https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program (accessed Apr. 1, 2021).

and potentially provide stakeholders with a more direct path for fixing NTAs issued erroneously.

However, if resource constraints prevent ICE from subsuming this workload, USCIS should address recurring service issues in several ways.

- ***Develop guidance for all directorates to define when in-person service is not practicable.*** Serving NTAs in person essentially guarantees proper service. Prior to the beginning of the COVID-19 pandemic, the asylum offices were the only offices that issued NTAs to noncitizens in person. As a result, the asylum offices developed internal procedures for determining when in-person service was not practicable (e.g., travel considerations for the applicant, staffing resources, etc.). Conversely, field offices and service centers have defaulted to issuing NTAs by regular mail without considering whether in-person service is practicable. To comply with the statute, USCIS should consider the operational feasibility of serving NTAs in person at a field location. Considering USCIS' mailing and address challenges, in-person service increases overall administrative efficiency and helps to prevent questions of proper service if the noncitizen fails to appear for his or her hearing.

- ***Serve NTAs by certified mail.*** When USCIS determines that in-person service is not practicable, it can reduce mailing issues by serving NTAs via certified mail. While no longer required by statute,[88] certified mail creates a strong presumption of effective service.[89] The cost of certified mail does not appear to outweigh the benefit of not having to resolve improper service. It is also on the whole less expensive than other methods that can be tracked, such as private courier services. Ultimately, this will help EOIR to increase docket efficiency by presumably reducing the number of motions to reopen *in absentia* proceedings filed on the basis of lack of notice.

- ***Update the appropriate case management system to reflect that an NTA has been issued and, if applicable, when returned as undeliverable.***[90] Since USCIS typically issues NTAs in connection with a pending or denied benefit request, it should update its internal system appropriately so that, when entering the associated receipt number, the agency's Case Status Online will reflect that an NTA was issued. This added layer of transparency will provide noncitizens with advance notice of an incoming NTA, which will also allow them to follow up if the notice is not received. The internal system should also be updated if the notice is returned as undeliverable. This will permit noncitizens to contact USCIS to potentially resolve any unknown address issues.

- *USCIS needs to recommit to creating a fair and just process*. Both the 2018 and 2011 memoranda instructed officers to consider issuing NTAs to Form N-400 applicants who are inadmissible at the time of adjustment of status.[91] Regardless of the decision whether to issue an NTA, the Form N-400 will be denied.[92] According to USCIS' Policy Manual, an applicant is ineligible under INA § 318 if lawful permanent resident status was obtained in error, even in the absence of fraud or willful misrepresentation. Courts have consistently deferred to the government's interpretation of "lawful admission."[93] While USCIS has carved out certain exceptions (e.g., non-allocation of visa number, missing payment of §245(i), and certain TPS applicants who departed and returned to the United States before August 20, 2020), it continues to routinely

[88] Prior to 1997 the statute required that notice be sent via certified mail, return receipt requested. INA §242B(a)(2)(A), (f)(1); 8 U.S.C. § 1252b(a)(2)(A), (f)(1) (repealed, effective 1997).

[89] *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008); *Stewart v. Holder*, 362 Fed. Appx. 518, 521-23 (6th Cir.2010); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002); *Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004).

[90] The Ombudsman notes that some USCIS service centers already undertake this practice; however, this measure is not consistently applied across all USCIS directorates.

[91] The 2011 Memo called for the case to be referred to the NTA panel. The 2018 Memo instructed officers to issue an NTA absent the favorable exercise of prosecutorial discretion. *See* USCIS Policy Memorandum, "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens," pp. 8–9 (Jun. 28, 2018); https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum (accessed Apr. 1, 2021); *see also* USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," pp. 7–8 (Nov. 7, 2011); https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf (accessed Apr. 1, 2021).

[92] "If the Review Panel declines to issue an NTA, deny the case under section 318 of the INA." USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," p. 8 (Nov. 7, 2011); https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf (accessed Apr. 1, 2021).

[93] *See Gallimore v. Att'y Gen.*, 619 F.3d 216, 223 & n.6 (3d Cir. 2010); *Shin v. Holder*, 607 F.3d 1213, 1217 (9th Cir. 2010); *Walker v. Holder*, 589 F.3d 12, 20-21 (1st Cir. 2009); *De La Rosa v. DHS*, 489 F.3d 551, 554-55 (2d Cir. 2007); *Savoury v. Att'y Gen.*, 449 F.3d 1307, 1313 (11th Cir. 2006); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1187 (8th Cir. 2005); *Monet v. INS*, 791 F.2d 752, 753-54 (9th Cir. 1986).

deny naturalization applicants pursuant to INA § 318 due to government error. The denial of the Form N-400 coupled with the decision to not place the applicant into removal proceedings leaves the noncitizen without any recourse.

Future guidance should recognize this inequitable practice and expand upon USCIS' current guidance to provide additional exceptions. For categories omitted from this expanded list, USCIS should create a streamlined process to help applicants who adjusted status improperly through no fault of their own. This process would entail re-adjusting the noncitizen correctly to establish eligibility under INA § 318. In correcting their status, USCIS could issue further policy guidance clarifying that the previous lawful permanent resident status counts toward the residency requirement for naturalization purposes.

- *USCIS needs to review additional ways to increase administrative efficiency*. To achieve increased docket efficiency and eliminate some of the challenges posed by the current constraints, DHS and DOJ should consider a regulatory change that would provide immigration judges with the authority to adjudicate I-130 petitions.[94] Currently, USCIS has exclusive jurisdiction over I-130 petitions.[95] However, immigration judges are responsible for assessing the *bona fides* of a marriage when deciding on a continuance or a motion to reopen.[96] Immigration judges also have the authority to conduct a *de novo* review of a Form I-751, *Petition to Remove Conditions on Residence,* previously denied by USCIS.[97] This often includes examining the *bona fides* of a marital relationship to determine the parties' intent at the time of the marriage.[98] Also, EOIR's Board of Immigration Appeals, which primarily decides appeals from the immigration courts, has exclusive appellate jurisdiction over the Form I-130.[99]

EOIR has identified continuances as a "dilatory tactic."[100] Lengthy USCIS adjudication delays engender this perception. Providing immigration judges with jurisdiction over I-130 petitions will increase docket efficiency by removing the need for continuances based on USCIS processing delays. This will reduce duplicative efforts made by both USCIS and EOIR to determine the *bona fides* of a marriage and decrease the need for coordination between USCIS and ICE on these petitions, which has proven to be inadequate. In addition, immigration judges have jurisdiction over the Form I-485, *Application to Register Permanent Residence or Adjust Status*.[101] Providing immigration judges with the authority to decide the underlying basis for adjustment of status streamlines the process.

Ultimately, DOJ and DHS will need to determine if this new authority would help alleviate current bottlenecks in the process, or if this added responsibility risks further overwhelming EOIR.

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[94] The Secretary of Homeland Security is "authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service." *See* INA §103(a)(6); 8 U.S.C. § 11103(a)(6). For example, in January 2020, USCIS issued updated policy guidance to address the limited circumstances in which USCIS has delegated authority to the Department of State (DOS) to accept and adjudicate I-130 petitions filed abroad at U.S. embassies and consulates. *See* USCIS Policy Alert, "Accepting Petition for Alien Relative (Form I-130) Abroad" (Jan. 31, 2020); https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200131-I-130FiledAbroad.pdf (accessed May 7, 2021).

[95] *See Freeman v. Gonzales*, 444 F.3d 1031, 1043 n. 19 (9th Cir. 2006)(citing *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir.1994) for the proposition that "the authority to adjudicate immediate relative preference petitions properly rests with the Attorney General (who has, in turn, delegated it to the district directors), and not with the BIA or immigration judge"). With the creation of DHS, the authority to adjudicate I-130 visa petitions was transferred from the INS (and the Attorney General) to the Director of USCIS. 6 U.S.C. § 271(b); 8 C.F.R. § 204.1 & 204.2.

[96] *See Matter of L-A-B-R*, 27 I&N Dec. at 415, 419 (A.G. 2018) (The probability that a respondent's collateral proceeding will succeed and materially affect the outcome of the respondent's removal proceedings should therefore be the most important consideration in the good-cause analysis…I therefore conclude that an immigration judge must assess whether good cause supports a continuance to accommodate a collateral proceeding by considering primarily the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings, and any other relevant secondary factors). *See also Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009); *Matter of Lamus-Pava*, 25 I&N Dec. 61 (BIA 2009); *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002); and *Wu v. Holder*, 571 F.3d 467,469 (5th Cir. 2009).

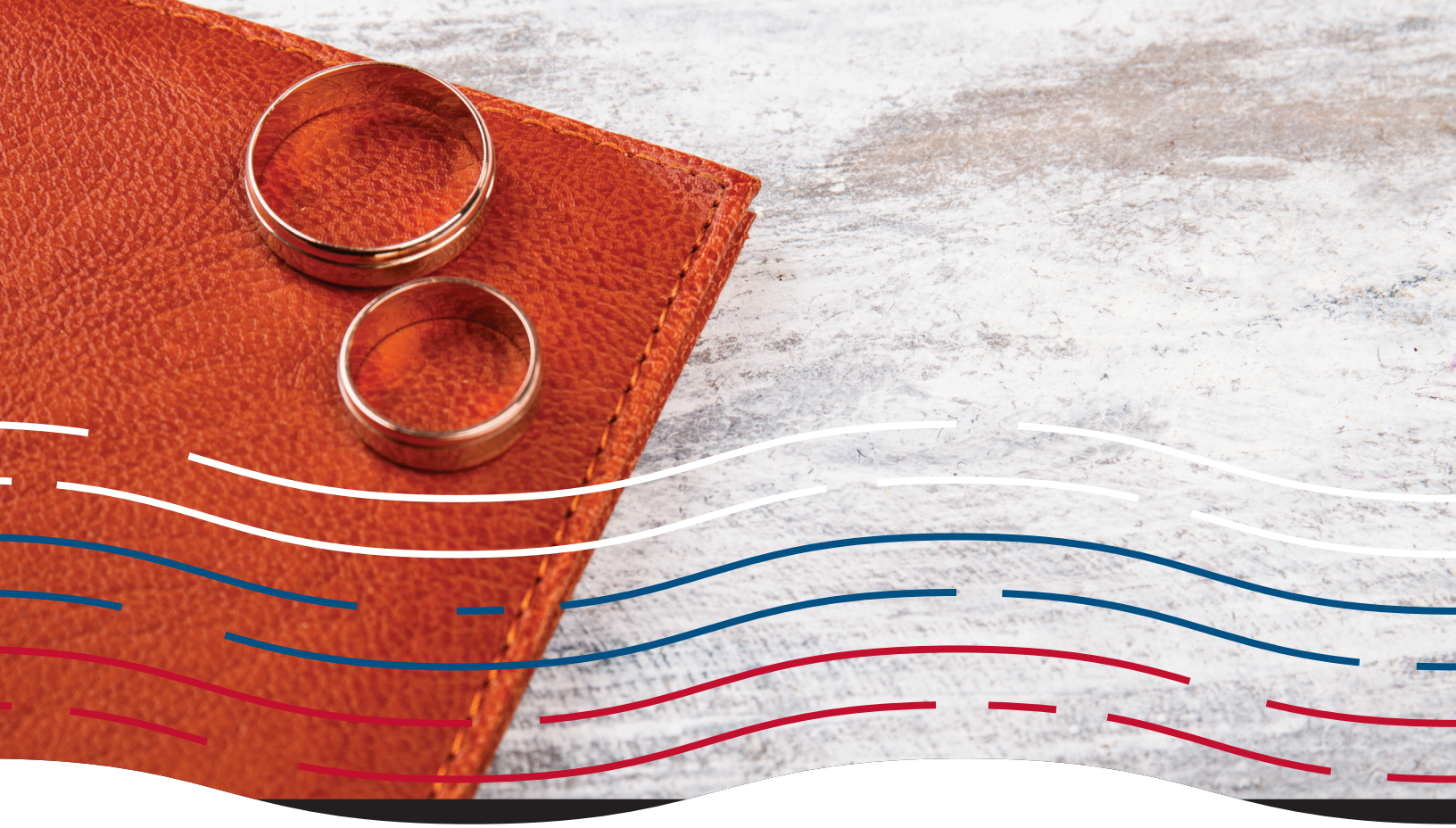
[97] *See Matter of Herrera Del Orden*, 25 I&N Dec. 589 (BIA 2011).

[98] *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

[99] 8 C.F.R. § 1003.1(b)(5).

[100] EOIR Policy Memorandum, "Continuances" (Jan. 8, 2021); https://www.justice.gov/eoir/page/file/1351816/download (accessed Apr. 1, 2021).

[101] 8 C.F.R. § 1245.2(a)(1)(i).



The Wedding Bell Blues:

Processing of Removal of Conditions for Conditional Permanent Residents Based on Marriage

Responsible Directorates: Service Center Operations, Field Operations, Fraud Detection and National Security

INTRODUCTION

Congress enacted the Immigration Marriage Fraud Amendments Act of 1986 (IMFA) in an attempt to balance family unification with the need to detect and deter marriage-based immigration fraud.[102] In the year prior to enactment, the Commissioner of the Immigration and Naturalization Service (INS) testified before Congress that as much as 30 percent of marriage-based petitions might be fraudulent,[103] and that the existing law was inadequate to counter such fraud.[104] To address this concern, the IMFA added Section 216 to the Immigration and Nationality Act (INA), which imposes conditions on any spouse or child who obtains permanent resident status by virtue of a marriage to a U.S. citizen or lawful permanent resident (LPR) that is less than 2 years old at the time of admission or adjustment of status.[105] Section 216 also provides a procedure by which a conditional permanent resident (CPR) may have these conditions removed by filing a Form I-751, *Petition to Remove Conditions on*

[102] Immigration Marriage Fraud Amendments Act of 1986 (IMFA), § (b), Pub. L. No. 99-636, 100 Stat. 3537, 3543 (Nov. 10, 1986), H.R. Rep. No. 906, 99th Cong. 2d Sess. (1986); Sen. Rep. No. 99-491, 99th Cong. 2nd Sess. (1986).

[103] "Fraudulent Marriage and Fiancé Arrangements to Obtain Permanent Resident Immigration Status," *before the* Subcommittee on Immigration and Refugee Policy *of the* U.S. Senate Judiciary Committee, 99th Cong. 1st Sess. at 35 (Jul. 26, 1985) (statement of Alan Nelson, Commissioner, Immigration and Naturalization Service).

[104] "Present protections against marriage fraud are totally inadequate. Once permanent status has been granted, it is almost impossible to revoke, rescind, deport, or even locate the alien or the original spouse." H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 9 (1986).

[105] "By postponing the privilege of permanent resident status until 2 years after the alien's obtaining the status of lawful admission for permanent residence, the bill provides a balanced approach. On the one hand, it strikes at the fraudulent marriage by the simple passage of time: it is difficult to sustain the appearance of a *bona fide* marriage over a long period. On the other hand, it still allows an alien spouse and son or daughter to come to the United States, and therefore provides for family unification." H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 9-10 (1986).

Residence. In addition to acting as a fraud deterrent, requiring noncitizens to file a Form I-751 also sought to place INS, now U.S. Citizenship and Immigration Services (USCIS), in a better position to identify those individuals seeking to circumvent the immigration laws.

Although the Congressional record shows a desire to address what it decided was a vulnerability, it did not want to impinge upon the rights of the "law-abiding majority."[106] Accordingly, CPRs enjoy the same rights, privileges, responsibilities, and duties as other permanent residents, including the right to apply for naturalization.[107] In addition, the IMFA mandated 90-day processing timeframes for conducting an interview after receipt of the Form I-751,[108] and for the adjudication of the petition post-interview.[109] The law also provided USCIS with the authority to waive the interview requirement,[110] and the agency has promulgated regulations indicating it will make an interview waiver determination within 90 days after receiving a Form I-751.[111] While the IMFA establishes a checkpoint for USCIS to reevaluate the authenticity of the marital relationship, it was not intended to act as a barricade for CPRs seeking evidence of status or naturalization.

However, due primarily to competing priorities, USCIS' Form I-751 processing times have rarely, if ever, met the statutory and regulatory processing timeframes. This article examines the Form I-751 process and highlights certain aspects that contribute to processing delays. It studies how these delays contribute to numerous challenges for CPRs and dilute the legislative intent of the IMFA. Finally, it recommends areas where the agency can mitigate the impact of processing delays while effectively combatting marriage fraud.

[106] "I think we have a piece of legislation which empowers those in authority to deal with the abusers and the cheaters while doing minimal, if any damage at all, to the rights of the law-abiding majority." 99th Cong. Rec. H. 27016 (Sep. 1986) (statement of Rep. Barney Frank).

[107] 8 C.F.R. § 216.1. *See also* INS Memorandum, "Legal Opinion: Status of a conditional permanent resident after denial of I-751 during pendency of review by EOIR" (Aug. 6, 1996); and USCIS Memorandum, "Extension of Status for Conditional Residents with Pending I-751, Petition to Remove Conditions on Residence" (Dec. 2, 2003) (in the possession of the CIS Ombudsman).

[108] "The interview under subsection (c)(1)(B) shall be conducted within 90 days after the date of submitting a petition under subsection (c)(1)(A) and at a local office of the Department of Homeland Security, designated by the Secretary of Homeland Security, which is convenient to the parties involved. INA § 216(c)(3(A)(ii); 8 U.S.C. § 1186(c)(3(A)(ii).

[109] "[T]he Secretary of Homeland Security shall make a determination, within 90 days of the date of the interview, as to whether the facts and information described in subsection (d)(1) and alleged in the petition are true with respect to the qualifying marriage." INA § 216(c)(3)(A); 8 U.S.C. § 1186(c)(3)(A).

[110] INA § 216(d)(3); 8 U.S.C. § 1186(d)(3).

[111] 8 C.F.R. § 216.4(b)(1).

BACKGROUND: THE GROWTH OF FORM I-751 PROCESSING DELAYS

Form I-751 processing delays are not a recent phenomenon.[112] They have, however, grown increasingly acute since Fiscal Year (FY) 2014,[113] especially at USCIS field offices where petitions requiring interviews are adjudicated. The agency has not only struggled to adjudicate these petitions within the timeframes required by law, but Form I-751 processing times have grown at a much quicker rate than other large-volume benefit requests. The decision to refer a case for an interview prolongs processing delays, and based on decision outcomes, there is little evidence to demonstrate that interviews change outcomes. In addition, adverse decisions typically result in subsequent filings, which restarts the lengthy process. The specific pain points—and their cumulative effect on processing delays—are apparent when examining specific components of the Form I-751 process.

The Form I-751 Process. Noncitizens and their dependent children who gain permanent residence status by virtue of a marriage that is less than 2 years old at the time of admission or adjustment of status are classified as CPRs. To evidence their status, CPRs are issued a Form I-551, *Alien Registration Card*, which is valid for a period of 2 years. Unless filing for a waiver of the joint filing requirement, and absent good cause and extenuating circumstances, the CPR and the petitioning spouse must jointly file a Form I-751 with USCIS within the 90-day period immediately preceding the second anniversary of the grant of conditional residence (i.e., expiration date on the card evidencing CPR status).[114]

The Form I-751 remains a paper-based petition process. Petitioners must include evidence with their filing establishing the *bona fides* of the marriage and that the marriage was not entered into for the purpose of evading immigration law.[115] Upon properly filing with USCIS, CPRs receive a Form I-797, *Notice of Action* that allows them to demonstrate continued status for what is currently 18 months past the expiration date on their CPR cards.

[112] *See, e.g.*, CIS Ombudsman Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Feb. 28, 2013); Ombudsman's Annual Report 2016, pp. 76–78.

[113] *See* Historical National Average Processing Time for All USCIS Offices (Nov. 29, 2018); available at https://www.aila.org/File/DownloadEmbeddedFile/78292 (AILA Infonet Doc. No. 18112934) (accessed Apr. 29, 2021). *See also* USCIS Webpage, "Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year;" https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (accessed Apr. 29, 2021).

[114] INA § 216(d)(2); 8 U.S.C. § 1186(d)(2).

[115] 8 C.F.R. § 216.4(a)(5).

Forms I-751 are adjudicated at both the service centers and field offices. In general, Forms I-751 that meet USCIS' interview waiver criteria are adjudicated at a service center. Petitions that require an interview to explore the *bona fides* of the marriage are adjudicated at the appropriate field office. If USCIS approves the Form I-751, it lifts the conditions on the CPR's status and an LPR card is delivered by mail within the weeks or months following approval. However, a denial terminates CPR status and USCIS issues a Notice to Appear (NTA).[116] The CPR has the right to have an immigration judge review the termination in removal proceedings.[117] While in removal proceedings, the CPR may file another Form I-751 with USCIS, which has original jurisdiction over all Form I-751 petitions, regardless of whether the petition is filed jointly or a waiver is requested.[118]

The Evolution of the Interview Waiver Determination. Unless waived, CPRs and their petitioning spouses must appear for an interview at a field office in connection with their jointly filed Form I-751.[119] While not required by statute, CPRs who file for a waiver of the joint filing requirement also may be referred for an interview. The primary purpose of the interview is to elicit testimony to assist in determining whether the marriage was for the purpose of evading immigration laws.[120] Accordingly, the interviewing adjudicator often will pursue a line of inquiry designed to probe the authenticity of the marriage.[121] An interview referral generally signifies the petitioner's failure to meet the burden of proof through documentary evidence alone. Alternatively, the record may contain derogatory information, or a complex set of facts that are best addressed in an interview setting.[122] An interview is not required for an adverse decision.[123]

Historically, the service centers have been responsible for determining marriage interview waiver eligibility. According to the regulations, the agency must make that determination within 90 days of the Form I-751 filing date.[124] In 2005, USCIS issued guidance on when to transfer a Form I-751 from a service center to a field office for interview.[125] In addition to discouraging the use of the interview process in lieu of the Request for Evidence (RFE) process,[126] the 2005 guidance identified the following criteria that would prevent the service centers from adjudicating a Form I-751 on its merits, resulting in an interview referral:

- Information that is inconsistent with information discovered in the supporting documentation;
- Potential evidence of fraud or misrepresentation;
- Inconclusive evidence pertaining to the *bona fides* of the marriage to make a decision on the record notwithstanding receipt of a response to an RFE; or
- A particularly complex set of facts or issues that the USCIS Director feels would be best resolved by an interview.[127]

Changes to the criteria send more interviews to the field. In December 2018, USCIS modified its Form I-751 interview waiver guidance to implement Executive Order 13780.[128] Pursuant to this guidance, USCIS adjudicators may consider waiving the interview requirement if they are satisfied that:

[116] 8 C.F.R. §§ 216.4(d)(2), 216.5(f).

[117] INA § 216(b)(2); 8 U.S.C. § 1186(b)(2); INA § 216(c)(2)(B); 8 U.S.C. § 1186(c)(2)(B); INA § 216(c)(3)(D); 8 U.S.C. § 1186(c)(3)(D).

[118] *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991).

[119] INA §§ 216(c)(1)(B), 8 U.S.C. § 1186(c)(1)(B); INA § 216(d)(3); 8 U.S.C. § 1186(d)(3); 8 C.F.R. §§ 216.4(b), 216.5(d).

[120] "Interviews provide USCIS with the opportunity to verify information contained in the petition or application, as well as the opportunity to discover new information that may be relevant to the adjudication or to determine the credibility of the individual seeking to remove the conditions on his or her lawful permanent resident status." USCIS Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence," p. 2 (Nov. 30, 2018); https://www.uscis.gov/news/alerts/uscis-revises-interview-waiver-guidance-for-form-i-751 (accessed Apr. 29, 2021).

[121] However, evidence that the marriage was entered into in good faith is not required for waiver requests based on extreme hardship. *See* 8 C.F.R. § 216.5(e)(1).

[122] For example, cases that have unresolved issues related to the filing deadline will be referred for an interview. *See* USCIS Memorandum, "Revised Guidance Concerning Adjudication of Certain I-751 Petitions" (Dec. 23, 2012).

[123] USCIS Memorandum, "Delegation of Authority for I-751, 'Petition to Remove Conditions on Residence'" (Jan. 30, 2006); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%20 1998-2008/2006/i751delgtn013006.pdf (accessed Apr. 29, 2021).

[124] 8 C.F.R. § 216.4(b)(1). USCIS' internal goal for making an interview waiver determination is 6 months. Information provided by USCIS (May 19, 2021).

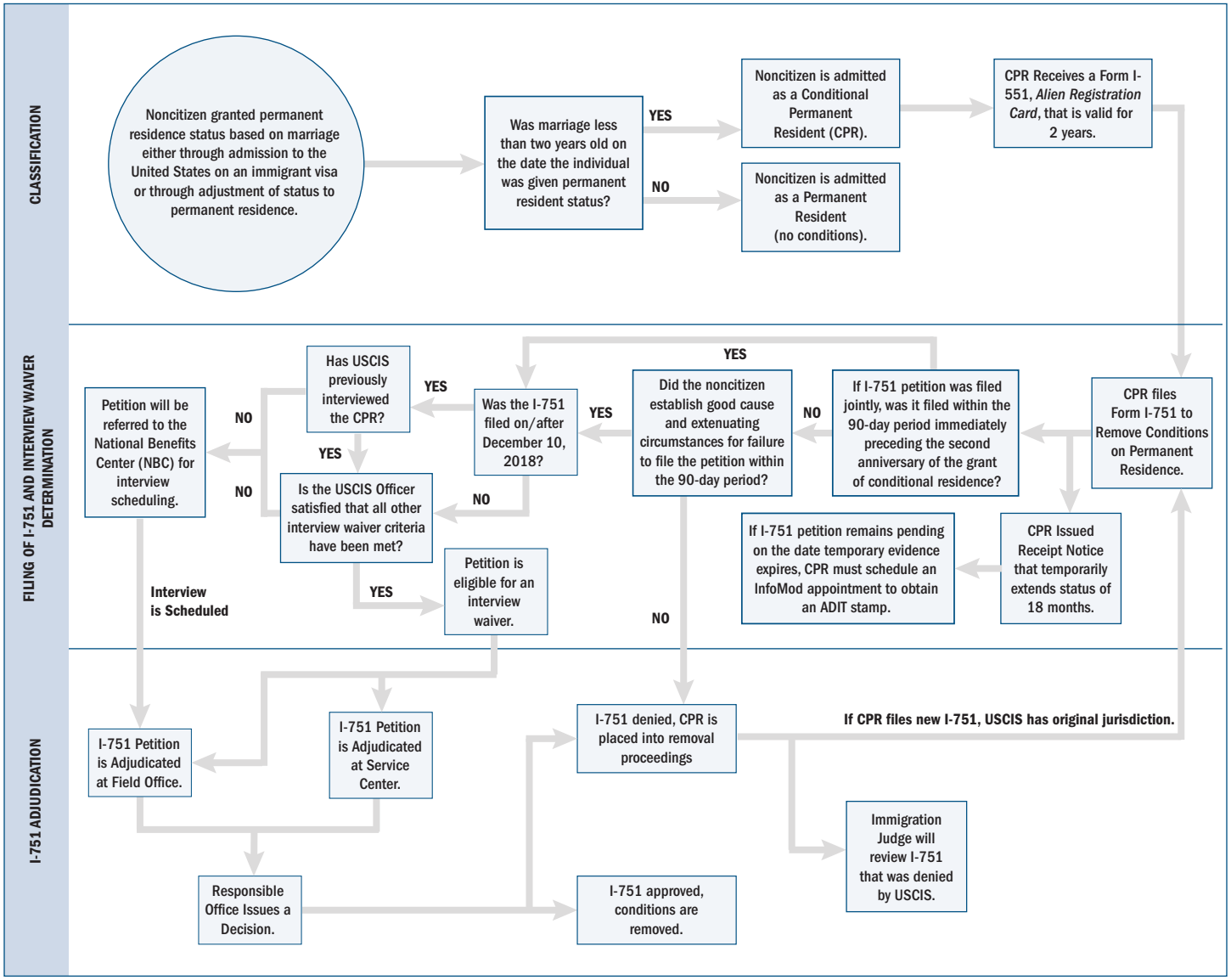
[125] USCIS Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence," p. 1 (June 24, 2005); https://www.uscis.gov/sites/default/files/document/memos/crintwaivr062405.pdf (accessed May 28, 2021).

[126] "When warranted, Service Centers should seek additional evidence through the RFE process and adjudicate the case on its merits in lieu of transferring to a district office for interview...." *Id*. p. 2.

[127] *Id*.

[128] Among other things, Executive Order 13780 instructs DHS and other federal agencies to develop a uniform baseline for screening and vetting standards and procedures, such as in-person interviews, to detect fraud and national security concerns. *See* Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (Mar. 6, 2017); 82 Fed. Reg. 13209, 13215 (Mar. 9, 2017). On January 20, 2021, Executive Order 13780 was rescinded. *See* Proclamation 10141, "Ending Discriminatory Bans on Entry to the United States" (Jan. 20, 2021); 86 Fed. Reg. 7005 (Jan. 25, 2021).

Form I-751 Process



- They can make a decision based on the record because it contains sufficient evidence about the *bona fides* of the marriage and that the marriage was not entered into for the purpose of evading the immigration laws of the United States;
- USCIS has previously interviewed the Form I-751 petitioner (for example, in connection with a Form I-485 or Form I-130);
- There is no indication of fraud or misrepresentation in the Form I-751 or the supporting documentation; and
- There are no complex facts or issues that require an interview to resolve questions or concerns.[129]

The primary goal of this guidance is to ensure interviews of those CPRs who have not previously appeared before USCIS (i.e., petitioners who obtained an immigrant visa abroad to obtain entry/permanent residence after a consular interview).[130] It was intended to aid potential

[129] USCIS Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence" (Nov. 30, 2018); https://www.uscis.gov/sites/default/files/document/memos/2018-11-30-PM-602-0168-revised-interview-waiver-guidance-for-form-I-751.pdf (accessed Apr. 29, 2021).

[130] Information provided by USCIS (May 19, 2021).

fraud identification and ensure benefit integrity.[131] While this updated guidance repeats most of the 2005 guidance criteria, it removes the emphasis placed on resolving cases through an RFE. It also adds a categorical interview requirement for cases filed on or after December 10, 2018 where the CPR consular processed. USCIS accordingly began routing Forms I-751 that met this criterion directly to the National Benefits Center (NBC) for intake processing and interview scheduling at the appropriate field office, eliminating the ability of the service centers to make a case-by-case determination on interview waiver eligibility.[132]

The updated guidance resulted in a significant increase in the number of Form I-751 petitions sent to field offices for adjudication. As of December 31, 2020, 58,371 Form I-751 petitions were pending with USCIS that met the categorical interview requirement.[133] From FY 2018 to FY 2020, field offices adjudicated a total of 28,426 Form I-751 petitions.[134] Moreover, in FY 2019, nearly 187,000 CPRs obtained their status through consular processing.[135] Under the 2018 guidance, a Form I-751 interview will be required for those 187,000 CPRs.

FORM I-751 ADJUDICATION AT THE FIELD OFFICES: SLOWER AND SLOWER

Two streams of petitions flow to the field. Service centers forward all petitions deemed ineligible for interview waivers to the NBC for interview scheduling at the appropriate field office. Due to competing priorities and finite resources, Form I-751 processing times at field offices have historically exceeded processing times at the service centers.[136] In general, field offices prioritize the interview and adjudication of employment-based Forms I-485, *Applications to Register Permanent Residence or Adjust Status*, and Forms N-400, *Applications for Naturalization*.[137] As a result, Form I-751 petitions often languish at the NBC awaiting interview scheduling. As of December 31, 2020, there were 81,693 Form I-751 petitions (or approximately 38 percent of all pending Forms I-751) at the NBC awaiting interviews; the median number of days pending for these petitions was approximately 200 days longer than petitions pending at the service centers.[138]

The movement from the NBC to the appropriate field office for interview does not often result in a timely adjudication. Although the statute requires that USCIS issue a decision within 90 days of the interview, in FYs 2019 and 2020, USCIS met this requirement in only about 49 percent of the Form I-751 petitions it adjudicated.[139] At the end of FY 2020, the median number of days pending for Form I-751 petitions at the field offices was approximately 540 days longer than petitions pending at the service centers.[140] This lack of timely decisions post-interview signals a potential bottleneck in the Form I-751 process.

The interview requirement makes for a longer adjudication time, which in turn limits the number of other types of interviews the field office can schedule. Figure 3.1 *(Form I-751 Completion Rates by Fiscal Year),* displays the Form I-751 completion rates for field offices and service centers from FY 2018 to FY 2020.

Figure 3.1: Form I-751 Completion Rates by Fiscal Year

Fiscal Year	Overall Completion Rate	Field Office Completion Rate	Service Center Completion Rate
2018	.57	.32	.65
2019	.52	.34	.58
2020	.42	.30	.51

Source: Information provided by USCIS (May 12, 2021).
Note: Completion rates reflect the number of completed petitions per hour.

In FYs 2018 and 2019, the Form I-751 completion rate at the service centers was approximately double that of the field offices. Due to a declining completion rate at the service centers, the gap was slightly reduced from FY 2019 to FY 2020. Notably, field offices were able

[131] *Id.*

[132] CIS Ombudsman webinar, "USCIS' Processing of Concurrently Pending Forms N-400 and Forms I-751," Oct. 7, 2020. Information provided by USCIS (May 19, 2021).

[133] Information provided by USCIS (May 19, 2021).

[134] *Id.*

[135] DHS Office of Immigration Statistics, 2019 Yearbook of Immigration Statistics, "Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019;" https://www.dhs.gov/immigration-statistics/yearbook/2019/table7 (accessed Apr. 29, 2021).

[136] As this Report is being finalized, the field offices are reporting a Form I-751 processing time range of 18.5 to 34.5 months. Of the five service centers responsible for adjudicating Form I-751 petitions, only the Potomac Service Center is reporting a median processing time (i.e., the number at the lower end of the range), that is shorter than the field offices' published processing times. When taken as an average, the service centers' collective Form I-751 processing times range from 13 to 20 months. *See* USCIS Webpage, "Case Processing Times," https://egov.uscis.gov/processing-times/more-info (accessed Apr. 29, 2021).

[137] According to USCIS, employment-based I-485s are the highest priority for the field offices to ensure use of all available visas. Information provided by USCIS (May 19, 2021). For further information regarding employment-based immigration, see William A. Kandel, Congressional Research Service, "Permanent Employment-Based Immigration and the Per-country Ceiling" (Dec. 21, 2018); https://crsreports.congress.gov/product/pdf/R/R45447 (accessed May 20, 2021).

[138] Information provided by USCIS (May 19, 2021).

[139] *Id.*

[140] *Id.*

to adjudicate more Form I-751 petitions in FY 2020 due to the protracted telework during the pandemic.[141] Specifically, the increased telework presented the need for non-interview work at the field, and the service centers transferred more than 42,000 petitions to the field offices for adjudication.[142] However, despite the increase in the number of Form I-751 petitions adjudicated at the field offices that did not require an interview, there was not a corresponding increase in the field offices completion rate.

DETERMINING WHETHER THE INTERVIEW ADDS VALUE

USCIS has previously informed the CIS Ombudsman that the denial rate is used as an indicator to determine if cases are being properly referred for an interview.[143] This assessment appears appropriate since, apart from the categorical requirement, the interview waiver criteria considers factors that may impact eligibility. USCIS also has indicated it is currently reconsidering its interview waiver criteria and is monitoring approval rates at field offices for FY 2019 and FY 2020, along with fraud referral rates, in an effort to recalibrate.[144] As such, evaluating decisional information provides necessary insight into the value of Form I-751 interviews at the field.

In FY 2019, USCIS approved 90 percent of the Form I-751 petitions that required an interview.[145] In FY 2020, this figure reduced slightly to 88 percent.[146] Due to system limitations, USCIS was unable to provide the most common reasons for Form I-751 denials at its field offices.[147] However, according to data USCIS previously provided to Congress, field offices rarely deny Form I-751 petitions for fraud.[148] In FY 2019, 3 percent of the field office denials were specifically denied for fraud.[149] In FY 2020, this figure dropped to 1 percent.[150] Since one of the central purposes of the interview component is to identify fraud, these figures reflect a serious misalignment in the number of cases being referred for interview. While some petitioners may benefit from an interview that allows them to substitute testimony where documentary evidence is lacking, the above cited data appears to cast doubt on the value of the current criteria. It also calls into question the weight service center adjudicators assign to evidence, their ability to resolve cases through the RFE process, and, potentially, their preconceived notions of what a *bona fide* marriage looks like on paper.

[141] In FY 2020, the number of Form I-751 petitions completed by field offices increased by 52 percent despite its suspension of in-person services from March 17, 2020 through June 4, 2020. In FY 2019, field offices adjudicated approximately 2,600 Forms I-751 per month, a rate that increased to nearly 3,800 in FY 2020 and over 9,500 during the first half of FY 2021. Thus, during the first half of FY 2021, field offices were adjudicating close to four times as many Forms I-751 as compared to two years ago. Information provided by USCIS (May 12, 2021 and May 19, 2021).

[142] USCIS confirmed that the petitions were not reviewed by the service centers prior to transferring. As such, adjudicators at the field offices were responsible for making the interview waiver determination. Information provided by USCIS (May 19, 2021).

[143] USCIS Response to the Citizenship and Immigration Services Ombudsman's Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Jul. 10, 2013); https://www.dhs.gov/sites/default/files/publications/Response_to_CISOMB_I-751_Recommendation_Signed_7-10-13.pdf (accessed May 21, 2021);

[144] Information provided by USCIS (May 19, 2021).

[145] CIS Ombudsman's calculation based on information provided by USCIS (May 19, 2021).

[146] *Id.*

[147] According to USCIS, the Form I-751 system of record, Claims 3, does not track a reason for a denial. Notwithstanding this system limitation, the service centers, who also adjudicate Form I-751 petitions in Claims 3, were able to provide the CIS Ombudsman with the most common reasons for denied Form I-751 petitions where the interview was waived. When derogatory evidence or fraud does not exist, but the petition is ultimately denied at a field office, the common reasons for denial at service centers helps to provide insights into some of the reasons a Form I-751 may be denied at a field office. In FY 2019 and FY 2020, the most common reasons for denial of the Form I-751 at the service centers were: abandonment for failure to appear for biometrics collection; failure to respond to an RFE; failure to submit proper signatures on the form; failure to provide evidence of termination of the marriage in response to an RFE on a divorce waiver; abandonment of LPR status as evidenced by the execution of a Form I-407, *Record of Abandonment of Lawful Permanent Resident Status*; failure to provide a good cause explanation for an untimely filed Form I-751; or the individual is subject to a final order of removal. Information provided by USCIS (May 12, 2021).

[148] *See, e.g.*, "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," USCIS, p. 13 (Apr. 29, 2020); https://www.uscis.gov/sites/default/files/document/reports/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY19-Signed-Dated-4.29.20.pdf (accessed May 21, 2021).

[149] CIS Ombudsman's calculation based on information contained within "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," USCIS, p. 14 (Apr. 29, 2020); https://www.uscis.gov/sites/default/files/document/reports/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY19-Signed-Dated-4.29.20.pdf (accessed Apr. 12, 2021).

[150] CIS Ombudsman's calculation based on information contained within "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," USCIS, p. 14 (Feb. 17, 2021); https://www.uscis.gov/sites/default/files/document/data/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY20-Signed-Dated-2-17-21.pdf (accessed Apr. 12, 2021).

ADJUDICATION OF FORMS I-751 AT THE SERVICE CENTERS HAS ITS OWN CHALLENGES

Currently, interview-waived Form I-751 petitions are adjudicated at all five service centers. Similar to the field offices, due to CPRs' ability to extend their status throughout the pendency of their petitions, service centers do not prioritize the adjudication of Forms I-751. The lack of prioritization coupled with the declining completion rates resulted in the service centers adjudicating approximately 60,000 fewer petitions in FY 2020 compared to FY 2019.[151] Although the number of adjudications tends to fluctuate, the Form I-751 approval rate at the service centers remained consistent. From FY 2018 to FY 2020, service centers approved approximately 96 percent of the Forms I-751 they adjudicated.[152]

If at first you don't succeed, file again. There is no limit on the number of Forms I-751 a petitioner may file. Where the basis for seeking removal of CPR status changes prior to final adjudication of a pending petition, including the breakdown of an existing marriage, the petitioner may file a new Form I-751.[153] After receiving a denial, one may refile under the same or different basis. The denial of a Form I-751 petition requires the CPR to be placed in removal proceedings.[154] While in removal proceedings, USCIS maintains original jurisdiction over all subsequently filed Form I-751 petitions by CPRs. The role of the immigration judge is to review only those Form I-751 petitions that have been denied by USCIS. Where a CPR in removal proceedings files a new joint or waiver petition with USCIS, the immigration judge will generally grant a continuance until USCIS adjudicates the Form I-751. USCIS guidance instructs adjudicators to expedite the processing of Form I-751 petitions for CPRs who are in proceedings.[155]

The lack of limitations on the number of filings combined with the requirement that USCIS retain jurisdiction over newly filed Forms I-751 for CPRs in removal proceedings further complicates processing. Approximately 25 percent of the petitioners who received a Form I-751 denial between FY 2018 and FY 2020 filed a subsequent I-751 petition.[156] For petitioners who filed under the *same* basis (e.g., both initial and subsequent petition filed as a joint petition), USCIS approved approximately 84 percent of the Form I-751 petitions it adjudicated.[157] For petitioners who filed a subsequent petition under a *different* basis, the approval rate is approximately 78 percent.[158] Approximately 66 percent of the subsequent filings identified remain pending.[159] This particular workload places additional strains on the Form I-751 process.

THE RESULT: MARKED INCREASES IN PROCESSING TIMES ACROSS DIRECTORATES

As demonstrated in Figure 3.2 *(Form I-751 Receipts, Adjudications, and Pending Inventory)*, although Form I-751 receipt levels have remained relatively consistent since FY 2014, processing times have increased markedly. In FY 2014, the national average processing times for the Form I-751 was 5.7 months. However, after consecutive fiscal years of declining completions, processing times increased dramatically. In FY 2018, the processing time peaked at 16.1 months. Although USCIS was able to reduce processing times from the FY 2018 level during the past 2 fiscal years, processing times in FY 2020 are 144 percent higher than where they were in FY 2014.[160] Apart from processing times for employment-based Form I-485 applications, no other high-volume benefit request has seen a larger increase in processing times during this timeframe than the Form I-751 petition.[161]

According to USCIS, the decrease in Form I-751 adjudications in FY 2017 and FY 2018 was due to several factors. Specifically, during this time, adjudicators working on Form I-751 petitions at the Vermont and California Service Centers were transferred to other product lines to address backlogs in those areas,

[151] CIS Ombudsman's calculation based on information provided by USCIS (May 19, 2021).

[152] *Id.*

[153] As noted above, USCIS may also amend a pending petition. Information provided by USCIS (May 19, 2021).

[154] 8 C.F.R. §§ 216.3(a), 216.4(b)(3), 216.5(d).

[155] USCIS Memorandum, "Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions" (Oct. 9, 2009); https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudication%20of%20Form%20I-751100909.pdf (accessed Jun. 1, 2021).

[156] CIS Ombudsman's calculation based on information provided by USCIS (May 19, 2021).

[157] *Id.*

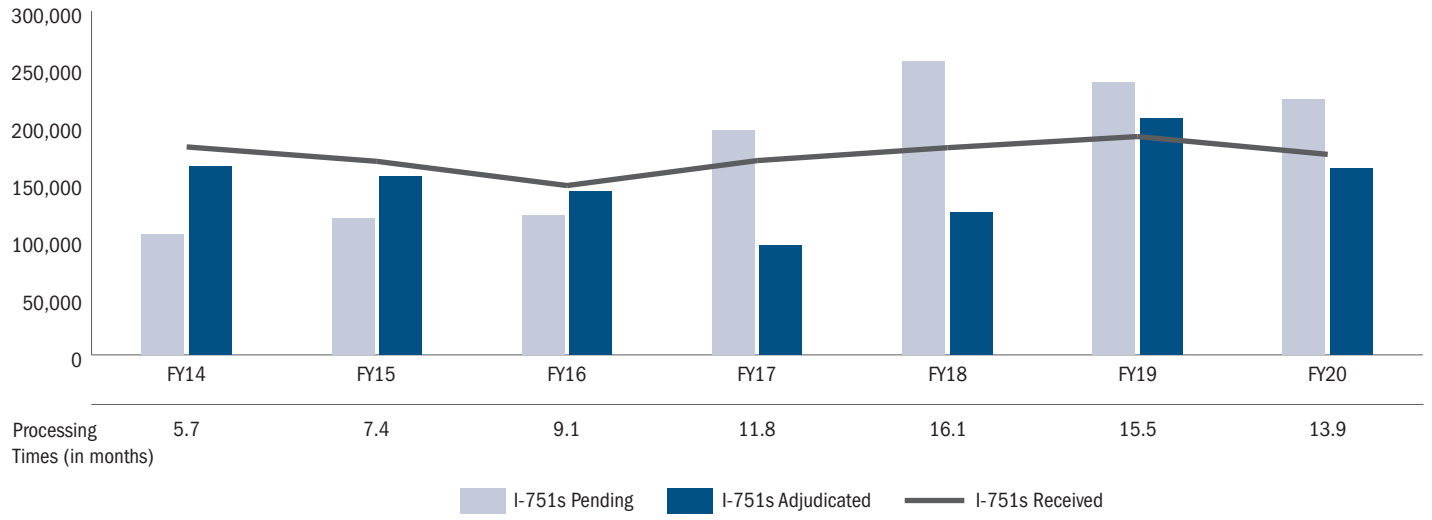
[158] *Id.*

[159] *Id.*

[160] CIS Ombudsman's calculation based on information contained within "Historical National Average Processing Time for All USCIS Offices (Nov. 29, 2018); available at https://www.aila.org/File/DownloadEmbeddedFile/78292 (AILA Infonet Doc. No. 18112934) (accessed Apr. 29, 2021); and USCIS Web page, "Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year;" https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (accessed Apr. 29, 2021).

[161] Notably, the I-485 employment-based processing times increased dramatically in FY 2018 through FY 2020 due to the expansion of the in-person interview requirement. *Id.*

Figure 3.2: Form I-751 Receipts, Adjudications, and Pending Inventory



Source: Historical National Average Processing Time for All USCIS Offices (Nov. 29, 2018); available at https://www.aila.org/File/DownloadEmbeddedFile/78292 (AILA Infonet Doc. No. 18112934) (accessed Apr. 29, 2021); USCIS Web page, "Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year," https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (accessed Apr. 29, 2021).
Note: Pending data begins with the number of I-751 petitions pending at the end of FY 2014 (i.e., September 30, 2014), and continues through the end of FY 2020. Completions are calculated by combining the total number of approvals and denials during the respective fiscal year.

including employment-based nonimmigrant petitions.[162] In addition, adjustments to adjudicators' performance metrics contributed to reduced productivity.[163] Finally, USCIS indicated that offices faced challenges with system functionality when the original case management system (the Marriage Fraud Amendment System or MFAS) was decommissioned and the Form I-751 workload initially migrated to the current case management system (Computer Linked Application Management System or CLAIMS 3) in 2018.[164]

Conversely, adjudications began to rebound in FY 2019 after additional service centers—Texas, Nebraska, and Potomac—began adjudicating Form I-751 petitions. This development enabled the service centers to balance workloads accordingly.[165] The modified interview waiver guidance, which resulted in field offices working a larger percentage of the pending Form I-751 petitions, also contributed to an overall increase in adjudications during this timeframe.

Despite this increase, the Form I-751 backlog continued to grow from FY 2019 to FY 2020.[166] USCIS attributes this growth to the following factors: challenges presented by the COVID-19 pandemic, including a backlog of cases awaiting biometrics collection scheduling at the Application Support Centers (ASCs) and the inability to obtain required immigration files (A-files) from the National Records Center (NRC); a frontlog of Form I-751 petitions at the lockbox facilities; and measures taken to prepare for the potential furlough in FY 2020, which included retraining and moving Form I-751 adjudicators to other product lines to support priority workloads.[167]

Steps taken to reduce processing times. In FY 2020, to mitigate Form I-751 processing issues arising from the COVID-19 pandemic, USCIS authorized the reuse of previously collected biometrics and issued guidance to temporarily waive the requirement that adjudicators obtain and review the A-file prior to final adjudication for certain jointly-filed Form I-751 petitions.[168] In an effort to reduce Form I-751 processing times at its field offices, USCIS

[162] Information provided by USCIS (May 19, 2021).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] From FY 2019 to FY 2020, the net backlog of Form I-751 petitions increased from 125,741 petitions to 142,355 petitions. *See* "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," USCIS, p. 13 (Feb. 17, 2021); https://www.uscis.gov/sites/default/files/document/data/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY20-Signed-Dated-2-17-21.pdf (accessed Apr. 12, 2021).

[167] Information provided by USCIS (May 19, 2021).

[168] *Id.*

is currently conducting a review of the interview waiver criteria to determine whether an interview is necessary on all consular processed Forms I-751.[169] With respect to the service centers, USCIS continues to monitor the current workload allocation (approximately 20 percent between all five centers) to determine if redistribution is required.[170]

Notwithstanding these initiatives, USCIS believes that there are several competing priorities that will continue to negatively impact Form I-751 backlog growth. These priorities include both the need to meet specific deadlines on current programs,[171] and to address both new and restarted programs.[172] USCIS' recent hiring freeze exacerbated these challenges as the agency must continue to shift resources to try to address these demands.[173]

ISSUES CAUSED BY PROCESSING DELAYS AND OTHER CHALLENGES

USCIS' inability to adjudicate cases within the statutory and regulatory timeframes risks diminishing the intent of the IMFA, specifically section 216. The cascading effects of these delays on the "law-abiding majority" involve lapses in status documentation (leading to lapses in employment and travel authorization as well as documents derived from them, such as drivers' licenses), delays in naturalization, and an inability to plan for the future. Moreover, the continued delay in transitioning the Form I-751 petition into electronic processing inhibits efficiency.

Delays Dilute the Intent of the IMFA.

"The purpose of the bill is to deter immigration related marriage fraud."[174]

It is unreasonable to expect that more than 25 years ago Congress could have anticipated the exponential growth of immigration benefit filings and the corresponding stress it has put on the agency charged with their adjudication (an agency that was not, at that time, reliant solely upon fees to fully recoup its operating costs). USCIS generally struggles to meet statutory and regulatory timeframes,[175] and it has made a calculated decision to deprioritize Form I-751 petitions because inaction does not delay the delivery of an immigration benefit. CPRs with pending Form I-751 petitions may obtain evidence of their status throughout the pendency of their petitions, and the rights, privileges, responsibilities, and duties that apply to all other lawful permanent residents apply equally to conditional residents.[176]

The lengthy processing times and the resulting backlogs continue to diminish the intent of the IMFA. The establishment of conditional status sought to discourage future fraud and provide the government with a second opportunity to identify sham marriages.[177] Congress included the specified timeframes to reduce the impact of processing delays on CPRs[178] and to ensure the agency is timely addressing fraud concerns, thereby promoting the intended deterrent effect.

The primary House of Representatives sponsor of the IMFA anticipated a straightforward process for removing conditions.[179] Based on the current completion rates, this expectation has not come to fruition. It is important to consider what procedures, or lack thereof, contribute to making the adjudication unnecessarily complex. In referring cases for interviews, USCIS adjudicators may determine a petition does not contain sufficient documentary evidence to establish the *bona fides* of the marriage. However, it is often unclear what, if anything, has changed since the approval of the underlying Form I-130, *Petition for Alien Relative,* that initiated the CPR

[169] *Id.*

[170] *Id.*

[171] For current programs that may impact Form I-751 processing times, USCIS provided the following examples: the focus of utilizing the greatest number of FY21 employment-based visa numbers as possible and timely adjudicating premium processing requests. Information provided by USCIS (May 19, 2021).

[172] For new and restarted programs that may impact Form I-751 processing times, USCIS provided the following examples: Deferred Action for Childhood Arrivals, Temporary Protected Status, and Deferred Enforced Departure. Information provided by USCIS (May 19, 2021).

[173] Information provided by USCIS (May 19, 2021).

[174] H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 6 (1986).

[175] *See, e.g.*, INA § 208(d)(5); 8 U.S.C. § 1158(d)(5) (in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed); § 235(d)(2) of the Trafficking Victims Protection and Reauthorization Act of 2008, Pub. L. 110-457 (all applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed); and INA § 214(c)(2)(C); 8 U.S.C. § 1184(c)(2)(C) (The Attorney General shall provide a process for reviewing and acting upon petitions under this subsection with respect to nonimmigrants described in section 1101(a)(15)(L) of this title within 30 days after the date a completed petition has been filed).

[176] 8 C.F.R. § 216.1.

[177] "The INS expects that the establishment of conditional status would simplify its procedures, since it would shift the burden of proof from the Service to the immigrants; the INS also expects this would have a sizeable deterrent effect, possibly reducing the number of aliens admitted for marriage-related reasons by as much as 15 percent. While notifying the applicants and processing the petitions at the end of the two-year period would result in increased paperwork, there would be a corresponding reduction in interviews and investigations because of the deterrent effect and the increased availability of information." H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 13 (1986).

[178] *Chettiar v. Holder*, 665 F.3d 1375 (9th Cir. 2012).

[179] "The petition on its face is not something that is of great burden to anyone. It simply recited [sic] the facts that exist at the time and would require the removal, if all things are equal, of that condition by the [Secretary]." 99th Cong. Rec. H. 27016 (Sep. 1986) (statement of Rep. Bill McCollum).

status.[180] Although life after the wedding is relevant to establishing the intent of the marital union,[181] Congress did not intend to subject CPRs to longer processing times via the interview requirement due to the agency's notions of what a marriage should look like after 2 years.[182]

Temporary evidence of status can be difficult to procure. CPRs are not only entitled to evidence of status, but are required to possess it.[183] As noted above, USCIS does not consider Forms I-751 a priority workload because CPRs may extend their status while their petitions remain pending. However, Form I-751 processing delays and difficulties in obtaining in-person appointments impede CPRs' ability to secure evidence of lawful status. Upon accepting a properly filed Form I-751, USCIS issues a receipt notice, extending the petitioner's CPR status for 18 months. This allows CPRs to travel, work, and otherwise enjoy benefits and protections associated with permanent residence in the United States past the expiration date on their Forms I-551. If the Form I-751 remains pending beyond the 18-month validity period, CPRs may in theory schedule an in-person appointment at their local field office to obtain an Alien Documentation Identification and Telecommunications (ADIT) stamp in their passport, also known as a Form I-551 stamp.[184]

The agency previously extended the validity period for temporary evidence of CPR status on the following occasions:

- In 1997, INS lengthened the validity period from 6 to 12 months to "assist the districts in reducing the backlog of unscheduled cases for removal of conditions."[185]
- In 2018, USCIS changed the validity period from 12 to 18 months because Form I-751 processing times "increased over the past year."[186] USCIS decided to not extend the validity period further because it was concerned that an extension beyond 18 months could lead individuals to erroneously believe the receipt notice by itself allowed them to remain outside of the United States for extended periods of time, potentially causing issues with their CPR status.[187]

When the validity period of the temporary evidence fails to accurately account for Form I-751 backlogged processing times, it increases the number of CPRs lacking evidence of status and heightens the demand for in-person appointments for ADIT stamping.[188] From FY 2018 to FY 2021, Quarter 1, in-person appointments scheduled for CPRs seeking an ADIT stamp comprised approximately 21 percent of the total in-person appointments scheduled.[189] During this timeframe, USCIS accommodated approximately 54 percent of the requests from CPRs seeking an ADIT stamp.[190]

Additional obstacles for obtaining temporary evidence during the COVID-19 pandemic. Due to COVID-19 mitigation efforts, delays in issuing Form I-751 receipts, and additional challenges in scheduling ADIT stamping appointments,[191] field offices have been unable to meet

[180] For example, while some married couples may accumulate an extensive paper trail documenting their life together during the first two years of marriage, others, due to socioeconomic factors or separate considerations, may not. This does not mean that the former is more likely than the latter to have entered into marriage for the sole purpose of obtaining an immigration benefit, or vice versa.

[181] *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

[182] "The Committee does not intend to cast a negative or suspicious eye on alien applicants with this legislation… The Committee was required to strike a delicate balance between the government's need to effectively enforce our laws and protect an individual's right to privacy. This bill provides a balanced approach by requiring an objective and unintrusive test. In most cases the couple should be able to satisfy the Attorney General through documentary evidence. When an interview with an officer of the Immigration and Naturalization Service is necessary, questions should not probe into the intimate personal habits of the applicants." Sen. Rep. No. 99-491, 99th Cong., 2nd Sess. at 6-7 (1986).

[183] INA § 264(d); 8 U.S.C. § 1304(d); *see also* 8 C.F.R. § 216.4(a)(1).

[184] An ADIT stamp is a temporary I-551 stamp, typically issued with a 12-month expiration date in the CPR's unexpired, foreign passport (if the expiration date of the passport is one year or more). If the CPR is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the conditional resident will be issued. USCIS Memorandum, "Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence" (Dec. 2, 2003); USCIS Memorandum, "Use of the USCIS Version of the DHS Dry Seal in the Issuance of Alien Documentation, Identification Telecommunication System (ADIT) Stamp as Temporary Evidence of Lawful Permanent Resident Status" (Dec. 10, 2008); and USCIS Memorandum, "Interim Guidance for the Issuance of an Alien Documentation, Identification and Telecommunications System (ADIT) Stamp as Temporary Evidence of Lawful Permanent Resident Status" (May 15, 2009) (in the possession of the CIS Ombudsman).

[185] INS Memorandum, "Extension of Processing Time for Petitions to Remove Conditional Resident Status (I-751)" (Sep. 16, 1997) (in the possession of the CIS Ombudsman).

[186] USCIS Webpage, "Update to Form I-797 Receipt Notices for Form I-751 and Form I-829" (Jul. 12, 2018) https://www.uscis.gov/news/alerts/update-to-form-i-797-receipt-notices-for-form-i-751-and-form-i-829 (accessed Apr. 29, 2021).

[187] Information provided by USCIS (May 19, 2021).

[188] ADIT stamping appointments account for nearly 80 percent of all InfoMod appointments at the field offices. Ombudsman's Annual Report 2020, p. 90.

[189] Information provided by USCIS (May 19, 2021).

[190] CPRs must wait until 30 calendar days prior to the expiration of their 18-month extension letter to submit a request for an ADIT stamp appointment. The current criteria used to determine if a CPR is eligible for an ADIT stamp is: 1) CPR must have either a pending, approved, or denied Form I-751; 2) the CPR must be located in Customer Profile Management Service (CPMS) for identity verification; and 3) the CPR must have an unexpired passport, or the petitioner will need to bring two passport-style photos with them to the appointment in order for the ADIT stamp to be placed on an I-94 with a photo attached. Information provided by USCIS (May 19, 2021).

[191] For a further discussion on the current challenges related to InfoMod scheduling, see Ombudsman's Annual Report 2020, pp. 86–95.

the demand, leaving CPRs without valid evidence of their lawful status. During FY 2020, the CIS Ombudsman received an increasing number of requests for case assistance from Form I-751 petitioners who were unable to obtain InfoMod appointments at their local field offices. Several of these petitioners were in need of an ADIT stamp to serve as evidence of status because USCIS failed to issue a receipt notice due to a technical issue.[192] To maintain safe occupancy levels during the pandemic, USCIS:

- Reduced the number of available appointments at its field offices, including those available for ADIT stamps;
- Incorporated additional requirements to identify the most urgent cases, such as by not allowing CPRs to request an appointment until 10 days before the expiration of their evidence of status;[193] and
- Required CPRs to present evidence to support their need for proof of status before scheduling an ADIT stamp appointment, such as a letter indicating that their employment will be terminated if proof of status is not presented.

These additional requirements, while presumably necessary to maximize limited appointment availability, were further obstacles to CPRs without valid evidence of their status, jeopardizing employment status and other essentials such as driver's licenses.

Concurrent processing of Forms I-751/N-400 is a growing challenge. CPRs may file a Form N-400 application once they are otherwise eligible to apply for naturalization; they do not need to wait for the adjudication of Form I-751. However, USCIS may not approve a Form N-400 if there is a pending Form I-751, as the removal of conditions of permanent residence is a necessary predicate to naturalization.[194] Due to lengthening processing times, the presence of concurrently pending Form I-751 petitions and Form N-400 applications has become increasingly common.[195] In addition, CPRs with pending Forms I-751 are waiting less time before filing their Form N-400 applications.[196]

The filing of the Form N-400 may impact the Form I-751 interview waiver determination. Specifically, once a CPR files a Form N-400, the service centers generally will not issue an RFE in connection with the Form I-751 before referring the case for interview, and the petition will be forwarded to the NBC for consolidation with the Form N-400 in anticipation of a field office interview.[197] CPRs subject to the interview requirement ostensibly benefit from having their Form I-751 linked to an application that the agency considers more of a priority.[198]

However, as demonstrated by Figure 3.3 (*Processing Timeframes for Concurrently Pending Forms I-751/N-400)*, USCIS often struggles to adjudicate these benefit requests simultaneously. Although USCIS has indicated that it has the capability to identify concurrently pending Forms I-751/N-400 prior to scheduling an interview at the field office, it appears that this technology is either underutilized or ineffective.[199] In addition, the median processing times

[192] In April 2020, USCIS deployed a new release of the CLAIMS 3 database. The deployment unleashed a software bug that caused receipt notices not to be printed for Form I-751 (Petition to Remove Conditions on Residence). In June, USCIS confirmed that over 25,000 Form I-751 petitions were affected, and that USCIS' solution was to manually print and mail the backlogged notices. Information provided by USCIS (Jul. 9, 2020).

[193] From March through mid-May 2020, requests for ADIT stamps were based on emergency need and field office availability. From mid-May through June 2020, ADIT stamps were screened for emergency cases specific to essential workers that were able to provide supporting documentation. On June 30, 2020, USCIS removed limitations and InfoMod appointments for ADIT stamps are screened for both emergent and non-emergent reasons. Information provided by USCIS (May 19, 2021).

[194] For a further discussion on the challenges presented by these concurrently pending benefit requests and specific recommendations where USCIS can improve processing, see Ombudsman's Annual Report 2020, pp. 10–27.

[195] For example, in FY 2016, when the national average processing times for the Form I-751 was 9.1 months, only 3,187 Forms N-400 were pending with a Form I-751 at the end of the respective fiscal year. This number increased to 41,599 at the end of FY 2019 after the national median processing times for the Form I-751 increased to 15.5 months. Information provided by USCIS (May 5, 2020 and May 19, 2021). *See also* USCIS Webpage, "Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year," https://www.uscis.gov/archive/historical-national-average-processing-time-in-months-for-all-uscis-offices-for-select-forms-by (accessed Apr. 29, 2021).

[196] In FY 2018, the average CPR with a concurrently pending Form I-751 and Form N-400 waited approximately 600 days into the pendency of their Form I-751 prior to filing a Form N-400. In FY 2020, this figure was reduced to 396 days. Information provided by USCIS (May 19, 2021).

[197] CIS Ombudsman webinar, "USCIS' Processing of Concurrently Pending Forms N-400 and Forms I-751," Oct. 7, 2020.

[198] In addition, USCIS takes the pending Form I-751 into account when scheduling the naturalization interview. Specifically, the Form I-751 is registered during an automated interview assessment and it will generally result in USCIS allotting more time for the Form N-400 interview. USCIS 2020 Annual Report Response, pp. 4–5 (Dec. 4, 2020); https://www.dhs.gov/sites/default/files/publications/2020_uscis_response.pdf (accessed May 25, 2021).

[199] USCIS' automated Form N-400 assessment enables USCIS to identify a Form N-400 with an associated pending Form I-751 prior to scheduling the naturalization interview at the field office. However, despite having nearly 42,000 Forms N-400 pending with an associated Form I-751 at the end of FY 2019, USCIS only scheduled 648 Form N-400 interviews in CY 2020 where the assessment identified a pending Form I-751. Information provided by USCIS (May 19, 2021). For further information on USCIS' automated Form N-400 assessment, *see* Ombudsman's Annual Report 2020, pp. 19–20; *see also* USCIS 2020 Annual Report Response, pp. 4–5 (Dec. 4, 2020); https://www.dhs.gov/sites/default/files/publications/2020_uscis_response.pdf (accessed May 25, 2021).

for Form I-751 petitions with a concurrently pending Form N-400 tend to exceed the national median.[200]

Figure 3.3: Processing Timeframes for Concurrently Pending Forms I-751/N-400

Fiscal Year	Number of Forms I-751/N-400 Adjudications	Percent of Forms I-751 Adjudicated Within 0–30 Days of Form N-400	Percent of Forms I-751 Adjudicated Within 31–89 Days of Form N-400	Percent of Form I-751 Adjudicated More Than 89 Days of Form N-400
2018	11,549	32%	36%	32%
2019	13,364	30%	27%	43%
2020	4,276	39%	19%	42%

Source: Information provided by USCIS (May 19, 2021).
Note: Number of Forms I-751/N-400 Adjudications represents the number of cases where Forms I-751/N-400 were pending concurrently prior to the adjudication of the respective benefit requests.

Technological challenges continue to aggravate processing issues. In 2013, the CIS Ombudsman noted the limitations of the electronic system used for Form I-751 adjudications at that time (MFAS), and recommended that USCIS explore and implement an alternative system capable of enhancing Form I-751 processing.[201] In response to this recommendation, USCIS informed the CIS Ombudsman it anticipated that Form I-751 processing would be moved to ELIS by July 2015.[202] Nearly 8 years after providing this response and almost 6 years past the proposed implementation date, Form I-751 petitions are still filed in paper format. Although it is adjudicated electronically, USCIS transitioned to a different electronic system than ELIS.[203]

In May 2018, MFAS functionalities were transitioned into CLAIMS 3.[204] This is particularly problematic for concurrently pending Form N-400 applications, 100 percent of which are adjudicated in ELIS,[205] and is emblematic of the recurring theme that Forms I-751 are not a priority for the agency.

Managing processing expectations. For Form I-751 petitioners, processing times provide an expectation on when a decision will be made, allowing individuals to make life plans accordingly. For USCIS, processing times dictate when a petitioner may inquire about a pending Form I-751. Unlike Form I-485 and Form N-400 processing time information, Form I-751 processing times are posted as a collective range for all field offices. As of the publication of this report, the Form I-751 processing times range from 18.5 to 34.5 months at field offices.[206]

In 2018, USCIS began posting Form I-751 processing times as a collective range rather than individually because, during this time, a greater number of petitions were being sent to field offices for interview.[207] Since USCIS was uncertain as to the impact of this increased volume on individual field offices' processing times, it believed that a collective range would provide stability.[208] However, the collective range essentially leaves petitioners unaware of how long their local field office will take to process their Form I-751. In addition, the lack of specific field office processing times effectively closes the door on case inquiries at field offices that are outperforming

[200] In FYs 2018, 2019, and 2020, the national median processing times for the Form I-751 were 15.9, 14.9, and 13.8 months, respectively. However, the median processing times for Form I-751 petitions with a concurrently pending Form N-400 during this same time period were 19.7, 18, and 18.2 months, respectively. CIS Ombudsman's calculation based on information provided by USCIS (May 19, 2021). *See also* USCIS Webpage, "Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year," https://egov.uscis.gov/processing-times/historic-pt (accessed May 25, 2021).

[201] Citizenship and Immigration Services Ombudsman's Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Feb. 28, 2013); https://www.dhs.gov/sites/default/files/publications/cisomb-conditional-residence-recommendation-final-02282013_1.pdf (accessed Apr. 29, 2021).

[202] USCIS Response to the Citizenship and Immigration Services Ombudsman's Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children" (Jul. 10, 2013); https://www.dhs.gov/sites/default/files/publications/Response_to_CISOMB_I-751_Recommendation_Signed_7-10-13.pdf (accessed Apr. 29, 2021).

[203] USCIS has indicated that they are currently considering the inclusion of Forms I-751 into ELIS, but no specific dates for deployment are available at this time. Information provided by USCIS (May 19, 2021).

[204] Information provided by USCIS (May 12, 2021). For further information on CLAIMS 3, *see* DHS Privacy Impact Assessment, "Computer Linked Application Management System and Associated Systems (CLAIMS 3)" (Jun. 30, 2020); https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis016d-claims3-july2020.pdf (accessed May 24, 2021).

[205] While the Form N-400 is now adjudicated solely in ELIS, the Form I-751 is adjudicated in a legacy system. The difference of adjudication systems can affect the processing environment and the need to go back and forth between systems as well as send applications and the related files to different locations. CIS Ombudsman webinar, "USCIS' Processing of Concurrently Pending Forms N-400 and Forms I-751," Oct. 7, 2020.

[206] The CIS Ombudsman often receives requests for case assistance from Form I-751 petitioners that are unaware of which directorate is responsible for adjudicating their petition, which has an impact on the processing times they should monitor as well as when they can inquire about their case. Per USCIS, if the receipt number begins with MSC, then the petition was routed at intake for interview scheduling. In this scenario, petitioners should reference the Form I-751 processing time for "All Field Offices" to determine when they may inquire about their case. If the receipt number begins with EAC, LIN, SRC, WAC, or YSC, then the case is being routed to a service center for review to determine whether the interview can be waived. In this scenario, petitioners should reference the appropriate service center's Form I-751 processing time information. However, if the service center ultimately determines that the interview cannot be waived, the adjudicator will update the system, which will result in the automatic generation of a notice that indicates that the file is being forwarded to the NBC (i.e., "All Field Offices" processing times apply). CIS Ombudsman webinar, "USCIS' Processing of Concurrently Pending Forms N-400 and Forms I-751," Oct. 7, 2020.

[207] Information provided by USCIS (May 19, 2021).

[208] *Id.*

the published inquiry dates. By placing all Form I-751 petitions at the field offices on the same track, it makes it impossible to hold individual offices accountable when an aberration occurs.

CONSIDERATIONS AND RECOMMENDATIONS

Prioritizing the adjudication of Form I-751 petitions could have deleterious effects on other product lines, particularly at the field offices, which have seen workloads only increase (but not staff resources) in recent years. Similarly, as the naturalization and adjustment of status backlogs continue to grow, it is unlikely USCIS will make a concerted effort to significantly reduce Form I-751 processing times anytime soon. Nevertheless, there are actions USCIS can take to increase efficiencies, manage expectations, and minimize the adverse impacts these delays have on CPRs and on the agency.

- *Lengthen the validity period for temporary evidence of CPR status to avoid multiple visits.* USCIS should extend the validity periods for both Form I-797 receipt notices and ADIT stamps to ensure CPRs have evidence of status throughout the processing of their Forms I-751. The lengthening of the receipt notice validity period from 12 to 18 months undertaken in 2018 has proven insufficient. As of December 31, 2020, 23 percent of Form I-751 petitions were pending for more than 18 months. The extended validity period should aim to drastically reduce the need to contact USCIS to schedule in-person appointments for ADIT stamping. Since Form I-751 processing times vary considerably by location, the modified validity period should be closer to the upper end of the processing time range for the worst-performing location rather than the best. To the extent that USCIS still has concerns regarding CPRs relying to their detriment on this temporary evidence (i.e., risking abandonment of residency), it should ensure that the receipt notice contains language that adequately addresses this issue.[209]

  Currently, the ADIT stamp is typically valid for up to 12 months,[210] but this too has proven to be inadequate for most petitioners. To reduce the need for subsequent InfoMod appointments, USCIS should consider extending the validity date of the stamp. Alternatively, if USCIS is unable to adjudicate the petition within the temporary extension timeframe provided on the receipt notice (e.g., 18 months for Form I-751), it should consider automatically issuing an additional receipt notice to further temporarily extend the validity period.[211] This solution has the potential to remove the need for ADIT stamping entirely.

- *Revise interview waiver criteria to make interviews more efficient.* To promote the effective use of field offices' finite resources, USCIS should remove the categorical requirement for its interview waiver criteria and rely solely on a risk-based analysis to determine which petitioners it should interview. Absent actionable derogatory information necessitating the need for further questioning, there is little value for an interview that contributes significantly to processing delays but rarely uncovers fraud, or even grounds to deny. Similarly, a risk-based approach could also allow USCIS to prioritize the limited number of Form I-751 petitions requiring an interview, which would help to accomplish the deterrent effect if fraud is identified.

  USCIS' Fraud Detection and National Security Directorate (FDNS) should play a role in revising the interview waiver criteria. From FY 2018 to FY 2020, FDNS created 16,639 fraud referral leads and cases that involved a Form I-751 petition.[212] FDNS was able to identify fraud in approximately 10 percent of these cases.[213] Since the primary purpose of the IMFA was to identify marriage fraud, and the interview is a key component to helping to uncover sham marriages, it would be advantageous to rely on FDNS investigatory work to develop the revised interview waiver criteria. Similarly, FDNS could analyze and identify patterns within the cases it has investigated where fraud was *not* found, as these cases may be illustrative of the petitions that are improperly referred for interview and can serve as training material for adjudicators. By incorporating known risk factors, as well as other considerations that may unduly influence an adjudicator, the revised guidance will limit unnecessary interview referrals, thus promoting the most effective use of field office resources.

  By standardizing this approach, USCIS will improve its ability to address relevant fraud concerns at the time of the Form I-751 adjudication, while simultaneously

[209] The CIS Ombudsman notes that the Form I-751 Receipt Notice already contains the following information, "If you think you will be out of the United States for a year or more, you should apply for a Re-entry Permit before leaving the country by filing Form I-131, *Application for a Travel Document*. As long as the Re-entry Permit is valid, it allows you to board a vessel or aircraft destined for the United States and/or apply for admission at a U.S. port of entry during the permit's validity without the need to obtain a returning resident visa from a U.S. Embassy or U.S. Consulate."

[210] Information provided by USCIS (May 19, 2021).

[211] Pursuant to 8 C.F.R. § 216.4(a)(1), upon receipt of a properly filed Form I-751, CPR status shall be extended "automatically" until USCIS has adjudicated the petition.

[212] CIS Ombudsman's calculation based on information provided by USCIS (May 19, 2021).

[213] *Id.*

reducing processing delays for *bona fide* married couples. Also, as fraud is constantly evolving, USCIS should consider regular assessment of the interview waiver criteria, periodically analyzing the field office approval/denial rates to evaluate the effectiveness of the criteria used, and the overall value of the interviews themselves. This periodic review will discourage individual adjudicators from substituting their own personal biases and judging marriages that do not conform to their standards, while also allowing USCIS to modify the criteria as appropriate.

- *Post processing times for individual field offices, not as an aggregate, to better inform petitioners on their real wait times*. To better manage petitioners' expectations, USCIS should disaggregate field office processing time information, as they vary considerably.[214] The current collective range hinders transparency and reduces petitioners' ability to contact USCIS when the processing of their petition is off track. Separating processing time information by field offices will allow petitioners to have a better understanding of the applicable waiting times and will promote accountability.

- *Initiate further improvements to Forms I-751/N-400 processing to increase efficiencies*. While USCIS has taken steps to improve the concurrent processing of Forms I-751/N-400 benefit requests, such as file consolidation and not issuing an RFE on Form I-751 before referring the case for interview, more can be done to increase efficiencies. Although providing petitioners with the option to file their Forms I-751 electronically is the end goal, it has proven to be an extremely difficult task for the agency. However, USCIS can immediately improve the concurrent processing of these benefit requests by aligning the internal processing platforms for both the Form I-751 and Form N-400, requiring a migration from CLAIMS 3 to ELIS, and the ingestion of paper-based Form I-751 filings into the digital environment. This enhancement would significantly reduce the delays attributed to file transfer issues associated with the concurrent processing. It will streamline concurrent adjudication as adjudicators will no longer have to toggle between an antiquated system and ELIS.

  In addition, while USCIS takes a pending Form I-751 into consideration when scheduling a Form N-400 interview, system enhancements and/or standardized processing could better identify these cases. The Form N-400 interview notice is not tailored to address the pending Form I-751 petition. For example, if USCIS wants the CPR's spouse to appear at the naturalization interview to adjudicate the Form I-751 petition, it needs to provide this instruction to avoid an unnecessary continuation of the case. Also, as USCIS assumes the Form I-751 will increase the interview length, USCIS is needlessly extending the interview time if the Form I-751 is eligible for an interview waiver, thereby reducing the number of Form N-400 interviews it can schedule in a day.

  The service centers frequently transfer Form I-751 petitions to the NBC to join a pending Form N-400 application without making an interview waiver determination. Once consolidated, these joint benefit requests will remain at the NBC until the Form N-400 interview has been scheduled. USCIS can address these inefficiencies by allowing the NBC to adjudicate interview-waived Form I-751 petitions. Adjudicating these petitions at the NBC (or, in the alternative, at a service center) will increase the likelihood that only petitions that require an interview are transferred to the field office with the pending Form N-400. This will allow USCIS to increase efficiency by making better informed decisions concerning the Form N-400 interview length, thus allowing resources to be aligned accordingly.

POSTSCRIPT: THE IMFA—25 YEARS LATER

Detecting immigration-based marriage fraud is an exceptionally difficult responsibility. Congress enacted Section 216 of the INA to provide USCIS with a second opportunity to identify those individuals who successfully circumvented the immigration laws in the first instance. At the time, Congress was led to believe that upwards of 30 percent of marriage-based immigration filings were fraudulent.[215] This figure was later found to be "wholly speculative and exaggerated."[216] Notwithstanding this faulty premise, the agency's inability to meet statutory processing times has resulted in an unintended consequence that Congress had hoped to avoid—processing delays that harm *bona fide* married couples.

From FY 2017 to FY 2020, USCIS denied 0.1 percent of the Form I-751 petitions it adjudicated for reasons

[214] CIS Ombudsman webinar, "USCIS' Processing of Concurrently Pending Forms N-400 and Forms I-751," Oct. 7, 2020.

[215] "Surveys conducted by the Immigration and Naturalization Service have revealed that approximately 30% of all petitions for immigrant visas involve suspect martial relationships." H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 9 (1986). "Government figures currently show that 30% of alien marriages involve fraud." Sen. Rep. No. 99-491, 99th Cong., 2nd Sess. at 6 (1986).

[216] *Manwani v. U.S. Dept. of Justice*, INS, 736 F. Supp. 1367 (W.D.N.C. 1990).

of fraud.[217] The Form I-751 processing times during this same period averaged 15 months. If Congress was informed in 1986 that the conditional residence requirement would only result in denials for fraud in 0.1 percent of cases adjudicated, and that it would take 15 months to make a decision, it is at least worth pondering whether it would have enacted the IMFA.

Nonetheless, concerns related to marriage fraud and individuals circumventing immigration laws are just as relevant today as they were 25 years ago. In fact, with the advent of the internet and the proliferation of global travel, opportunities for both legitimate and fraudulent marriages to form remotely has increased exponentially since 1986. The notable difference is that with the creation of DHS, the government now has considerable resources dedicated to investigating immigration benefit fraud.[218] The Form I-751 graduated framework, while developed with the best of intentions, appears a relic, established before a time the Department existed and had adequate resources to conduct fraud investigations independent of its adjudicative function.[219] Similarly, several of the concerns that justified the need for this legislation have been largely addressed through subsequent legislation, additional resources, and advancements in technology,[220] making the Form I-751 framework somewhat superfluous. That framework, however, now hinders the petitioners it is supposed to help, putting their lives and livelihoods on hold because of the lack of prioritization of supposedly "safe" statuses.

Regardless of its shortcomings, USCIS is bound by the law and has a duty to detect fraud to the best of its abilities while simultaneously lessening the adverse impact of Form I-751 processing delays. The agency can accomplish these congruent tasks by limiting the effects that processing delays have on CPRs' ability to demonstrate their status and naturalize. While the Form I-751 process has drifted far from what Congress intended, modest reforms can reduce significant processing delays while minimizing the impact overall delays have on the "law-abiding majority."

[217] CIS Ombudsman's calculation based on information contained within the following USCIS reports: "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," p. 14 (Feb. 17, 2021); https://www.uscis.gov/sites/default/files/document/data/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY20-Signed-Dated-2-17-21.pdf (accessed Apr. 12, 2021); "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," p. 14 (Apr. 29, 2020); https://www.uscis.gov/sites/default/files/document/reports/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY19-Signed-Dated-4.29.20.pdf (accessed Apr. 12, 2021); and "Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security," p. 10 (Apr. 9, 2019); https://www.uscis.gov/sites/default/files/document/data/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY18-Signed-Dated-4-12-19.pdf (accessed Apr. 12, 2021).

[218] *See* U.S. Immigration and Customs Enforcement Webpage, "Identity and Benefit Fraud," https://www.ice.gov/investigations/identity-benefit-fraud (accessed Apr. 29, 2021). *See also* USCIS Webpage, "Fraud Detection and National Security Directorate," https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate (accessed Apr. 29, 2021).

[219] "The real problem is our Immigration Service is not adequately staffed to be able to handle these matters…What happens is the people get here, they get caught up in the system and we never find out about the fraudulent aspects of it in most cases until it's really too late and the person becomes a citizen." 99th Cong. Rec. H. 27016 (Sep. 1986) (statement of Rep. McCollum).

[220] For example, both the House and Senate reports noted that the existing protections were inadequate because "it is almost impossible" to revoke, rescind, deport or even locate the noncitizen of the original spouse. Sen. Rep. No. 99-491, 99th Cong., 2nd Sess. at 11 (1986). *See also* H.R. Rep. No. 906, 99th Cong., 2nd Sess. at 6 (1986). However, Congress subsequently enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which allows DHS to initiate removal proceedings without having to first rescind lawful permanent resident status. In addition, U.S. Immigration and Customs Enforcement now has an entire outfit dedicated to locating removable noncitizens, and, with the advent of modern-day surveillance technologies, concerns related to the inability to locate noncitizens have largely been addressed.

Accessing the Naturalization Starting Block:

The Challenges of the Medical Disability Test Waiver Process

Responsible Directorate: Field Operations Directorate

INTRODUCTION

With certain exceptions, sections 312(a)(1) and (a)(2) of the Immigration and Nationality Act (INA) require an applicant for U.S. citizenship to demonstrate the ability to read, write, and speak English, along with knowledge and understanding of U.S. history and government. Requiring naturalized citizens to have a certain level of English and familiarity with American history and civics can strengthen their ability to become full participants in their adopted country and understand their rights and responsibilities as U.S. citizens. Section 312(b)(1) of the INA provides an exception to the English and civics requirements: "[A]ny person who is unable [to demonstrate an understanding of the English language and/or the history, principles and U.S. form of government] because of physical or developmental disability or mental impairment" is not required to comply with the English and civics requirements. The intent of the exception is to allow applicants with disabilities who are otherwise eligible to become naturalized citizens to become U.S. citizens despite the inability to learn English or civics.[221]

In this article, we explore the obstacles faced by naturalization applicants who may be unable to access citizenship requirements for English and U.S. government and history and conclude with recommendations as to how USCIS can provide a more fair and efficient disability waiver process.

[221] For the purposes of this article, individuals who are eligible to become naturalized citizens are individuals who have been admitted to the United States as lawful permanent residents (also known as green card holders) and have met the residence and physical presence required for naturalization under section 316 of the INA. During the adjudication process, USCIS may determine some of these individuals fail to qualify for naturalization for other reasons.

BACKGROUND

Article 1, Section 8 of the U.S. Constitution gives Congress the power to establish a uniform rule of naturalization. In the Naturalization Act of 1790, Congress delineated the requirements and process to become a naturalized citizen. Overall, Congress placed few restrictions on the ability of Whites to acquire U.S. citizenship; however, it placed significant restrictions on the ability of enslaved descendants of Africa and other non-Whites to gain citizenship.[222] As the nation grew and attempted to define what its citizenry should be, subsequent laws removed or added requirements to achieve the status of citizen, such as removing race and nationality restrictions[223] and incrementally adding an understanding of American language and history as requirements.

In 1906, Congress amended the naturalization law to require applicants to be able to "speak the English language."[224] The Internal Security Act of 1950 (the McCarran Act) amended the English language provision to an "understanding" of the English language, defined to include "an ability to read, write, and speak words in ordinary usage in the English language."[225] Congress specifically provided an exception to the English language requirement for applicants who were not able to comply due to a physical disability or were over 50 years of age and had been legally residing in the United States for 20 years. The McCarran Act also amended the Nationality Act of 1940 to require applicants to demonstrate "a knowledge and understanding of the fundamentals of the history, and the principles and form of government, of the United States."[226]

The Immigration Act of 1990 transferred the authority to naturalize from the federal courts to the Executive Branch (then the Attorney General, now DHS), and the English and civics requirements were codified under section 312 of the INA.[227] The last significant piece of legislation amending section 312 of the INA, the Immigration and Nationality Technical Corrections Act of 1994, amended section 312 of the INA to expand the waiver of the English requirement to individuals with a mental impairment or those who are over 55 years of age and have been living in the United States as a lawful permanent resident for at least 15 years.[228] The Act also added subsection (b)(1) to section 312 of the INA, which extended the expanded disability waiver qualifications to apply to the civics requirement, and subsection (b)(3), which authorized DHS to "provide for special consideration" in how it determines whether applicants who are over 65 years of age and have been living in the United States as lawful permanent residents for at least 20 years have met the civics requirement.[229] Older applicants may be eligible to waive the English language requirement based on their age and length of time in the United States, but they would still have to pass the civics test either in English or their native language.

USCIS now tests applicants' ability to speak, read, and write in English at the time of the naturalization interview. An officer assesses whether the applicant can provide meaningful verbal responses to questions relevant to their naturalization eligibility, and can correctly read and write one out of three sentences taken from a standardized reading test form in a manner that the officer understands.[230] To pass the civics test, applicants must answer correctly a certain number of questions from a standardized list of civics questions and answers, now made available on USCIS' website.[231]

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[222] An Act to Establish a Uniform Rule of Naturalization, Ch. 3, § 1-103 (Mar. 26, 1790) (repealed 1795).

[223] *See* Patrick Weil, "The Sovereign Citizen," *passim* (2012); https://muse.jhu.edu/book/21278 (accessed Apr. 23, 2021). *See generally* Miriam L. Smith, "INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898," National Archives Prologue Magazine (Summer 2002); https://www.archives.gov/publications/prologue/2002/summer/immigration-law-1.html (accessed Apr. 23, 2021).

[224] An Act to Establish a Bureau of Immigration and Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States, Ch. 3592, § 8 (Jun. 29, 1906).

[225] Internal Security Act of 1950, Pub. L. 81-831, § 30 (Sep. 23, 1950) (amending § 304 of the Nationality Act of 1940).

[226] *Id.*

[227] Immigration Act of 1990, Pub. L. 101-649, § 403, 104 Stat. 5039 (Nov. 29, 1990).

[228] Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103, § 108 (Oct. 25, 1994) (amending § 312 of the INA).

[229] *Id.*

[230] 12 USCIS Policy Manual, Pt. E, Ch.2(D); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-2 (accessed Apr. 26, 2021).

[231] On December 1, 2020, USCIS implemented a revised naturalization civics test as part of a decennial review and update process. However, in alignment with the recent Executive Order 14012, *Restoring Faith in Our Legal Immigration Systems*, USCIS determined the 2020 civics test may inadvertently create potential barriers and reverted to the 2008 version of the naturalization civics test beginning March 1, 2021. USCIS News Release, "USCIS Reverts to the 2008 Version of the Naturalization Civics Test" (Feb. 22, 2021); https://www.uscis.gov/news/news-releases/uscis-reverts-to-the-2008-version-of-the-naturalization-civics-test (accessed Mar. 10, 2021).

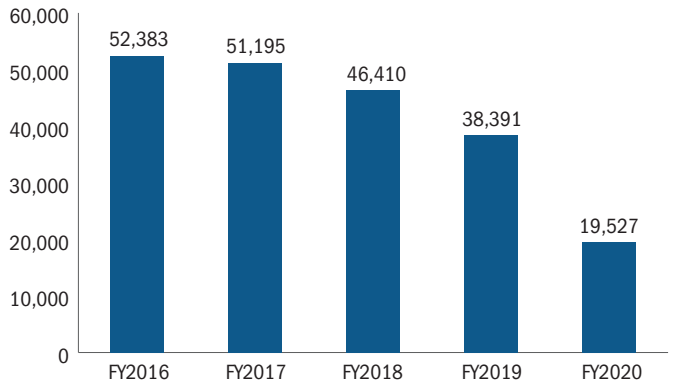
ADVERSITY, AGE, DISABILITIES, AND IMPAIRMENTS CREATE OBSTACLES TO NATURALIZATION FOR OTHERWISE ELIGIBLE LAWFUL PERMANENT RESIDENTS

According to USCIS, the two primary reasons officers deny a Form N-400, Application for Naturalization (N-400), are: (1) the applicant's inability to demonstrate an ability to read, write, and speak English, and (2) the applicant's inability to meet the civics requirements under section 312(a) of the INA.[232] A study published in 2007 found 55 percent of the lawful permanent residents who were estimated to be eligible to apply for naturalization, and 67 percent of those who would soon be eligible, had limited English proficiency.[233] If an applicant's English proficiency is limited, they will not be able to understand the U.S. history and government questions asked in English and provide correct responses in English, unless they fall within the category of older applicants who are permitted to complete the civics portion in their native language.

The INA recognizes disabilities and impairments. For those who must overcome mental or physical challenges, the English and civics requirements present potentially insurmountable obstacles. Section 312(b)(1) of the INA preserves access to naturalization for this group. Of the nearly 1 million Forms N-400 filed in Fiscal Year (FY) 2020, 19,527 (almost 2 percent) included a request for a disability waiver from the English and/or civics requirements—a steep drop from previous years.[234] See Figure 4.1 (*Forms N-400 Submitted that Included At Least One Form N-648 Between FYs 2016 and 2020).*

USCIS does not provide a list of medical conditions that qualify for a disability exception. Neither illiteracy nor advanced age (the latter of which has its own exemption to the English language requirement and leniencies for the civics test) alone is sufficient to justify a medical waiver.[235] According to stakeholders, common reasons for requesting a disability waiver include dementia, memory loss, post-traumatic stress disorder (PTSD), and severe forms of anxiety and depression.[236]

Figure 4.1: Forms N-400 Submitted that Included At Least One Form N-648 Between FYs 2016 and 2020



Source: Information provided by USCIS (Apr. 4, 2020 and Apr. 9, 2021). Some Forms N-400 are associated with more than one Form N-648.

It appears, in particular, that among the groups eligible for naturalization, those first admitted as refugees or asylees face specific obstacles by virtue of their history that translate into a higher need for a waiver. While applicants from all classes and walks of life may require a waiver, certain characteristics stand out among the population.

Some adversities common among refugees and asylees contribute to the need for a waiver. The percentage of denials for failure to pass the English or civics requirements is higher for refugees and asylees than naturalization applicants who were initially admitted for permanent residence under an employment-based or family-based category. As can be seen in Figure 4.2 *(Naturalization Applicant Denial Rates for Failure to Pass Knowledge Tests by Basis for Permanent Residence, FY 17–20)*, each fiscal year between 2017 and 2020, USCIS denied the Forms N-400 filed by refugees and asylees at a higher rate than for other applicants because they were unable to meet the English and civics requirements: 72 percent of the time in FY 2017 and 63 percent of the time each fiscal year between 2018 and 2020, compared to rates ranging between 44 percent and 31 percent in the same years for naturalization applicants who were admitted in employment-based categories.[237] Applicants who have had limited formal education, such as some who entered

[232] Information provided by USCIS (Apr. 9, 2021).

[233] Pew Research Center, "Growing Share of Immigrants Choosing Naturalization: V. Characteristics of Naturalized and Eligible Populations" (Mar. 28, 2007); https://www.pewresearch.org/hispanic/2007/03/28/v-characteristics-of-naturalized-and-eligible-populations/ (accessed Mar. 10, 2021). In New York City alone, 59 percent of lawful permanent residents who are eligible to naturalize have limited English proficiency. New York City Mayor's Office of Immigrant Affairs and Office for Economic Opportunity, "Fact Sheet: Eligible to Naturalize New Yorkers" (Dec. 2019); https://www1.nyc.gov/assets/immigrants/downloads/pdf/Elig-to-natz-fact-sheet-2019-12-18.pdf (accessed May 31, 2021).

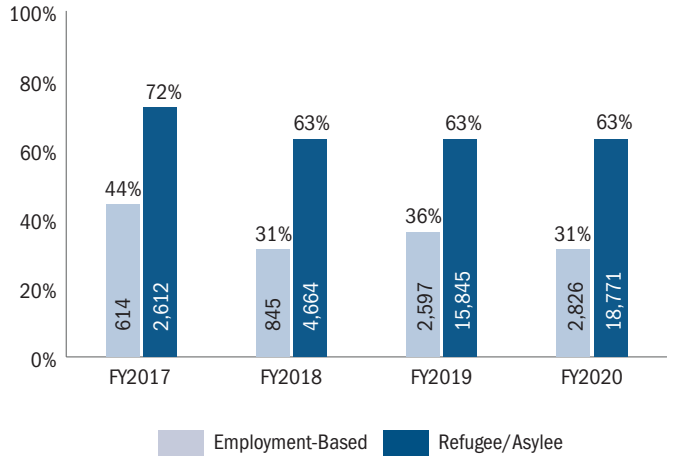
[234] Information provided by USCIS (Apr. 9, 2021).

[235] "USCIS Webpage, "Teleconference on N-648, "Medical Certification for Disability Exceptions," p. 2 (Feb. 12, 2019); https://www.uscis.gov/sites/default/files/document/foia/USCIS_N648_Teleconference_2.12.2019.pdf (accessed Apr. 26, 2021).

[236] Information provided by stakeholders (Mar. 4, 2021).

[237] CIS Ombudsman's calculation based on information provided by USCIS (Apr. 19, 2021). Some applications denied may have been received in previous reporting periods, and a single application can have more than one reason for denial.

Figure 4.2: Naturalization Applicant Denial Rates for Failure to Pass Knowledge Tests by Basis for Permanent Residence, FY 17–20



Source: Information provided by USCIS (Apr. 19, 2021). Numbers between parentheses are the total denial reason counts for each category.

as refugees, can face insurmountable difficulties in passing the civics test, even in their native language, because they are very likely to be unfamiliar with concepts and terms related to U.S. history and government.[238]

Potential conditions limiting an individual's ability to learn English and American history and government include PTSD, depression, dementia, severe trauma, and previous long-term food insecurity—afflictions that are common among refugees and asylees.[239] Not surprisingly, refugee/asylee naturalization applicants request a disability waiver more often than employment-based applicants. The percentage of refugee/asylee naturalization applicants requesting a disability waiver fluctuated between FYs 2015 and 2020 from a low of 8.3 percent to a high of 13.4 percent, compared to around 0.5 percent for employment-based naturalization applicants during the same time period.[240]

An aging applicant population contributes to a higher need for waivers. In analyzing data provided by USCIS, the population of those eligible to apply for naturalization is growing older. In FY 2019, 1,750,000 of the "eligible to naturalize" population was age 65 or over, compared to 1,710,000 in FY 2018; 1,640,000 in FY 2017; 1,570,000 in FY 2016; and 1,540,000 in FY 2015.[241]

While the mean age for all naturalization applicants in FY 2020 was 43, it was 62 among naturalization applicants who requested a waiver of the English and civics requirements.[242] Elderly applicants who do not meet the age exemptions and flexibilities under section 312(b)(2) and (3) of the INA will be at a greater disadvantage of passing the English and civics requirements because of the aging process alone, or in conjunction with a lack of formal education, poor nutrition, and/or subpar living standards in the home country. These aggravating factors may make it impossible for some eligible applicants, no matter how much effort they make to achieve the necessary level of English and civics knowledge, to pass these requirements.[243] It is not surprising that older naturalization applicants (55 years and older) requested a disability waiver more often than younger applicants in FY 2020.[244]

APPLICATION AND ADJUDICATION PROCESS FOR DISABILITY WAIVERS

Filing and Adjudicating Form N-648, Medical Certification for Disability Exceptions to Request Testing Waiver. Applicants who are unable to satisfy the English or civics requirements due to physical, developmental, or mental challenges may seek a waiver of one or both of these testing requirements by submitting a completed Form N-648, *Medical Certification for Disability Exceptions*. The form must be completed and signed by a licensed medical professional, specifically defined as a medical doctor, doctor of osteopathy, or clinical psychologist, no more than 6 months before the applicant submits it to USCIS. USCIS' website lists information for medical professionals on how to properly complete Form N-648.[245]

Applicants must submit their Form N-648 together with the Form N-400 for their request for a disability waiver to be considered timely filed unless the applicant provides a

[238] *See* Jeff Chenoweth and Laura Burdick, CLINIC, "A More Perfect Union: A National Citizenship Plan," *passim* (2007); https://cliniclegal.org/resources/citizenship-and-naturalization/more-perfect-union-national-citizenship-plan (accessed Apr. 25, 2021).

[239] *See* Migration Policy Institute, Rocío Naranjo Sandalio, "Life After Trauma: The Mental-Health Needs of Asylum Seekers in Europe" (Jan. 30, 2018); https://www.migrationpolicy.org/article/life-after-trauma-mental-health-needs-asylum-seekers-europe (accessed Apr. 29, 2021); *see also* Jeff Chenoweth and Laura Burdick, CLINIC, "A More Perfect Union: A National Citizenship Plan" (2007); https://cliniclegal.org/resources/citizenship-and-naturalization/more-perfect-union-national-citizenship-plan (accessed Apr. 25, 2021).

[240] CIS Ombudsman's calculation based on information provided by USCIS (Apr. 19, 2021).

[241] Bryan Baker, "Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015–2019," DHS Office of Immigration Statistics, p. 4, Table 6 (Sept. 2019).

[242] Information provided by USCIS (Apr. 9, 2021).

[243] *See* Jeff Chenoweth and Laura Burdick, CLINIC, "A More Perfect Union: A National Citizenship Plan," p. 78 (Jan. 2007); https://cliniclegal.org/resources/citizenship-and-naturalization/more-perfect-union-national-citizenship-plan (accessed May 31, 2021).

[244] Information provided by USCIS (Apr. 19, 2021).

[245] Information provided by USCIS (Apr. 9, 2021); *see also* USCIS Webpage, "Information for Medical Professionals Completing Form N-648" (Dec. 4, 2020); https://www.uscis.gov/forms/all-forms/information-for-medical-professionals-completing-form-n-648 (accessed Apr. 26, 2021).

credible explanation.[246] If an applicant has experienced a significant change in their medical condition since the filing of the Form N-400, USCIS may consider a later-filed Form N-648 appropriate.[247] Although other explanations may be acceptable, the officer is encouraged to consult with a supervisor and USCIS counsel before accepting a Form N-648 filed subsequent to the Form N-400.[248] USCIS was unable to provide information on how often applicants filed the Form N-648 simultaneously with their Form N-400 because its systems do not capture this data.[249] Organizations that assist naturalization applicants have told the CIS Ombudsman they believe filing the Form N-400 and Form N-648 simultaneously is a best practice, but sometimes the need for the waiver is discovered only after submitting the Form N-400; a disability or impairment can remain undiagnosed until an English and/or civics instructor notices an applicant is not progressing as they should, or the applicant is unable to timely schedule an appointment with an authorized medical professional.[250]

Intake of Forms N-400 and N-648. USCIS now processes all Forms N-400 in its Electronic Immigration System (ELIS), the agency's electronic case management system, whether the application was filed electronically or paper-filed. Though approximately half of all naturalization applications are now filed electronically, applicants seeking medical disability waivers at the time of filing continue to mail paper applications to the appropriate USCIS lockbox with the Form N-648, often because they are not aware they can submit the Form N-648 with an online naturalization application.[251] For paper filings, the lockbox contractors convert the submitted Form N-400 application into an electronic format and transmit the benefit request information in ELIS.[252] Whether Form N-400 is submitted on paper or electronically, USCIS will issue a receipt number for it, but the agency never issues a separate receipt number for the Form N-648. However, a record of the disability waiver application is created in ELIS at the time it is submitted, allowing an officer to view the form electronically.[253] The applications are then transferred to the National Benefits Center (NBC) for pre-interview processing, which includes scheduling a biometrics appointment, conducting relevant security and background checks, and obtaining the applicant's immigration file (A-file).[254]

All Forms N-400, including those requesting waivers, are adjudicated at a field office. The NBC transfers the A-file to the relevant field office for all further processing, interviewing, and adjudication. It is the field office staff that reviews whether applicants qualify for a medical disability waiver of the English language and civics requirements.[255]

As a result of electronic processing of Form N-400 cases, USCIS can leverage automated functions in ELIS to better manage workloads at field offices. Since January 2020, USCIS has implemented the Formalized Check-In (FCI) process at all field offices. This process transitioned non-decisional tasks into an expanded pre-interview "check-in" and allows officers to focus principally on the benefit interview, thereby reducing the overall length of interview time.[256] The FCI process also includes an automated assessment of the Form N-400 to customize the length of the interview based on the presence or absence of factors in the case. Generally, the criteria used to determine assessment levels relate to common factors that require additional interview time. A Form N-400 with an associated Form N-648 is one of these factors.[257]

[246] 12 USCIS Policy Manual, Pt. E. Ch. 3(B)(2); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[247] *Id.*

[248] *Id.*

[249] Information provided by USCIS (Apr. 9, 2020).

[250] Information provided by stakeholders (Mar. 4, 2021).

[251] Information provided by stakeholders (Mar. 11, 2021). According to USCIS' Form N-400 online filing instructions, online filers seeking a medical disability waiver can upload a copy of the completed Form N-648 and bring the original to the naturalization interview.

[252] DHS Privacy Impact Assessment, "USCIS Electronic Immigration System (USCIS ELIS)," p. 2 (Dec. 3, 2018); https://www.dhs.gov/sites/default/files/publications/privacy-pia-appendixbupdate-uscis-elis-jan2020.pdf (accessed Apr. 25, 2021).

[253] USCIS Webpage, "Teleconference on N-648, "Medical Certification for Disability Exceptions," p. 7 (Feb. 12, 2019); https://www.uscis.gov/sites/default/files/document/foia/USCIS_N648_Teleconference_2.12.2019.pdf (accessed Apr. 25, 2021).

[254] *See* Ombudsman's Annual Report 2016, p. 67 (Figure 5.1: Becoming a U.S. Citizen through Naturalization Process). The A-file contains official immigration records of aliens or persons who are not citizens or nationals of the United States. DHS Privacy Impact Assessment, "Integrated Digitization Document Management Program (IDDMP)," p. 2 (Dec. 3, 2018); https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-iddmp-09242013.pdf (accessed Apr. 8, 2021).

[255] 12 USCIS Policy Manual, Pt. E. Ch. 3(A); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[256] *See* Ombudsman's Annual Report 2020, pp. 19–20.

[257] USCIS 2020 Annual Report Response, p. 5 (Dec. 4, 2020); https://www.dhs.gov/sites/default/files/publications/2020_uscis_response.pdf (accessed Apr. 26, 2021).

BALANCING EFFICIENCY AND INTEGRITY IN RECENT POLICY GUIDANCE ON FORM N-648 DETERMINATIONS

USCIS has expressed concern about fraud within the disability waiver process, particularly the potential susceptibility to "doctor shopping."[258] On December 12, 2018, USCIS issued Policy Alert *Sufficiency of Medical Certification for Disability Exceptions (Form N-648)* updating its Form N-648 filing procedures with new guidance. Among other things, the update clarifies that, absent a credible explanation, the Form N-648 *must* be submitted with the Form N-400. In addition, it explained that officers can find a Form N-648 insufficient if there is a finding of credible doubt, discrepancies, misrepresentations, or fraud, and provided a list of factors that may give rise to credible doubt.[259] These factors include actions taken (or not taken) by both the applicant and the medical professional who completed the Form N-648, and include indicators such as the lack of the medical condition being listed in previous medical submissions (such as Form I-693, *Report of Medical Examination and Vaccination Record*, which is submitted with Form I-485, *Application to Register Permanent Residence or Adjust Status)*.[260] In addition, in their review of the Form N-648 for sufficiency, adjudicators must determine whether the medical professional completed the form and assessed the following components:

- Ensure that the Form N-648 relates to the applicant, and that there are no discrepancies between the form and other available information, including biographic data, testimony during the interview, or information contained in the applicant's A-file;
- Determine whether the Form N-648 contains enough information to establish that the applicant is eligible for the exception by a preponderance of the evidence. This determination includes ensuring that the medical professional's explanation is both sufficiently detailed as well as specific to the applicant and to the applicant's stated disability (rather than a generic, "one size fits all" explanation);
- Ensure the Form N-648 fully addresses the underlying medical condition and its causal connection or nexus with the applicant's inability to comply with the English or civics requirements or both; and
- If the record reflects that the applicant has a regularly treating medical professional, but another medical professional has completed the Form N-648, ensure that the form includes a credible and sufficiently detailed explanation why the regularly treating medical professional did not complete the Form N-648.[261]

On December 4, 2020, USCIS published Policy Alert *Properly Completed Medical Certification for Disability Exception (N-648)* which aligned the policy guidance with the current N-648 version and specified that the Form N-648 must be submitted to USCIS within 6 months from the date the medical professional completed the form.[262] The current version of the form asks the medical professional to include dates of diagnosis and when the disability or impairment began, as well as a description of the severity of the disability or impairment and how it impacts specific functions of the applicant's daily life activities. An officer may question an applicant during the interview if there are inconsistencies between the activities performed and information contained elsewhere in the applicant's file.[263] It is too soon to analyze whether the December 2020 updates have led to operational efficiencies for USCIS; the agency did not yet have any relevant data to provide.[264]

POTENTIALLY ELIGIBLE NATURALIZATION APPLICANTS WITH A MEDICAL DISABILITY OR IMPAIRMENT FACE SEVERAL OBSTACLES

The CIS Ombudsman has previously identified challenges in the medical disability waiver process. In 2010, the CIS Ombudsman included recommendations to USCIS in its Annual Report to improve the processing of requests for exemptions to the English and civics requirements based on a disability:

- In each field office, assign one expert or supervisory adjudicator as the point of contact;
- Distribute, and make publicly available on the USCIS website, a training module for medical professionals who complete Form N-648;
- Use experts to adjudicate Form N-648; and

[258] Information provided by USCIS (Apr. 9, 2021); *see also* Ombudsman's Annual Report 2020, p. 21.

[259] 12 USCIS Policy Manual, Pt. E. Ch. 3(E)(5); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[260] *Id*.

[261] 12 USCIS Policy Manual, Pt. E, Ch. 3(E)(1); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[262] 12 USCIS Policy Manual, Pt. E, Ch. 3(B)(4); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[263] 12 USCIS Policy Manual, Pt. E, Ch. 3(E)(24); https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-3 (accessed Apr. 26, 2021).

[264] Information provided by USCIS (Apr. 9, 2021).

- Track the number of Forms N-648 filed, approved, and rejected, as well as other key information.[265]

As part of its 2020 Annual Report, the CIS Ombudsman provided additional recommendations to USCIS on how to improve the processing of disability waiver exemption requests. These included pre-adjudicating requests at the NBC prior to transferring the file to the field office for an interview and moving forward with its regulatory agenda item proposing to create a process to designate and revoke the status of medical professionals authorized to complete Form N-648.[266] In its response to the CIS Ombudsman's 2020 Annual Report, USCIS indicated it would consider having the NBC pre-adjudicate concurrently filed Forms N-648 prior to transferring the file to the field office for an interview and that it was creating a process to designate or revoke the status of medical professionals authorized to complete Forms N-648.[267]

It is often difficult to find a medical professional willing to complete the Form N-648. During engagements, stakeholders informed the CIS Ombudsman that some primary care physicians decline completing Form N-648 for their patients because the length and complexity of the form is too time-intensive.[268] USCIS estimates the time to complete the current version of Form N-648 is 2.42 hours,[269] which is longer than the estimated 2 hours to complete the 2018 version,[270] when it went from 6 to 9 pages, nearly doubling the number of questions from 12 to 23. Applicants and their legal representatives often have to make multiple visits to physicians to ask them to complete unanswered questions, provide more details, or modify the wording to conform to the perceived local standards.[271] The increased time and effort discourages doctors from completing the form for their patients. In fact, some doctors in immigrant communities place signs in their offices stating that they do not complete immigration forms.[272] Stakeholders also reported that some medical professionals charge an additional fee to justify the burden of completing Form N-648.[273] Although doctors charging a fee to cover additional services may be justified for the time and expertise employed, it places an additional financial burden on applicants who are often unlikely to be able to afford the considerable expense.

In addition, stakeholders informed the CIS Ombudsman that some applicants, especially low-income applicants, have nurse practitioners or physician assistants as their primary care practitioners,[274] but these medical professionals are not authorized to conduct the in-person examination or sign Form N-648. As a result, these applicants must search for a doctor who meets the definition of a medical professional for purposes of the disability waiver who also is willing to evaluate them and complete the Form N-648.

Processing times for naturalization applicants requesting a waiver are longer than those who do not. In FY 2020, the median processing time for Form N-400 filed with a Form N-648 was 304 days, compared to 271 days for all Forms N-400.[275] A longer processing time is conceivable, given the added complexity a Form N-648 brings to the naturalization adjudication, as the requests contain medical terminology explaining complex disability and mental impairment issues. In addition, the challenges applicants face in trying to find a doctor can also lead to delays in filing the Form N-400 or in filing the Form N-648. Doctors who complete the form for individuals they do not regularly treat may have to rely on patient records or recollections to complete the form, which may not give a complete picture of the applicant's situation, especially if the applicant feels less comfortable confiding in unfamiliar medical professionals. An incomplete form or discrepancies in the information provided will lead the USCIS officer to ask more questions during the interview and possibly continue the case, issue a Request for Evidence (RFE), and/or request a new Form N-648 after the interview, all of which have the potential to substantially increase the processing time. Almost 18 percent of the refugees and asylees who requested a disability waiver had to submit more than one Form N-648 to become a naturalized citizen in FY 2020.[276] For refugees and asylees with disabilities, delays in starting the naturalization process and in the process itself can

[265] Ombudsman's Annual Report 2010, pp. 78–82.

[266] Ombudsman's Annual Report 2020, pp. 21–22.

[267] *See* USCIS 2020 Annual Report Response, p. 5 (Dec. 4, 2020); https://www.dhs.gov/sites/default/files/publications/2020_uscis_response.pdf (accessed Apr. 30, 2021).

[268] Information provided by stakeholders (Mar. 1, 2021, Mar. 4, 2021, Mar. 9, 2021, and Mar. 15, 2021).

[269] "Agency Information Collection Activities; Revision of a Currently Approved Collection: Medical Certification for Disability Exceptions," 86 Fed. Reg. 20704, 20705 (Apr. 21, 2021).

[270] "Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Medical Certification for Disability Exception," 83 Fed. Reg. 46513, 46514 (Sep. 13, 2018).

[271] Information provided by stakeholders (Mar. 1, 2021, Mar. 4, 2021, Mar. 9, 2021, and Mar. 15, 2021).

[272] Information provided by stakeholders (Mar. 1, 2021).

[273] Information provided by stakeholders (Mar. 1, 2021 and Mar. 9, 2021).

[274] Information provided by stakeholders (Mar. 4, 2021).

[275] Information provided by USCIS (Apr. 9, 2021).

[276] Information provided by USCIS (Apr. 19, 2021).

potentially cause them to lose needed benefits, such as Supplemental Security Income (SSI).[277]

Finding legal representation can be difficult for those seeking waivers. The time-consuming process of preparing the Form N-648 has led legal providers to more carefully scrutinize whether to represent naturalization applicants requiring a medical disability waiver. Due to the complexity of the disability waiver, they are also more likely to accompany their naturalization applicants who file a Form N-648 to the interview(s), translating into higher costs for the applicant.

Legal representatives who primarily serve refugee populations, in particular, have noted a significant number of the naturalization applicants they assist seek a medical disability waiver. These practitioners have an ongoing concern that their offices will not have the resources to meet the demand posed by this population or the additional hurdles they must overcome.[278] Stakeholders have informed the CIS Ombudsman they are more particular about the types of naturalization cases they agree to take because of the additional time required to review and revise the Form N-648 and potential for multiple trips to field offices.[279] As a result, a vulnerable population that could use additional support and advice the most may not be able to find it.

The number of individuals granted refugee and asylum status has generally increased over the past decade, and this group has historically had a high naturalization application rate.[280] The percentage of refugees/asylees who became naturalized citizens after receiving disability waivers has also increased from almost 11 percent in 2016 to almost 13 percent in 2019.[281]

USCIS emphasis on fraud detection may deter applicants. DHS has investigated doctors found to have provided false and fraudulent mental health diagnoses to individuals seeking to obtain disability benefits and waivers from the English and civics requirements of the naturalization process.[282] USCIS has a robust process for investigating immigration benefit fraud, including medical disability waiver fraud. Officers adjudicating naturalization applications can refer cases with a fraud indicator in a Form N-648 to USCIS' Fraud Detection and National Security (FDNS) Directorate for review.[283] In FY 2020, only 302 of 65,091 (0.5 percent) cases referred to FDNS were related to Forms N-648, of which 66 (0.1 percent of FDNS' total completed workload) were found to be fraudulent.[284] FDNS may refer cases to U.S. Immigration and Customs Enforcement (ICE) for criminal investigation if warranted, and in fact did so in three instances related to Form N-648 fraud in FY 2020.[285]

The revisions made to the disability waiver to combat fraud have, however, created challenges for legitimate applicants. A Form N-648 completed by someone other than the applicant's regularly treating doctor may give rise to credible doubt as to the veracity of the information provided. USCIS does not track how often the form is completed by a non-treating doctor,[286] but based on feedback from stakeholders, this practice appears to be common. Applicants may seek another doctor for legitimate reasons, such as having a regular attending medical professional who does not complete immigration forms, is not authorized to sign the form, or is unfamiliar with how to complete the form properly (and unwilling to learn).[287] As the medical profession moved to virtual appointments to stop the spread of COVID-19 in the spring of 2020, some eligible naturalization applicants with a disability had to find another doctor, or delay starting the naturalization process for potentially months.[288]

In its 2020 Annual Report, the CIS Ombudsman recommended USCIS increase efficiencies and combat fraud by creating a process to designate and revoke the status of medical professionals authorized to complete the Form N-648, similar to the process that exists for civil surgeon designations.[289] While the recommendation could increase efficiencies while combatting fraud, stakeholders are concerned such a process could make it more difficult for individuals with disabilities to find a doctor to certify

[277] Certain non-citizens, including refugees, are eligible for SSI, but most such recipients are subject to a 7-year limit. Social Security Administration Publication No. 05-11051, "Supplemental Security Income (SSI) for Non-Citizens" (September 2019); https://www.ssa.gov/pubs/EN-05-11051.pdf (accessed May 31, 2021).

[278] Information provided by stakeholders (Mar. 1, 2021, Mar. 4, 2021, and Mar. 9, 2021).

[279] Information provided by stakeholders (Mar. 4 and 11, 2021).

[280] *See* DHS Annual Flow Report, "Refugees and Asylees: 2019," pp. 3, 8, and 10 (Sep. 2020); https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj0w4irhZ_wAhVvc98KHW_aD-8QFjAMegQIBBAD&url=https%3A%2F%2Fwww.dhs.gov%2Fsites%2Fdefault%2Ffiles%2Fpublications%2Fimmigration-statistics%2Fyearbook%2F2019%2Frefugee_and_asylee_2019.pdf&usg=AOvVaw2oESleyojpCPoK3YjsxpjI (accessed Apr. 27, 2021).

[281] CIS Ombudsman's calculation based on information provided by USCIS (Apr. 19, 2021). The number of refugees/asylees who had filed an N-648 and naturalized in FY 2020 decreased to 11,521 (almost 12 percent), which could have been for various reasons, including as a result of fewer naturalizations.

[282] Information provided by USCIS (Apr. 9, 2021).

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] Information provided by stakeholders (Mar. 1, 2021, Mar. 4, 2021, and Mar. 15, 2021).

[288] Information provided by stakeholders (Mar. 4, 2021).

[289] *See* 8 C.F.R. § 232.2.

the form by further limiting an already narrow field of authorized medical professionals. Even if they find a doctor willing to complete the process, applicants may feel less comfortable sharing sensitive information or reliving traumatic events with an unfamiliar doctor.[290]

The CIS Ombudsman recognizes the crucial role maintaining the integrity of the immigration system plays in USCIS' ability to effectively and efficiently administer immigration benefits, and the data provided by USCIS shows it is able to detect fraud in the medical disability waiver process. The challenge the data raises is how to determine when the agency's anti-fraud efforts create barriers rather than remove them for vulnerable qualified individuals per Congress' intent when it created the disability waiver exception.

There is no training for medical professionals, which leads to insufficient information being supplied. USCIS has information for medical professionals on how to complete a Form N-648 and certify an individual's disability,[291] but it does not provide training on the current guidance for Form N-648.[292] Previously, USCIS provided medical professionals with a link to an instructional video regarding completion of the form, but removed it after the 2018 and 2019 updates because some of the information in the video was no longer accurate.[293] Some organizations have tried to fill the training gap by providing USCIS presentation slides that pre-date the current form and policy guidance or creating a one-page primer on how to properly fill out the form that applicants can give to their doctors.[294] Even with these measures, legal representatives continue to find themselves advising their clients to return to doctors to correct mistakes or fill gaps on the form so the facts are presented in a manner that meets the local office's standards or responds to requests by officers after the naturalization interview. Stakeholders believe more community outreach by local field offices would decrease the burden doctors feel when completing the form by providing them with a better understanding of the information USCIS is seeking.

USCIS officers may be insufficiently trained. The USCIS Field Operations Directorate (FOD) created a comprehensive training on adjudicating medical disability waiver requests and began instituting it nationwide in February 2019 to adjudicators who adjudicate Form N-400.[295] However, stakeholders are concerned the training is not sufficient because they have noticed differences in adjudications among field offices, and in particular have observed officers applying the new guidance improperly.[296] For example, one stakeholder informed the CIS Ombudsman that a local field office required all applicants with a Form N-648 to bring a legal guardian to both the interview and the oath swearing-in ceremony; this represents a substantial burden for the applicants because acquiring a legal guardian requires a court proceeding.[297] Stakeholders also mentioned some officers inconsistently issue RFEs for the same issues across applications, ask lines of questions that appear to "second guess" the certifying doctor's diagnosis, often do not provide reasons in writing why the Form N-648 is insufficient, and provide a lesser level of customer service to applicants with obvious disabilities.[298]

Some of these differences may be due to circumstances specific to a particular field office, such as legitimate concerns about disreputable doctors. However, the interpretation of policy guidance or treatment of applicants should be uniform so that officers apply the same evidentiary weight to a doctors' findings across applications and written justifications for insufficiency should be consistent. Questions asked by officers and reasons provided for denying disability waiver requests may lead applicants to wonder whether the officer actually understands the complex medical conditions described on the forms. Applicants, especially those whose medical condition or impairment are the result of trauma or other difficult experiences, may feel officers are not sensitive to their emotional state when they ask them to relive traumatic events in their lives.[299] In addition, an applicant may be apprehensive about sharing information with an officer who comes across as uncomfortable or dismissive when interacting with someone who has a visible disability. The officer may interpret the applicant's behavior as suspicious, giving rise to doubts about the applicant's claims.

[290] Information provided by stakeholders (Mar. 1, 2021).

[291] USCIS Webpage, "Information for Medical Professionals Completing Form N-648" (Dec. 4, 2020); https://www.uscis.gov/forms/all-forms/information-for-medical-professionals-completing-form-n-648 (accessed Apr. 29, 2021).

[292] Information provided by USCIS (Apr. 9, 2021).

[293] *Id.*

[294] Information provided by stakeholder (Mar. 9, 2021).

[295] Information provided by USCIS (Apr. 9, 2021).

[296] *See* International Rescue Committee, "The Narrowing Path to Citizenship," p. 4 (Oct. 2019); https://www.rescue.org/report/narrowing-path-citizenship#:~:text=Naturalization%2C%20enacted%20by%20the%20first,and%20contribute%20socially%20and%20economically (accessed May 3, 2021).

[297] Information provided by stakeholders (Mar. 1, 2021).

[298] Information provided by stakeholders (Mar. 1, 2021, Mar. 4, 2021, and Mar. 9, 2021).

[299] Information provided by stakeholders (Mar. 1, 2021 and Mar. 4, 2021).

CONSIDERATIONS AND RECOMMENDATIONS

Given the key role naturalization plays in securing full participation in American society, this most significant of immigration benefits should be available to all eligible lawful permanent residents, not just those without disabilities or impairments. Noncitizens with disabilities often face greater difficulty in navigating the naturalization process as designed, particularly the English language and civics requirements, whether through testing or applying for the medical disability waiver. USCIS has made efforts to make the naturalization process more efficient, including leveraging electronic filing, processing, and some streamlining with automation, but there is more it can do to ensure vulnerable eligible lawful permanent residents have the same chance to become naturalized citizens. The following recommendations are intended to increase the likelihood eligible applicants who have a disability have equal access to naturalization.

- *Better educate stakeholders on the availability of online filing of the Form N-400 with a disability waiver request to streamline submission and encourage online filers.* Delays in processing jeopardizes eligible naturalization applicants' ability to participate in American society fully and receive necessary benefits. Most naturalization applicants can file their Form N-400 online, allowing them to take advantage of the benefits and efficiencies mentioned on USCIS' website. While USCIS electronically processes Form N-648, the form is not listed on USCIS' Forms website as being available to be accepted electronically, leading to individuals not being aware that they can file the Form N-400 online even when including a Form N-648. Lack of awareness prevents the most vulnerable naturalization applicants from initiating the naturalization process at the same place as applicants without a medical disability. Online filing would give applicants a way to avoid bottlenecks at the front of the process.

- *Pre-adjudicate concurrently filed Forms N-648 at the NBC to foster consistency and efficiency*. Submitting Form N-648 with the Form N-400 creates a more efficient process because it gives officers more time to review the disability waiver. As mentioned in our 2020 Annual Report, USCIS can leverage its policy and allow Forms N-400 and N-648 to be submitted concurrently and to create a central adjudication process for Form N-648 at the NBC prior to transferring the file to the field office for an interview. USCIS has acknowledged that the centralization of certain pre-interview assessments allows interviewing officers to focus on the person applying for the benefit and to increase the number of interviews a field office can schedule.[300] Forms N-648 submitted at the time of filing provide an opportunity to centralize and streamline another pre-interview task, removing an adjudicative burden from the interviewing officer.

A centralized process also ensures greater levels of consistency across the field offices by eliminating any bias or training deficit on the part of the officers that may surface during the interview. The approval can be provisional, subject to an officer's determination that the applicant can communicate in English at a level sufficient to be tested during the interview. The officer would still be required to follow the policy guidance of accepting the medical professional's diagnosis. An RFE could be used to clarify discrepancies. Stakeholders also believe that applicants, especially those who have suffered trauma, would feel more at ease knowing whether their waiver application has been approved before attending an interview, and it would save USCIS precious interview time if an RFE is issued to correct deficiencies in the Form N-468 before scheduling an interview.

- *Increase USCIS officers' training to improve consistency of adjudication*. If disability waiver requests continue to be adjudicated by officers at local field offices, then USCIS should continue to provide adjudicators enhanced, uniform training. Training for all officers who adjudicate Form N-648 could ensure greater consistency among adjudicators. USCIS provided mandatory training to officers on the policy guidance that became effective on February 12, 2019. Additional training, however, where officers can ask questions and walk through different scenarios with trainers would give them an opportunity to share best practices and receive feedback from others. Training is also an opportunity to clarify the standard of proof and steps the officers should and should not take under the existing policy guidance. Well-trained officers will be more efficient by asking more directed questions that get to the issues for which they seek information and will likely make fewer mistakes, resulting in fewer delays and higher-quality decisions. The CIS Ombudsman also recommends USCIS include disability etiquette and awareness concepts in its training protocols to assist officers in understanding

[300] See "Hearing on Policy Changes and Processing Delays at USCIS," *before the* Subcommittee on Immigration and Citizenship *of the* U.S. House Committee on the Judiciary, 116th Cong. 1st Sess. (Jul. 16, 2019) (joint written statement of Don Neufeld, Associate Director, Service Center Operations Directorate; Michael Valverde, Deputy Associate Director, Field Operations Directorate; and Michael Hoefer, Chief, Office of Performance and Quality, Management Directorate);" https://www.uscis.gov/tools/resources-for-congress/testimonies/hearing-on-policy-changes-and-processing-delays-at-uscis-before-the-house-committee-on-the-judiciary (accessed Apr. 30, 2021).

how to interact with applicants with disabilities, so they can uniformly provide professional and courteous service to all individuals seeking immigration benefits from USCIS.

- *Expand the list of authorized medical professionals to raise the quality of information provided*. Finding a doctor who is able and willing to complete Form N-648 becomes more difficult for applicants if doctors remove themselves from the already narrow pool of authorized medical professionals. According to the Association of American Medical Colleges (AAMC), the United States is facing a shortage of primary care physicians.[301] Possible solutions to narrow the gap between supply and demand include utilizing a wider variety of medical professionals, such as licensed nurse practitioners, and increasing the use of telehealth to more efficiently access the doctors currently available.[302] According to the American Association of Nurse Practitioners (AANP), the number of nurse practitioners in the United States continues to increase at a rapid pace, with more than 290,000 in 2020.[303] An applicant may have a nurse practitioner in lieu of the primary care physician for reasons of accessibility or cost, but currently must have someone else certify the Form N-648, often resulting in further delays and additional costs, and raising questions concerning the applicant's credibility by the officer. If nurse practitioners were recognized as authorized medical professionals, it would expand the pool of available medical witnesses—including witnesses who have more familiarity with the patient and the patient's condition.
- *Increase outreach to the public to improve outcomes*. USCIS should engage with authorized medical professionals and legal and community-based organizations that facilitate completion of Form N-648 at the local level to ensure the medical and legal professions are able to assist their patients and clients as efficiently as possible. USCIS could inform stakeholders of the importance of the Form N-648 and what constitute adequate responses to the questions on the form. In addition, USCIS could provide feedback to the community on trends it has identified concerning insufficient forms and questionable findings. These engagements should also give participants an opportunity to ask questions related to their experience. It is inevitable that some professionals will interpret guidance and instructions differently than their colleagues. Identifying those variances and sharing them along with solutions can help to ensure greater levels of consistency in adjudications. Greater levels of community engagement can only enhance that effort. The agency should also engage with disability and elderly advocates to better understand the issues these groups face.

Naturalization applicants with a disability have faced challenges to receiving fair, compassionate, and consistent processing of their applications, and recent changes in policy guidance compounded these challenges. USCIS has taken measures to efficiently process naturalization applications, and it should consider additional measures that allows everyone equal access to the naturalization process.

[301] *See* AAMC, "The Complexities of Physician Supply and Demand: Projections from 2018 to 2033" (June 2020); https://www.aamc.org/media/45976/download (accessed Apr. 7, 2021).

[302] *See* The American Journal of Managed Care, Dr. Gary Mangiofico, "Physician Shortage Requires Multi-Prong Solution" (Jan. 26, 2018); https://www.ajmc.com/view/physician-shortage-requires-multiprong-solution (accessed Apr. 7, 2021).

[303] AANP Webpage, "NP Fact Sheet" (Aug. 2020); https://www.aanp.org/about/all-about-nps/np-fact-sheet (accessed Apr. 7, 2021). Nurse practitioners are nurses who have completed either a master's degree or a doctoral nursing program for additional training, often in a particular area, and they are qualified to perform many of the same duties as medical doctors, such as assessing patients, ordering and interpreting diagnostic tests, diagnosing and treating patients for various conditions, and prescribing medications. AANP Webpage, "All About NPs," https://www.aanp.org/about/all-about-nps (accessed Apr. 7, 2021).

An Update on the Continuing Complications of USCIS' Digital Strategy

Responsible Offices: Office of Information Technology, Management Directorate; Immigration Records and Identity Services Directorate

INTRODUCTION

The transition from a paper-based system to a digital platform has been a struggle for U.S. Citizenship and Immigration Services (USCIS) and a significant area of concern for the CIS Ombudsman. USCIS originally envisioned itself decommissioning many legacy data and management systems and replacing them with a single fully integrated digital system for immigration benefits, customer communication, filing adjudication, and electronic record storage.[304] However, over 15 years later, the agency still receives, transfers, and processes thousands of paper filings daily. In 2020, the need for a digital delivery system was further substantiated by the COVID-19 pandemic.

This article reviews these pervasive challenges, acknowledges the substantial progress made by USCIS to reach its current state of digitization, and examines several recurrent obstructions to the development and implementation of a leading-edge technological standard. It concludes with specific recommendations to enhance future development, including ways to further execution,

[304] USCIS, "USCIS Transformation Program: Concept of Operations Ver 1.5" (Mar. 28, 2007); https://www.hsdl.org/?view&did=483127 (accessed May 2, 2021).

bolster resource management, and ensure more robust participation from external stakeholders.

BACKGROUND: A LONG AND ARDUOUS JOURNEY IN PURSUIT OF DIGITIZATION

The CIS Ombudsman has frequently acknowledged the challenges faced by USCIS during its journey to reconfigure the immigration benefits system onto a digital platform by offering recommendations for improvement.[305] Other Federal oversight components share the CIS Ombudsman's interest in digitization, including the U.S. Government Accountability Office (GAO)[306] and the DHS Office of Inspector General (OIG).[307]

GAO summarized the dilemma: in establishing this massive digitization effort, the agency "has continually faced management and development challenges, limiting its progress and ability to achieve its goals of enhanced national security and system integrity, better customer service, and operational efficiency."[308] Congress' concern about USCIS' modernization efforts culminated in fall 2020 with an agency mandate to produce a 5-year plan to accomplish the following:

1. Establish electronic filing procedures for all applications and petitions for immigration benefits;
2. Accept electronic payment of fees at all filing locations;
3. Issue correspondence, including decisions, requests for evidence, and notices of intent to deny, to immigration benefit requestors electronically; and
4. Improve processing times for all immigration and naturalization benefit requests.[309]

Transformation. Following OIG's 2005 recommendations, USCIS began its first iteration to digitize their immigration benefit system through a massive undertaking known as "Transformation."[310] The agency sought to modernize the processing of more than 90 immigration benefit form types through the work of the newly established Transformation Program Office (TPO).[311] The agency identified 17 performance indicators for near-term and long-range program evaluation, including customer satisfaction, process efficiency, and system access.[312] In 2007, USCIS described its plan to "transform" the agency's adjudicative functions:

> TPO's vision is to provide a transformed business process for USCIS' services based on a "person-centric" model and customer accounts. The new approach will enable customers and their representatives to become "account holders," who engage in "transactions" with USCIS rather than merely submitting applications and petitions. For individual applicants and petitioners, biometrics will also be linked to the account to ensure unique identity. All information related to an individual will be linked in a single account and available through the system thereby creating the transformed end-to-end adjudicative process.[313]

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[305] *See* Ombudsman's Annual Report 2019, pp. 62–69. *See also* Ombudsman's Annual Report 2017, pp. 51–55, Ombudsman's Annual Report 2016, pp. 41–42, Ombudsman's Annual Report 2015, pp. 86–88.

[306] *See, e.g.*, 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/assets/gao-17-486t.pdf (accessed Apr. 29, 2021).

[307] *See, e.g.*, DHS Office of Inspector General, "USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery," OIG-18-23 (Nov. 2017); https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf (accessed May 10, 2021); "Management Alert—U.S. Citizenship and Immigration Services' Use of the Electronic Immigration System for Naturalization Benefits Processing," OIG-17-26-MA (Jan. 2017); https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA-011917.pdf (accessed May 22, 2021); "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 May 21, 2021); "USCIS Information Technology Management Processes and Challenges," OIG-14-112 (Jul. 2014); https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-112_Jul14.pdf (accessed May 22, 2021); "U.S. Citizenship and Immigration Services' Progress in Transformation," OIG-12-12 (Nov. 2011); https://www.oig.dhs.gov/assets/Mgmt/OIG_SLP_12-12_Nov11.pdf (accessed May 5, 2021); "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-09-90 (Jul. 2009); https://www.hsdl.org/?view&did=34776 (accessed May 22, 2021); "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-07-11 (Nov. 2006); https://www.oig.dhs.gov/assets/Mgmt/OIG_07-11_Nov06.pdf (accessed June 22, 2017); "USCIS Faces Challenges in Modernizing Technology," OIG-05-41 (Sep. 2005); https://www.oig.dhs.gov/assets/Mgmt/OIG_05-41_Sep05.pdf (accessed Apr. 22, 2021).

[308] GAO 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/assets/gao-17-486t.pdf (accessed May 10, 2021).

[309] *See* Continuing Appropriations Act, 2021 and Other Extensions Act Div. D, Title 1, § 4103, Pub. L. 116–159 (accessed May 23, 2021). This report was due to Congress 180 days after the legislation was enacted (March 30, 2021). As this Report was being finalized, the report had not yet been submitted to Congress.

[310] DHS OIG, "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-09-90 (Jul. 2009) at 1; https://www.hsdl.org/?view&did=34776 (accessed May 22, 2021).

[311] DHS OIG, "USCIS Automation of Immigration Benefits Processing Remains Ineffective," OIG-16-48 (Mar. 2016); http://trac.syr.edu/immigration/library/P11616.pdf (accessed May 5, 2021).

[312] DHS OIG, "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," OIG-09-90 (Jul. 2009) at 1; https://www.hsdl.org/?view&did=34776 (accessed May 22, 2021).

[313] USCIS, "Transformation Program Solutions Architect Task Order HSHQDC-09-J-00001" (Nov. 3, 2008); https://www.dhs.gov/sites/default/files/publications/mgmt_order_hshqdc06d00019.pdf (accessed May 11, 2021). USCIS, "USCIS Transformation Program: Concept of Operations Ver 1.5" (Mar. 28, 2007); https://www.hsdl.org/?view&did=483127 (accessed May 2, 2021).

ELIS: two steps forward, one step back. USCIS formally launched Electronic Immigration System (ELIS), the Transformation program's electronic platform, in 2012.[314] In its first configuration, ELIS permitted online filing of three immigration-related forms: Form I-539, *Application to Extend/Change Nonimmigrant Status*; Form I-526, *Immigrant Petition by Alien Investor*;[315] and Form I-90, *Application to Replace Permanent Resident Card*.[316] ELIS was also configured to receive the Immigrant Visa Fees paid by arriving immigrants who obtained immigrant visas overseas.[317] Additional improvements were made in 2015 when USCIS successfully transitioned ELIS to cloud-based technology.[318] Despite these successes, cost overruns and missed deliverables caused USCIS to be in breach of its acquisition and development plan under Federal policies.[319] The agency had to re-baseline its entire digital modernization program, and public criticism of its technology challenges sharpened.[320]

ELIS 2 and beyond. In 2016, the agency decommissioned ELIS, and in doing so, eliminated online filing of Forms I-539 and I-526. USCIS then launched a new ELIS, known as ELIS 2; its first substantial test was the implementation of electronic adjudication and filing of Form N-400, *Application for Naturalization*.[321] The ELIS 2 launch occurred as the agency shifted to an "agile" model featuring smaller bursts of software development that encouraged technology more responsive to changing needs.[322]

Moving Form N-400 to online adjudication and filing was a massive undertaking that required new technology training for every field office. Despite these efforts, naturalization applicants and USCIS officials encountered technical difficulties with the Form N-400 process, which culminated in OIG criticizing USCIS in January 2017 for "significant operational and security issues that pose grave concern and merit [USCIS'] attention and corrective action."[323] USCIS immediately suspended Form N-400 online submissions.[324] In the interim, and to "ensure the integrity of the ELIS process, [USCIS conducted] 100 percent quality assurance checks of TECS background checks in two ways—once through ELIS and again outside of ELIS—and [compared] results to ensure consistency."[325] Technical glitches, lack of progress, and increased processing time delays exposed the magnitude of the

[314] USCIS Webpage, "USCIS Launches Online Immigration System, USCIS ELIS" (May 22, 2012); https://wwwuscis.gov/archive/uscis-launches-online-immigration-system-uscis-elis (accessed May 2, 2021).

[315] *See* USCIS 2013 Annual Report Response, p. 2 (Nov. 12, 2014); https://www.uscis.gov/sites/default/files/document/reports/cisomb-2013-annual-report-response.pdf (accessed May 22, 2021).

[316] *See* USCIS Webpage, "From Nov. 12 to 15, Form I-90, Application to Replace Permanent Resident Card, Available for Filing in USCIS" (Oct 02, 2017); https://www.uscis.gov/archive/from-nov-12-15-form-i-90-application-to-replace-permanent-resident-card-available-for-filing-in (accessed Apr. 27, 2021).

[317] USCIS Webpage, "Electronic Immigration System (ELIS)" (Aug. 31, 2015); https://www.uscis.gov/archive/uscis-simplifies-the-immigrant-fee-payment-process (accessed Apr. 27, 2021).

[318] Aliya Sternstein, "The Online System to Automate the Processing Of Green Cards and Other Immigration Benefits Has Struggled to Function Properly Since at Least 2009," *Nextgov* (Mar. 13, 2015); https://www.nextgov.com/cio-briefing/2015/03/new-uscis-computer-was-supposed-speed-immigration-processing-what-went-wrong/107505/ (accessed May 11, 2021). For more on Cloud computing *see generally* Eric Griffith, "What is Cloud Computing," *PC Magazine* (Jun. 29, 2020), https://www.pcmag.com/news/what-is-cloud-computing (accessed May 10, 2021).

[319] GAO Report, "Immigration Benefits System: Better Informed Decision Making Needed on Transformation Program," GAO-15-545 (May 2015); https://www.gao.gov/assets/gao-15-415.pdf (accessed May 2, 2021).

[320] *See, e.g.*, Aliya Sternstein, "The Online System to Automate the Processing Of Green Cards and Other Immigration Benefits Has Struggled to Function Properly Since at Least 2009," *Nextgov* (Mar. 13, 2015), https://www.nextgov.com/cio-briefing/2015/03/new-uscis-computer-was-supposed-speed-immigration-processing-what-went-wrong/107505/ (accessed May 11, 2021) *and* James Markon, "A Decade into a Project to Digitize U.S. Immigration Forms, Just 1 is Online," *Washington Post* (Nov. 8. 2015); https://www.washingtonpost.com/politics/a-decade-into-a-project-to-digitize-us-immigration-forms-just-1-is-online/2015/11/08/f63360fc-830e-11e5-a7ca-6ab6ec20f839_story.html (accessed May 10, 2021).

[321] *See* USCIS 2017 Annual Report Response, p. 2 (May 11, 2018); https://www.uscis.gov/sites/default/files/document/reports/cisomb-2017-annual-report-response.pdf (accessed May 3, 2021); *see also* DHS OIG, "Modernizing our Immigration System United Management Alert - U.S. Citizenship and Immigration Services' Use of the Electronic Immigration System for Naturalization Benefits Processing," OIG-17-26-MA (Jan. 2017); https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA-011917.pdf (accessed May 4, 2021).

[322] Jose Maria Delos Santos, "Agile vs. Waterfall: Differences in Software Development Methodologies?" *Project-Management.com* (Aug. 12, 2020); https://project-management.com/agile-vs-waterfall/ (accessed May 10, 2021).

[323] DHS OIG, "Management Alert—U.S. Citizenship and Immigration Services' Use of the Electronic Immigration System for Naturalization Benefits Processing," OIG-17-26-MA (Jan. 2017), p. 2; https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-26-MA-011917.pdf (accessed May 4, 2021).

[324] *See* USCIS 2017 Annual Report Response, p. 2 (May 11, 2018); https://www.uscis.gov/sites/default/files/document/reports/cisomb-2017-annual-report-response.pdf (accessed May 3, 2021).

[325] "Immigration Benefits Vetting: Examining Critical Weaknesses in USCIS Systems," *before the* Oversight and Management Efficiency Subcommittee *of the* House Committee on Homeland Security, 115th Cong. 1st Sess. 3 (2017) (statement of Lori Scialabba, former Acting USCIS Director); http://docs.house.gov/meetings/HM/HM09/20170316/105629/HHRG-115-HM09-Wstate-ScialabbaL-20170316.pdf (accessed May 10, 2021).

challenges faced by the agency and attracted scrutiny from the CIS Ombudsman,[326] GAO,[327] and the media.[328]

The agency aims for a complete online presence by the end of 2020—but not for long. In October 2017, newly appointed USCIS Director L. Francis Cissna reenergized the agency's modernization program by prioritizing the digital transition and setting the ambitious goal of completing the shift to a digital environment by December 2020.[329] To support the agency's endeavor, USCIS reevaluated its digitization strategy, concluding that the amalgamation of existing filing, vetting, and adjudication systems, and petition/application storage would be successful.[330] The rechristened "eProcessing" strategy gave USCIS confidence that it could move expeditiously to an end-to-end, electronic immigration benefit and case management system.[331] Unfortunately, progress slowed following the departure of Director Cissna in June 2019. Progress slowed further as fiscal and operational impacts of the pandemic spread in spring 2020. Correspondingly, the agency shifted priorities toward the resumption of normal operations, stating that the December 2020 modernization goal was "no longer an agency priority."[332]

Had USCIS achieved its 2020 digitization objectives, the agency would have been better-positioned to shift to remote adjudications, publicly demonstrating recognizable results during the pandemic. Unfortunately, USCIS had limited flexibility when the pandemic forced closure of its public-facing facilities and the necessary shift to remote work. Electronic files could have been assigned, adjudicated, and completed digitally instead of traveling to and from USCIS offices to pick up and drop off paper files.

CURRENT ONLINE FILING AND EPROCESSING: PROGRESS DESPITE PANDEMIC'S SETBACKS

The unprecedented pandemic-related closure of public-facing offices to applicants and petitioners resulted in obstructions to the agency's modernization effort.[333] Since USCIS is a fee-funded agency, the precipitous fall in new fee receipts resulted in consequential revenue and resource shortages, and compelled the agency to implement cost-cutting measures, affecting all components and programs, including its digital strategy project.[334] Several contractors assigned to this project were released in Fiscal Year (FY) 2020, and the agency suffered slowdowns in its program development.[335]

2020: Digital gains despite the pandemic. USCIS successfully made several forms available for digital processing by reusing existing automation technologies and establishing new uses for simple technologies. Reusing tools enabled USCIS to capitalize on proven functionalities and ensured fewer problems as usage increased. In FY 2020, these measures resulted in online filing of 1,450,700 applications and petitions, a more than 20 percent increase compared to FY 2019.[336]

Currently, 45 percent of forms and benefits that are eligible for online filing are filed online; an additional 20 percent (estimated) are processed through some combination of paper and electronic processing.[337] The 45 percent figure includes the processing of Form I-90, Form I-539, Form N-400, Form I-130, other naturalization-related filings, as well as a few additional benefit requests.[338]

As seen in Figure 5.1 *(USCIS Online Filings, FY 2018–FY 2020 and by Month for FY 2020)*, online filing increased significantly during the pandemic. Some of this increase is attributable to increased filings in

[326] Ombudsman's Annual Report 2017, pp. 51–55, Ombudsman's Annual Report 2016, pp. 41–42.

[327] GAO Report, "Immigration Benefits System: Significant Risks in USCIS's Efforts to Develop Its Adjudication and Case Management System," GAO-17-486T (Mar. 2017) at 10; http://www.gao.gov/pdf/product/683403 (accessed Apr. 29, 2021).

[328] Tajha Chappellet-Lanier, "After Harsh Report, Citizenship Office Says It's Taking ELIS Challenges Very Seriously," *FedScoop* (Dec. 11, 2017); https://www.fedscoop.com/wake-harsh-report-citizenship-office-says-taking-elis-challenges-seriously/ (accessed May 10, 2021) *see also* Eric Pianin, "A $3.1 Billion Digital System That Threatens National Security Is Shut Down," *The Fiscal Times* (Jan. 27, 2017); https://www.thefiscaltimes.com/2017/01/27/31-Billion-Digital-System-Threatens-National-Security-Shut-Down (accessed May 3, 2021) *and* Hana Schank and Tara Dawson McGuinness, "What Happened When the U.S. Government Tried to Make the Immigration System Digital," *Slate* (Apr. 16, 2021); https://slate.com/technology/2021/04/elis-uscis-digital-immigration-system.html (accessed May 3, 2021).

[329] Laura D. Francis, "Paperless Intake Is Immigration Agency Director's Top Priority," *Daily Labor Report* (Oct. 18, 2018); https://news.bloomberglaw.com/daily-labor-report/paperless-intake-is-immigration-agency-directors-top-priority (accessed Apr. 11, 2021).

[330] 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).

[331] Leslie Dellon, "USCIS' New eProcessing System Will Test Whether the Agency Learned from Past Mistakes," *ImmigrationImpact.com* (May 29, 2019); https://immigrationimpact.com/2019/05/29/uscis-new-eprocessing-system/#.YKrt-ytJGUk (accessed May 23, 2021).

[332] Information provided by USCIS (Jan. 30, 2020).

[333] USCIS News Release, "Deputy Director for Policy Statement on USCIS' Fiscal Outlook" (Jun. 25, 2020); https://www.uscis.gov/archive/uscis-launches-online-immigration-system-uscis-elis (accessed Apr. 12, 2021).

[334] Information provided by USCIS (Mar. 30, 2021).

[335] Information provided by USCIS (Mar. 31, 2021).

[336] USCIS, "2020 USCIS Statistical Annual Report," p. 15; https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf (accessed May 14, 2021).

[337] Information provided by USCIS.

[338] USCIS Webpage, "Forms Available to File Online" (Jun. 11, 2020); https://www.uscis.gov/file-online/forms-available-to-file-online (accessed Apr. 11, 2021).

advance of the (ultimately enjoined) 2020 fee rule; the number of Immigrant Fees filed online correspondingly dropped (consistent with closures of consulates and travel limitations).

Figure 5.1: USCIS Online Filings, FY 2018–FY 2020 and by Month for FY 2020

	Forms Filed Online	Immigrant Fees Filed Online	Total Online Filings
FY 2018	553,700	516,700	1,070,500
FY 2019	701,100	474,500	1,175,700
FY 2020	1,183,500	267,200	1,450,700
October 2019	59,600	38,300	97,900
November 2019	62,500	38,600	101,100
December 2019	75,300	40,700	116,000
January 2020	89,000	40,600	129,600
February 2020	96,300	37,600	133,900
March 2020	91,400	23,800	115,200
April 2020	89,200	1,400	90,600
May 2020	104,800	7,400	112,200
June 2020	114,600	5,900	120,500
July 2020	112,300	12,200	124,500
August 2020	117,400	7,900	125,300
September 2020	171,200	5,800	177,000

Source: USCIS, "2020 USCIS Statistical Annual Report," p. 22; https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf (accessed May 14, 2021).

Among the digital progress USCIS made in FY 2020 and FY 2021:

- Reintroduced online filing of Form I-539, *Application to Extend/Change Nonimmigrant Status*,[339] for certain applicants;
- Introduced I-130, *Petition for Alien Relative,* for online filing;[340] and
- Successfully launched an electronic H-1B cap-lottery registration and selection tool.[341] In FY 2020, nearly 275,000 H-1B registrations were filed.[342] In March 2021, over 300,000 were filed,[343] and selected petitioners were notified within days,[344] streamlining a process that formerly involved paper submissions best measured in reams.

Progress continued through the pandemic. On April 12, 2021, USCIS announced the release of a limited online filing option for Form I-765, *Application for Employment Authorization.*[345] The CIS Ombudsman has previously urged USCIS to make Form I-765 available for electronic filing. That form alone, when fully developed for digital submission and adjudication, will be the source of over a million filings annually. A "soft launch" in March 2021 made the form available for F-1 students seeking Optional Practical Training (OPT).[346] This addressed a receipting problem students experienced with cases filed during the first half of FY 2021.

There were some missteps, however. Previously, USCIS informed the CIS Ombudsman that it expected to roll out Form I-589, *Application for Asylum and for Withholding of Removal*, "imminently," but has now revised the launch to an undetermined date before the end of calendar year 2021.[347] USCIS had also anticipated an FY 2020 online filing option for Form I-129, *Petition for a Nonimmigrant Worker*, for agricultural workers,[348] as well as Form I-485, *Application to Register Permanent Residence or*

[339] USCIS Webpage, "Check Your Eligibility to File Form I-539 Online" (Mar. 19, 2021); https://www.uscis.gov/i539online (accessed Apr. 12, 2021). As this report was being finalized, however, legal representatives still cannot file Form I-539 for their clients; the form can only be filed by the applicant. USCIS has indicated it intends to activate this capability soon.

[340] USCIS News Release, "USCIS Makes Another Form Available for Online Filing" (Oct. 30, 2019); https://www.uscis.gov/news/news-releases/uscis-makes-another-form-available-online-filing (accessed Apr. 12, 2021).

[341] Over 270,000 individual beneficiaries were electronically registered during the period of March 1 through March 20, and all petitioning employers were electronically notified of the lottery selection results on or before March 30, 2021. *See generally* USCIS Webpage, "FY 2022 H-1B Cap Season Updates" (Mar. 30, 2021); https://www.uscis.gov/news/alerts/fy-2022-h-1b-cap-season-updates (accessed Apr. 12, 2021).

[342] USCIS News Release, "FY 2021 H-1B Cap Petitions May Be Filed as of April 1" (Apr. 1, 2020); https://www.uscis.gov/news/news-releases/fy-2021-h-1b-cap-petitions-may-be-filed-as-of-april-1 (accessed Apr. 12, 2021).

[343] Bloomberg News reported that petitions for approximately 308,000 beneficiaries were submitted. Genevieve Douglas, "H-1B Skilled Visa Demand at Record High Despite Pandemic (1)," *Bloomberg News* (May 7, 2021); https://news.bloomberglaw.com/daily-labor-report/specialty-occupation-visa-demand-at-record-high-despite-pandemic (accessed May 26, 2021).

[344] USCIS Webpage, "FY 2022 H-1B Cap Season Updates" (Mar. 30, 2021); https://www.uscis.gov/news/alerts/fy-2022-h-1b-cap-season-updates (accessed Apr. 12, 2021).

[345] USCIS News Release, "F-1 Students Seeking Optional Practical Training Can Now File Form I-765 Online" (Apr. 12, 2021); https://www.uscis.gov/news/news-releases/f-1-students-seeking-optional-practical-training-can-now-file-form-i-765-online (accessed May 5, 2021).

[346] CIS Ombudsman's Webinar Series, "USCIS' Online Filing and Customer Service Tools," Mar. 21, 2021.

[347] Information provided by USCIS (Jan. 30, 2020).

[348] *Id.*

Adjust Status.[349] In a March 2021 meeting with the CIS Ombudsman, however, the agency did not recommit itself to a timeline for an online filing option for these benefit submissions.

USCIS has also engaged in back-end enhancements to improve *myUSCIS*, its customer-facing digital interface. This interface allows individuals to create an account, obtain real-time information about their immigration filings, and communicate with the agency digitally.[350] The *myUSCIS* platform also includes a search function, which guides users to other resources including the "Find a Class" tool to locate English as a Second Language and citizenship preparation classes, the "Find a Doctor" tool, and an interactive Civics Practice Test.[351]

As mentioned *supra*, Congress specifically instructed USCIS to submit a 5-year plan to establish electronic filing procedures for all immigration forms, and to implement a system to facilitate two-way electronic communications with its customers.[352] In ordering this report, Congress may be signaling its concern with the pace of progress. This is understandable since at least $2 billion has been spent on the project since it began in 2005.[353] USCIS has accordingly drafted a plan "toward a goal of completion by Fiscal Year 2026."[354]

CONCERNS ABOUT USCIS' DIGITAL PROGRESS REMAIN

The CIS Ombudsman recognizes USCIS' significant progress over the past year in support of its digital strategy and pursuit of a fully electronic environment, despite funding cuts, pandemic protocols, and other challenges in employing its existing digital tools. However, achieving these goals also requires confronting several ongoing obstacles.

Lack of transparency. It has been several years since USCIS has engaged external stakeholders in reviewing its digital transformation project. While the agency has requested specific assistance occasionally during the development of *myUSCIS* and various related online forms, much of its planning and timelines for future development has remained undisclosed.

Prioritization of online filing types. USCIS has never disclosed publicly the factors it considers when choosing which immigration benefit applications and petitions it plans to make available for online filing. Consequently, stakeholders with technical knowledge and expertise cannot share valuable input that might lead to improved decision-making.

Lack of engagement with case-management and forms vendors. USCIS has failed to reach out to such vendors even as most immigration legal representatives use an integrated case and forms management system. According to the most recent data available to the CIS Ombudsman, approximately 39 percent of all filings submitted to USCIS are filed by a legal representative.[355]

Competing demands for future premium processing fees. Congress recently changed Section 286(u) restrictions on the use of premium processing fees for premium processing operations and infrastructure improvements. USCIS is now statutorily permitted to use these fees to "respond to adjudication demands, including by reducing the number of pending immigration and naturalization benefit requests."[356] Given USCIS' significant adjudications backlog, it is likely that there will be competing demands within the agency for these fee revenues.

CONSIDERATIONS AND RECOMMENDATIONS

The CIS Ombudsman encourages USCIS to consider the following actions:

- *Implement outreach and education to encourage customers to file online*. Current data shows that only 33 percent of customers are using *myUSCIS* or otherwise file for immigration benefits online when the

[349] USCIS News Release, "Cuccinelli Announces USCIS' FY 2019 Accomplishments and Efforts to Implement President Trump's Goals" (Oct. 19, 2019); https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-to-implement-president-trumps-goals (accessed Apr. 12, 2021).

[350] For more information on account history and functionality, *see* Ombudsman's Annual Report 2019, p. 65.

[351] *See generally* DHS Privacy Impact Assessment, "*myUSCIS*" (Dec. 14, 2016); https://www.dhs.gov/sites/default/files/publications/privacy-pia_appendix-uscis-myuscis_appendix_i-june2019.pdf (accessed Apr. 12, 2021).

[352] *See* Continuing Appropriations Act, 2021 and Other Extensions Act, Div. D, Title 1, § 4103, Pub. L. 116-159.

[353] The initial estimated cost for the entire initiative was $536 million, ballooning to a revised "estimate of $3.1 billion by 2033, including operations and maintenance costs for up to 15 years after full system deployment." DHS Office of Inspector General, "USCIS Automation of Immigration Benefits Processing Remains Ineffective," OIG-16-48 (Mar. 2016) at 22; https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-48-Mar16.pdf (accessed Apr. 22, 2021).

[354] Information provided by USCIS (Apr. 29, 2021).

[355] Based on CIS Ombudsman calculations using data provided in a USCIS 2014 Final Rule entitled, "Notices of Decisions and Documents Evidencing Lawful Status" (Oct. 29, 2014); https://www.govinfo.gov/content/pkg/FR-2014-10-29/html/2014-25622.htm. *See also* "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2014;" https://www.uscis.gov/sites/default/files/document/data/all_forms_performancedata_fy2014_qtr4.pdf (accessed Apr. 23, 2021).

[356] *See* Continuing Appropriations Act, 2021 and Other Extensions Act, Div. D, Title 1, § 4102(a), Pub. L. 116-159.

option is available.[357] While investigating why this is so, the agency should consider new ways to reach its intended audience.

- *Establish relationships with third-party case-management and forms vendors*. This is not the first time the CIS Ombudsman has made this recommendation,[358] and the agency has previously stated it would do so when its online platform is more developed.[359] As noted above, most legal representatives filing immigration benefit forms use case management systems. USCIS' delay in facilitating system-to-system data uploads to complete forms results in inefficiencies and additional costs to legal representatives and their clients.
- *Prioritize the development of high impact/volume immigration benefit filings.* USCIS has been working toward digitizing some of the higher-volume form filings, such as Form I-485 and Form I-589, but has not made outward progress toward online processing nor online filing. However, the recent implementation of online filing and processing of Form I-765 for F-1 students demonstrates the benefit of moving high-volume filings into the digital environment. The CIS Ombudsman encourages moving these products further into a digital environment. This will reduce the likelihood of frontlogs, rejections due to mailing and filing fee payment issues, and paper file movement costs; it will also benefit from the communication functionalities available through *myUSCIS*.
- *Recommit to helping non-English proficient customers.* The CIS Ombudsman encourages the agency to continue breaking down barriers to access for those with limited English proficiency. In doing so, more non-English proficient customers would take advantage of accessible options being rolled out through USCIS' digitization efforts.
- *Consider interim measures*. Among such interim measures that would achieve identifiable goals during the transition:
  - Increase use of electronic communications (email with attachments if possible) between officers and benefit filers, including their legal representatives. The CIS Ombudsman recognizes the applicable Privacy Act issues. The CIS Ombudsman welcomes the opportunity to discuss these challenges with stakeholders and USCIS over the coming year.
  - Establish a central portal for Form G-28, *Notice of Entry of Appearance as Attorney or Representative*, that allows legal representatives to submit such notices electronically. USCIS can match these filings with the corresponding A-file.
  - Expand access to filing fee payments by credit card to all forms submitted online or through USCIS' lockboxes.[360] USCIS should use its agile development approach to adopt an enterprise-level payment system to allow those who directly file their applications with a USCIS field office or service center to pay by credit card.

While the agency has made much progress since beginning its digital strategy journey, it has proven a bumpy one. Current Congressional attention to the issue is an opportunity to recommit the agency's efforts to achieving the goal with all deliberate speed. While no one can predict whether the agency will have the same need that full online processing would have met during the pandemic, the need to maximize processing resources will continue to be a significant driver of its digital strategy.

[357] Information provided by USCIS (Mar. 30, 2021).

[358] Ombudsman's Annual Report 2020, p. 104 and Ombudsman's Annual Report 2019, p. 68.

[359] Ombudsman's Annual Report 2019, p. 68.

[360] *See* USCIS Webpage, "Forms Processed at USCIS Lockbox Facilities" (Dec. 11, 2019); https://www.uscis.gov/forms/filing-fees/forms-processed-at-uscis-lockbox-facilities (accessed Apr. 12, 2021).

Grading DHS's Support of International Student Programs

Responsible Offices: Student and Exchange Visitor Program, National Security Investigations Division, Immigration and Customs Enforcement (ICE); Service Center Operations Directorate, USCIS

INTRODUCTION

International student program administration in the United States is complex and involves multiple government entities. The Student and Exchange Visitor Program (SEVP), an arm of U.S. Immigration and Customs Enforcement (ICE), provides overall guidance to foreign students. The Student and Exchange Visitor Information System (SEVIS) is the web-based system in which ICE maintains information regarding international students and exchange visitors. U.S. Citizenship and Immigration Services (USCIS) adjudicates applications from students requesting a change in status and work authorization.

Designated School Officials (DSOs) serve as the primary interlocutors between students applying to study in the United States, their universities, and the U.S. immigration system. DSOs ensure that the foreign students attending their institutions remain compliant with immigration regulations.

The COVID-19 pandemic, however, tested the system's resilience and capacities, exacerbating long-standing

process challenges dependent on interagency coordination. As schools scrambled to adjust operations to virtual or hybrid learning, DSOs, and the students they serve, grappled with inconsistent guidance from SEVP, lengthy USCIS processing times, and the inability to receive timely information from either agency.

DHS's interest is in ensuring the integrity of the program—that international students come and remain in the United States for legitimate purposes. The CIS Ombudsman's 2020 Annual Report included a risk analysis of the Optional Practical Training (OPT) program, which allows F-1 nonimmigrant students to file Form I-765, *Application for Employment Authorization*, to pursue 12 months of pre-completion or post-completion employment.[361] F-1 students with degrees in science, technology, engineering, or math (STEM) fields may apply for a 24-month employment authorization extension to continue that training. OPT allows students to gain practical experience that can be used in their home country or to afford access to employment opportunities in the United States. There were 223,539 foreign students with OPT during the 2019–2020 academic year.[362]

The CIS Ombudsman continues to review potential improvements to the student visa and OPT programs to increase compliance and make government interactions more user-friendly. Accordingly, the CIS Ombudsman held 19 public engagements for school-related stakeholders from January 2020 to February 2021, engaging with more than 90 DSOs across the country. During these engagements and through a subsequent online survey, stakeholders shared the scope of their duties and how they perform them; how they ensured qualifications and training; what interactions with USCIS and SEVP were like; and what they perceived as the challenges in complying with their Federal immigration regulatory requirements in advising students. The online survey, open from March 25, 2021 to April 8, 2021, captured 287 responses. This small sample of the thousands of registered DSOs at institutions of higher education provided useful data for identifying systemic issues, informing the CIS Ombudsman's recommendations to improve the administration of F-1 related immigration benefits.

[361] *See* Ombudsman's Annual Report 2020, "Foreign Students and the Risks Surrounding Optional Practical Training," pp. 62–85.

[362] Open Doors® data portal, "Academic Level;" https://opendoorsdata.org/data/international-students/academic-level/ (accessed Apr. 22, 2021).

BACKGROUND

International education contributes to greater understanding among diverse cultures and attracts future global leaders to study and train in the United States. The Federal government promotes mutual understanding through international education by encouraging and creating opportunities for noncitizens to learn here.[363] The United States offers foreign students access to quality education as well as employment opportunities after graduation.[364] Approximately 1,075,496 international students were living in the United States during the 2019–2020 academic year, which constitutes nearly 5.5 percent of the post-secondary student population.[365]

The majority of these students hold F-1 visas in pursuit of an Associate's, Bachelor's, Master's, or Doctorate degree.[366] International students living abroad may apply to the Department of State (DOS) for a student visa, or if already lawfully present in the United States, may file an application to change status with USCIS. In every case, the student's application must be supported by a Form I-20, *Certificate of Eligibility for Nonimmigrant Student Status*, generated by a DSO from the relevant institution.[367]

According to the Institute of International Education (IIE), between fall 2019 and fall 2020, international student enrollment decreased 16 percent and the number of first-time applicants plummeted by 43 percent.[368] Beginning in March 2020, due to the COVID-19 pandemic,[369] noncitizens were subject to additional travel restrictions

[363] *See generally* Institute of International Education Annual Report, "At A Glance: Commemorating a Century" (2019); https://www.iie.org/Why-IIE/Annual-Report (accessed Apr. 14, 2021) and Department of State Web page, "Bureau of Educational and Cultural Affairs;" https://eca.state.gov/about-bureau (accessed Apr. 14, 2021).

[364] *See* Emma Israel and Jeanne Batalova, "International Students in the United States," Migration Policy Institute (Jan. 14, 2021); https://www.migrationpolicy.org/article/international-students-united-states-2020#academic_levels (accessed Apr. 18, 2021).

[365] Opendoors® data portal, "Enrollment Trends;" https://opendoorsdata.org/data/international-students/enrollment-trends/ (accessed Apr. 14, 2021).

[366] Information provided by SEVP (Mar. 11, 2021).

[367] 8 C.F.R. § 214.2(f)(1)(i)(A).

[368] Julie Baer and Mirka Martel, Ph.D., "Fall 2020 International Student Enrollment Snapshot," IIE (Nov. 2020); https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports (accessed Apr. 18, 2021).

[369] *See generally* DOS Webpage, "Presidential Proclamations on Novel Coronavirus" (Jan. 26, 2021); https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html (accessed Feb. 22, 2021). F-1 students from certain countries have been exempt from travel bans, but the exemption process resulted in an additional step in the visa process. *See* Asher Stockler, "State Dept. Exempts Foreign Students from Travel Restriction," *Law360* (Feb. 11, 2021); https://www.law360.com/immigration/articles/1354638/state-dept-exempts-foreign-students-from-travel-restriction?nl_pk=a1c93459-944f-4bbc-9fa2-ded6387583bc&utm_source=newsletter&utm_medium=email&utm_campaign=immigration&read_more=1 (accessed Feb. 22, 2021)(copy available with the Ombudsman).

and limited access to U.S. embassies and consulates. New students deferred enrollment, and many returning students opted to attend online and live outside the United States.[370] Schools continue to recruit outside the United States with the expectation that students will return as travel restrictions are rescinded.[371] However, government actions post-pandemic will likely impact the future of international study in the United States.

An F-1 student must attend an institution of higher learning certified by SEVP to study in the United States and to participate in the OPT program.[372] SEVP is housed under ICE's National Security Investigations Division and is separate from USCIS. SEVP tracks and provides oversight of foreign students (and any accompanying family members) by managing the web-based database, SEVIS. SEVP partners with other agencies, including USCIS and DOS, the latter of which oversees documentation for the J visa as part of its Exchange Visitor program.[373]

ROLES AND RESPONSIBILITIES OF DESIGNATED SCHOOL OFFICIALS

DSOs are school employees responsible for ensuring compliance with SEVP regulations as well as assisting foreign students as they navigate the immigration compliance pathway. They must be U.S. citizens or lawful permanent residents.[374] A SEVP-certified school must employ at least one DSO on each campus with foreign students, but may hire as many DSOs as necessary to timely comply with SEVP regulations.[375] Large institutions may hire many DSOs and divide their duties to cover distinct tasks for each student or assign all tasks for a certain number of students, while smaller institutions may hire fewer DSOs to shepherd students through the end of their F-1 life cycle. The smallest institutions may employ multi-tasking DSOs who coordinate other duties in addition to assisting international students. According to SEVP, there are currently 22,985 registered DSOs and Principal Designated School Officials assigned to cover 867,453 college students.[376]

DSOs: a wide range of responsibilities. DSOs are required to create an entry in SEVIS for each enrolled foreign student, maintain and update student information and documents in SEVIS, and recommend students for OPT.[377] DSOs enter and update required information on nonimmigrant students and ensure enforcement of applicable immigration laws.[378] DSOs enter and update certain information about their schools and foreign students in SEVIS, monitor alerts on students, and view and print reports.[379] These activities are required to ensure the student remains in status.

DSOs have additional reporting requirements for students they have recommended for OPT.[380] DSOs are responsible for updating changes in name, address, employer, and employment status in SEVIS for students participating in OPT.[381] For students in STEM OPT, DSOs must collect a Form I-983, *Training Plan for STEM OPT Students,* completed by the student and signed by the employer, as well as a validation report every 6 months confirming the student's information has not changed.[382] The DSO must also secure an interim evaluation of the student's progress toward their training goals at the 1-year mark and a final evaluation at the end of the program. Once they have recommended the student for OPT, DSOs must maintain the student's SEVIS record as long as the OPT lasts.[383]

Although not specifically dictated by regulation, DSOs also advise students how to avoid immigration violations, delineating the steps necessary to maintain status, and how to follow a myriad of processes.[384] They also serve as the intermediary between the student and DHS to ensure SEVIS and USCIS databases are accurate and reflective of one another.

DSOs are under a great deal of pressure to perform their duties well, given the serious consequences to American

[370] Of the 700 U.S. higher education institutions who responded to the IIE's survey, 40,000 of their students had deferred enrollment to a future term and twenty percent of their foreign students were studying online outside of the United States in fall 2020. Julie Baer and Mirka Martel, Ph.D., "Fall 2020 International Student Enrollment Snapshot," IIE (Nov. 2020), p. 5; https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports (accessed Feb. 21, 2021).

[371] *See* Sophie Quinton, "Coronavirus, Trump Chill International Enrollment at U.S. Colleges," The PEW Charitable Trusts (Sep. 14, 2020); https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/14/coronavirus-trump-chill-international-enrollment-at-us-colleges (accessed Apr. 21, 2021).

[372] 8 C.F.R. § 214.3(a)(1).

[373] DHS Webpage, "Get to Know SEVP: The Student and Exchange Visitor Program" https://studyinthestates.dhs.gov/assets/Get%20to%20 Know%20 SEVP_Oct2018.pdf (accessed Feb. 22, 2020).

[374] 8 C.F.R. § 214.3(l)(1).

[375] 8 C.F.R. § 214.3(l)(1)(iii).

[376] Information provided by ICE (Mar. 10, 2021). An individual can hold multiple DSO roles across campuses.

[377] 8 C.F.R. § 214.2(f)(11)(ii).

[378] *See generally* 8 C.F.R. § 214.3(l).

[379] DHS Webpage, "SEVIS Help Hub;" https://studyinthestates.dhs.gov/sevis-help-hub/sevis-basics/system-access-and-security/terms-and-conditions-of-accessing-sevis (accessed Apr. 14, 2021).

[380] 8 C.F.R. §§ 214.2(f)(11)(ii)(A)-(C) and (f)(12).

[381] 8 C.F.R. § 214.2(f)(12)(i).

[382] *See* 8 C.F.R. §§ 214.2(f)(10)(ii)(C)(6)-(7).

[383] *See* 8 C.F.R. § 214.2(f)(11)(ii).

[384] *See generally* DHS Webpage, "Designated School Official;" https://studyinthestates.dhs.gov/schools/get-started/designated-school-official (accessed Apr. 14, 2021).

security, impact on universities' reputations and finances, and high stakes for foreign students, particularly those who want to work in the United States. Failure to provide timely or accurate updates in SEVIS can negatively affect a student's status or eligibility for benefits, sometimes with a long-lasting impact. DSOs have to coordinate with SEVP and USCIS to fix an incorrect SEVIS record. For example, if the DSO or SEVP terminated the student's SEVIS record in error, the student must file to reinstate status with USCIS or otherwise depart the United States immediately.[385] In addition, missing a deadline by even 1 day can result in an otherwise eligible student being barred from practical training in the United States—a necessary first step for many foreign students ultimately seeking permanent residence based on employment.[386]

A particular issue is the SEVP Portal that allows F-1 students on post-completion OPT to independently update their address and employment information without relying upon their DSO.[387] Students do not have access to SEVIS and it is the DSO who is ultimately responsible for ensuring that the record is current. This is difficult because the DSO may not know what information the student self-reported. In addition, stakeholders reported that the SEVIS Portal has at times sent messages to students that are not relevant to them, which can cause confusion.[388]

TRAINING FOR DESIGNATED SCHOOL OFFICIALS

DSOs must certify that they are familiar with the immigration regulations concerning foreign students' admission, maintenance of status, and change of status at the time of hiring and as part of the school's biennial recertification processes.[389] SEVP offers non-mandatory online and in-person information and training to DSOs.[390] The SEVP External Training Application (SETA) is an online training tool that offers seven courses on the rules and regulations that govern SEVP. *SEVP Basics,* for example, provides an overview of SEVP, SEVIS, and the management of nonimmigrant student records; *SEVP 101* tells the history of SEVP and describes the different types of nonimmigrant students and exchange visitors and the programs that certify, monitor, and oversee them.[391] SEVP also provides in-person and virtual trainings through SEVP field representatives, as well as live webinars and presentations during school visits and at conferences and events hosted by other organizations.[392] DHS's *Study in the States* website also provides information on the foreign student process and SEVIS registration and reporting instructions.

Some schools organize in-house training programs to complement, or sometimes in lieu of, SEVP training.[393] Educational trade organizations, such as NAFSA: Association of International Educators (NAFSA), also provide learning and professional development opportunities, written resources, and opportunities for DSOs to connect with other DSOs and learn about updates from SEVP and USCIS.[394] Stakeholders cite this type of external organization as a good source for identifying training opportunities and a resource for seeking answers on difficult fact patterns and novel situations, but they can only reflect established policies.[395]

DSOs need more than basic training. DSO training offered by SEVP provides basic information, such as which regulations apply and how to enter information in SEVIS. Stakeholders suggested that more practical training in handling complex issues would be particularly helpful.[396] DSOs need to maintain a deeper understanding of the regulations that govern SEVP and the international student life cycle to properly and fully advise students. In addition, frequent changes in immigration laws, policies, and practices make progressive training essential.

Several times since 2012, the U.S. Government Accountability Office (GAO) has investigated SEVP's management of the foreign student program.[397] In a 2019 report, GAO noted DSOs were potentially overwhelmed by program responsibilities and not fully trained, including in identifying "fraud schemes or trends . . . including student visa exploitation and national security

[385] DHS Webpage, "Maintaining Accurate SEVIS Records;" https://studyinthestates.dhs.gov/schools/maintaining-accurate-sevis-records (accessed Apr. 18, 2021).

[386] *See* Elizabeth Redden, "Dream Derailed Leads to Lawsuit Against Berkeley," *Inside Higher Ed* (Mar. 19, 2021); https://www.insidehighered.com/news/2021/03/19/former-international-student-who-lost-dream-job-sues-berkeley-alleging-negligence (accessed Mar. 20, 2021).

[387] DHS Webpage, "SEVP Portal Help;" https://studyinthestates.dhs.gov/sevp-portal-help (accessed Apr. 18, 2021).

[388] Information provided by stakeholders (Mar. 9, 2021).

[389] 8 C.F.R. § 214.3(l)(3).

[390] Information provided by SEVP (Mar. 10, 2021).

[391] DHS Webpage, "SEVP External Training Application;" https://studyinthestates.dhs.gov/schools/additional-resources/sevp-external-training-application (Mar. 17, 2021). For information on the variety of online tools for foreign students and school officials, please visit DHS website https://studyinthestates.dhs.gov/tools.

[392] Information provided by SEVP (Mar. 10, 2021).

[393] Information provided by stakeholders (Mar. 9, 2021).

[394] *See generally*, NAFSA Webpage, "Professional Resources;" https://www.nafsa.org/ (accessed Apr. 14, 2021).

[395] Information provided by stakeholders (Nov. 18, 2020 and Mar. 9, 2021).

[396] Information provided by stakeholders (Dec. 15, 2020).

[397] *See* Ombudsman's Annual Report 2020, "Foreign Students and the Risks Surrounding Optional Practical Training," pp. 68–69.

vulnerabilities."[398] GAO recommended ICE implement mandatory DSO training, to include fraud-specific training, to address this. The report also identified SEVP's failure to provide mandatory and universal training to DSOs as one of many weaknesses in SEVP's management of the foreign student program.[399] GAO stated that DSOs "may not have time to keep up with SEVP rules and policy updates" and that they "have a high rate of turnover, especially at small schools, and may lack the expertise to effectively follow program requirements."[400] GAO asserted enhanced training for DSOs would ensure that they "adequately understand the program's regulations" and "their own responsibilities within the program."[401] In March 2021, ICE indicated it was in the process of addressing GAO's mandatory training recommendations.[402]

SEVP FIELD REPRESENTATIVES

SEVP field representatives act as a liaison between SEVP headquarters and DSOs. They are SEVP's "boots on the ground," ensuring DSOs understand SEVP regulations, policies, and directives on tracking nonimmigrant students and can comply with them by:

- Meeting with DSOs at schools in their assigned territories at least once per year;
- Answering general questions related to the nonimmigrant student process;
- Providing training and technical assistance to DSOs; and
- Attending conferences and meetings in their territories that pertain to nonimmigrant students.[403]

SEVP oversees 8,029 schools, encompassing 16,241 campuses and 867,453 students.[404] Each campus is assigned to one of 60 territories that are further divided into three regions (Eastern, Central, and Western). SEVP assigns a field representative to each territory and currently has a field representative for 55 of the 60 territories across the United States.[405] Schools with more than one campus can be under the jurisdiction of more than one territory if their campuses are located in different territories. Many field representatives have served as DSOs or worked for SEVP in other capacities.[406]

Field representatives undergo an intensive 6-week training course at SEVP headquarters that includes regulatory classroom instruction, presentations, and tours to better understand how SEVP fits into the broader missions of ICE and DHS.[407] During the training period, new hires work directly with seasoned field representative mentors who assist them with school scheduling strategies, practicing mock visits, and preparing for the day-to-day aspects of the role. They undergo regular knowledge checks and must pass a written final exam before working in their designated territory.[408]

Field representatives continue to receive regular training, including an annual regional meeting and *ad hoc* trainings as necessary following changes to policy or internal systems. Field representatives also receive briefings and updated information on policies and guidance from USCIS components, including the Field Operations Directorate, the Service Center Operations Directorate, and the Fraud Detection and National Security Directorate. In Fiscal Year (FY) 2021, SEVP began an initiative where one afternoon each month is dedicated to field representative training, covering a variety of rotating topics.[409]

During routine school visits, field representatives answer questions concerning federal regulations, changes to SEVIS, and clarification on SEVP directives or guidance.[410] Field representatives establish working relationships with DSOs, ensuring they fully understand program requirements and providing training to close knowledge gaps. During these trainings, DSOs can view live demonstrations and ask questions.[411] Despite the pandemic, field representatives conducted 14,683 school visits in FY 2020, a slight increase from the 14,522 and 14,592 school visits conducted in FYs 2019 and 2018, respectively.[412]

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398 GAO, "Student and Exchange Visitor Program: DHS Can Take Additional Steps to Manage Fraud Risks Related to School Certification and Program Oversight," GAO-19-297 (Mar. 2019), p. 49; https://www.gao.gov/products/gao-19-297 (accessed Feb. 20, 2021).

399 *Id.* at 49.

400 *Id.* at 48.

401 *Id.* at 47–49.

402 GAO Webpage, "Recommendations Database;" https://www.gao.gov/reports-testimonies/recommendations-database?processed=1&priority=all&topic=all&agency=United%20States%20Immigration%20and%20Customs%20Enforcement&page=1 (accessed Apr. 22, 2021).

403 Information provided by SEVP (Mar. 10, 2021).

404 *Id.*

405 Information provided by SEVP (Mar. 10, 2021).

406 ICE Webpage, "FAQs: SEVP Field Representatives" (Nov. 16, 2020); https://www.ice.gov/sevis/schools/fru-faqs#:~:text=Field%20representatives%20will%20primarily%20help,observed%20while%20performing%20their%20duties (accessed Apr. 15, 2021).

407 Information provided by SEVP (Mar. 10, 2021).

408 *Id.*

409 *Id.*

410 *Id.*

411 *Id.*

412 *Id.*

As a liaison between DSOs and SEVP headquarters, the field representatives are a logical source for DSOs to turn to when they have immigration-related questions. However, DSOs have many questions that are not within a SEVP field representative's scope of knowledge. Field representatives employed by SEVP may not be able to provide assistance or advice in matters concerning USCIS immigration processes, for example.[413] Field representatives are likely to seek guidance from SEVP headquarters on a novel or complex issue within ICE's responsibility before responding.

According to DSO responses to the CIS Ombudsman survey, DSOs generally have a good relationship with their field representatives and they believe the information and training they provide is accurate and helpful to resolve issues. DSOs with whom the CIS Ombudsman engaged believed that field representatives, especially those who had previously been DSOs, had a good understanding of the position's challenges and answered their questions in ways that were useful.[414] We also heard, however, from DSOs who sometimes thought the information provided by their field representatives was not consistent with the regulations or what they were hearing from other DSOs with different field representatives. There was also concern expressed that field representatives were overlong in providing a response; they may wish to be responsive to questions but may lack the necessary information to share. When dealing with decisions impacting a student's future, even slight differences in information or missing details may be critical, and lack of resolution may adversely impact the DSO-field representative relationship.

THE LIMITED BUT CRITICAL ROLE PLAYED BY USCIS

USCIS' role with students is specific and limited. Typically, foreign students apply for an F-1 visa before entering the United States. However, USCIS may also grant F-1 status after an individual who is in the United States applies for a change or reinstatement of status.[415] A change of status is relatively straightforward; an individual enters in one status and needs to change status in order to enroll full-time in an academic program. If a student has dropped but returns to a full-time course of study, or a record needs to be reactivated after a data correction, the DSO must recommend reinstatement and/or make the correction in SEVIS and issue a new Form I-20 to the student.[416] In both scenarios, the student must file Form I-539, *Application To Extend/Change Nonimmigrant Status*, electronically or by paper, to reinstate student status. Applicants cannot attend school until USCIS has approved the change of status, within 30 days of the program start date.[417]

DSOs are also extensively involved with OPT. Participation in the OPT program has increased over time, even where foreign student growth on U.S. campuses has slightly slowed.[418] Before the pandemic, the total number of Forms I-765 filed with USCIS requesting post-completion OPT rose from 135,947 in 2015 to 151,185 in 2019, an increase of slightly more than 10 percent; applications filed requesting STEM OPT increased at a higher rate during the same time period, from 29,370 to 61,959, an increase of over 70 percent.[419] Although the number of Form I-765 applications received decreased in FY 2020 from the previous year to 138,954 for OPT and 58,335 for STEM OPT,[420] this is most likely due to the pandemic.

An employer does not have to be identified before a DSO recommends a student for OPT or a student submits Form I-765 to USCIS. Students applying for OPT must submit Form I-765 to USCIS and pay a filing fee to receive an Employment Authorization Document (EAD) to present to employers as proof of work authorization.[421] Eligibility is based on information contained on the student's Form I-20 and SEVIS record, which the DSO must issue and maintain, respectively.[422]

DSOs play a limited role with USCIS for students. DSOs cannot always provide assistance to students with USCIS. USCIS' current customer service policy limits the sharing of case-specific information to the applicant or legal representative. While foreign students can call the USCIS Contact Center on their own, it can be difficult to negotiate in a foreign language, and it can be difficult to get through

[413] Information provided by stakeholders (Dec. 15, 2021).

[414] *Id*.

[415] *See* USCIS Webpage, "Changing to a Nonimmigrant F or M Student Status," https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment/changing-to-a-nonimmigrant-f-or-m-student-status (accessed Mar. 19, 2021).

[416] *See* SEVIS User Guide, "Reinstatement" (June 29, 2016); https://studyinthestates.dhs.gov/sites/default/files/Reinstatement%20User%20Guide_0.pdf (accessed Apr. 21, 2021).

[417] 8 C.F.R. § 214.2(f)(5)(i).

[418] *See* Julie Baer and Mirka Martel, Ph.D., "Fall 2020 International Student Enrollment Snapshot," IIE (Nov. 2020); https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports (accessed Apr. 18, 2021).

[419] CIS Ombudsman's calculations based on information provided by USCIS (Apr. 24, 2020 and Feb. 2, 2021).

[420] Information provided by USCIS (Feb. 2, 2021).

[421] 8 C.F.R. § 274a.12(c)(3)(i)(B)-(C). Effective April 12, 2021, F-1 students seeking pre-completion, post-completion, or OPT STEM extension approval can file the Form I-765 and pay the filing fee online via myUSCIS. USCIS News Release, "F-1 Students Seeking Optional Practical Training Can Now File Form I-765 Online" (Apr. 12, 2021); https://www.uscis.gov/news/news-releases/f-1-students-seeking-optional-practical-training-can-now-file-form-i-765-online (accessed Apr. 16, 2021).

[422] Information provided by USCIS (Apr. 25, 2019).

to live assistance.[423] Since the USCIS Contact Center will not share individual case information with anyone other than the applicant or their legal representative, students must be with the DSO during the call.[424] Coordinating this can be difficult with students' class schedules and the current requirement that live assistance comes via a returned call from the USCIS Contact Center.

DSOs may also have to intervene with respect to the Systematic Alien Verification for Entitlements (SAVE™), an electronic immigration status verification system that assists government agencies in determining a noncitizen's eligibility for certain benefits by verifying immigration status.[425] State drivers' licensing agencies use SAVE to determine applicant eligibility, which almost always requires proof of immigration status.[426] If the foreign student's SEVIS record is not accurate or the information pushed to SAVE is inconsistent, the DSO may have to contact USCIS to fix the data discrepancy.

COVID-19: UNPRECEDENTED COMMUNICATION AND COORDINATION CHALLENGES

SEVP: Delays in issuing pandemic guidance. The unchartered waters brought on by the COVID-19 pandemic made the spring 2020 semester particularly difficult for DSOs and students. In response to local and national health and safety orders, colleges and universities made operational changes regarding in-person and virtual attendance which were at odds with existing student regulations. DSOs were at a loss as to how to advise students to maintain status in a virtual or hybrid learning environment since immigration regulations prohibit foreign students from taking more than one online course per term.[427] Complying with SEVP regulations became more difficult as campuses curtailed services. Complicating matters, DSOs were advising students in various postures: some remained in the United States while others traveled abroad; some were continuing students with active status in SEVIS, while others were incoming students or returning after temporary absences.

SEVP issued a series of electronic communications collectively referred to as the "March 2020 guidance" to cover the 2020 fall academic period. The guidance exempted schools and students from the regulatory limits on distance learning and applied to nonimmigrant students actively enrolled at a U.S. school on March 9, 2020.[428] This appeared to resolve the regulatory conflict regarding online learning. However, on July 6, 2020, SEVP issued refined guidance creating confusion by continuing some flexibilities to schools that adopted an in-person or hybrid model for fall 2020, but not to schools operating completely online.[429] The evolving policies left schools, some of which had already announced their fall plans for virtual and/or in-person learning, with a serious dilemma. DSOs reported not receiving timely, adequate, or consistent information from the field representatives.[430] Universities sued DHS in *President and Fellows of Harvard College v. U.S. Dept. of Homeland Security*, No. 1:20-cv-11283 (D. Mass. 2020). The settlement agreement reaffirmed the March 2020 guidance for the fall 2020 academic period and rescinded SEVP's July 6, 2020 guidance.[431]

Information gaps and challenges in obtaining accurate and updated information continued into the 2021 academic year. Guidance from SEVP for the spring 2021 semester was not released until December 2020, which caught DSOs by surprise because they had not received information sooner from their field representatives.[432]

USCIS: Inaccessibility and lack of information. The pandemic exacerbated existing communications issues. International students frequently look to DSOs for answers to questions concerning immigration benefits, such as eligibility, filing fees, filing locations, and guidance on completing forms. They also turn to DSOs when they make mistakes, or when USCIS makes a mistake.

[423] Information provided by stakeholders (Dec. 9, 2020).

[424] Information provided by stakeholders (Dec. 15, 2020).

[425] *See* USCIS Webpage, "About SAVE" (Sept. 16, 2020); https://www.uscis.gov/save/about-save/about-save (accessed Apr. 20, 2021).

[426] *See* USCIS Webpage, "For Benefit Applicants" (Sept. 30, 2020); https://www.uscis.gov/save/for-benefit-applicants (accessed Apr. 20, 2021).

[427] *See* 8 C.F.R. § 214.2(f)(6)(i)(G).

[428] *See* SEVP Broadcast Messages, "Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M nonimmigrant students" (2003-01) (Mar. 9, 2020); https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf (accessed Apr. 15, 2021) and "COVID-19: Guidance for SEVP Stakeholders" (Mar. 13, 2020); https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf (accessed Apr. 15, 2021). SEVP issued a total of six documents providing guidance for the 2020 fall semester.

[429] *See* SEVP Broadcast Message, "COVID-19 and Fall 2020" (2007-01) (July 6, 2020); https://www.nafsa.org/sites/default/files/media/document/bcm2007-01.pdf (accessed Apr. 28, 2021).

[430] Information provided by stakeholders (Dec. 15, 2020).

[431] *See* NAFSA Webpage, "SEVP COVID-19 Guidance Sources" (Mar. 30, 2021); https://www.nafsa.org/regulatory-information/sevp-covid-19-guidance-sources (accessed Apr. 15, 2021); *see also* SEVP Broadcast message, "Follow-up: ICE Continues March Guidance for Fall School Term" (2007-02) (Jul. 24, 2020); https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf (accessed Apr. 28, 2020).

[432] Information provided by stakeholders (Dec. 15, 2020). On December 9, 2020, *Inside Higher Education* reported that the fall semester guidance would continue to apply to the spring 2021 semester, according to a SEVP spokesperson, and confirmed by NAFSA. *See* NAFSA Webpage, "Updates on Spring 2021 SEVP COVID-19 Guidance" (Dec. 9, 2020); https://www.nafsa.org/regulatory-information/sevp-covid-19-guidance-sources (accessed Mar. 21, 2021).

Many DSOs responding to our survey indicated that challenges in contacting USCIS negatively affected their ability to meet their responsibilities. Representatives at the USCIS Contact Center and community relations officers in the field were not able to answer DSO questions, many of which were complicated. Some students returned to their home countries to continue their studies during the COVID-19 pandemic, which raised new questions for DSOs. How could these students submit their Form I-765 for OPT from abroad, and how would these students be accommodated in F-1 status given regulatory restrictions that did not provide for online learning? Neither SEVP nor USCIS was responsive to their inquiries. SEVP referred DSOs to USCIS for a response since the Form I-765 is submitted to that agency; however, DSOs reported that USCIS did not respond.[433]

DSOs have also expressed to the CIS Ombudsman their concern that the agency's centralization of inquiries through the USCIS Contact Center has not benefitted foreign students. As noted above, the foreign student must coordinate carefully to obtain case-specific information. They reported that Contact Center representatives have provided inconsistent information concerning filing fees or the status of an application sent to the wrong lockbox location.[434] Further, DSOs have recounted to the CIS Ombudsman several situations in which foreign students accidentally included the wrong filing fee amount with their Form I-765 because they were unaware that a Federal court had blocked USCIS' implementation of its new, higher fee schedule in late September 2020.[435]

Insufficient coordination between USCIS and SEVP. The pandemic also underscored a lack of coordination between SEVP and USCIS regarding international students. While each agency has a specific oversight role with respect to students in the immigration system, stakeholders made it clear that the lines of communication and data exchange between these two components, and with DSOs, is problematic.

One example of these gaps in communication that will become a post-pandemic problem all stakeholders will have to expend resources on involves recordkeeping. SEVIS automatically terminated the records of foreign students who did not attend in-person classes during the 2020 fall academic period, whether by choice or by an inability to secure a visa due to the pandemic.[436] The consequences of this will impact many actors. If these international students want to attend an in-person class at U.S. academic institutions in the future, the DSO must submit a data fix request to the SEVIS Help Desk to update the student's status to "active" in SEVIS. If in the United States, the student must apply for reinstatement with USCIS.[437] If they are not in the United States, they must ensure they have the appropriate visa. Large schools may have thousands of students who will need such fixes; DSOs must submit each individually, along with responding to individual student requests and ensuring they have updated documentation.

In addition, USCIS has been experiencing exceptionally long processing times for many of its forms, including Form I-539.[438] As this Report is being finalized, USCIS is taking 9.5 to 16 months to adjudicate a change of status to F-1.[439] The length of time to convert to student status is concerning, as the individual is unable to begin the course of study until the application is approved; this can impact the applicant's ability to maintain legal status in the United States.

Delays in OPT receipts alarmed many students. Another consequence of the pandemic for students was the substantial delay in obtaining OPT application receipts. Between November 2020 and March 2021, DSOs reported that students were waiting longer than usual to receive receipt notices.[440] The CIS Ombudsman received hundreds of requests for case assistance related to this issue.[441] Students were legitimately concerned about delays in receiving receipt notices because of the narrow window in which to apply for OPT, as well as changes in fees and form versions, which might make rejections more common, and corrections more difficult.[442]

[433] Information provided by stakeholders (Dec. 15, 2020).

[434] Information provided by stakeholders (Dec. 15, 2020 and Mar. 31, 2021).

[435] Information provided by stakeholders (Nov. 18, 2020 and Dec. 9, 2020).

[436] Information provided by stakeholders (Mar. 9, 2021). In March 2020, DOS suspended all routine visa appointments worldwide, but its U.S. Embassies and consulates are currently operating at limited capacity. *See* DOS Webpage, "Suspension of Routine Visa Services" (July 22, 2020); https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (accessed Apr. 28, 2021).

[437] *See* DHS Webpage, "Reinstatement COE (Form I-20)" (June 8, 2020); https://studyinthestates.dhs.gov/sevis-help-hub/student-records/certificates-of-eligibility/reinstatement-coe-form-i-20 (accessed Apr. 28, 2021).

[438] *See* Amy L. Peck, "What Processing Delays in Immigration Cases Mean," *The National Law Review* (Mar. 16, 2019); https://www.natlawreview.com/article/what-processing-delays-immigration-cases-mean (accessed Mar. 25, 2021).

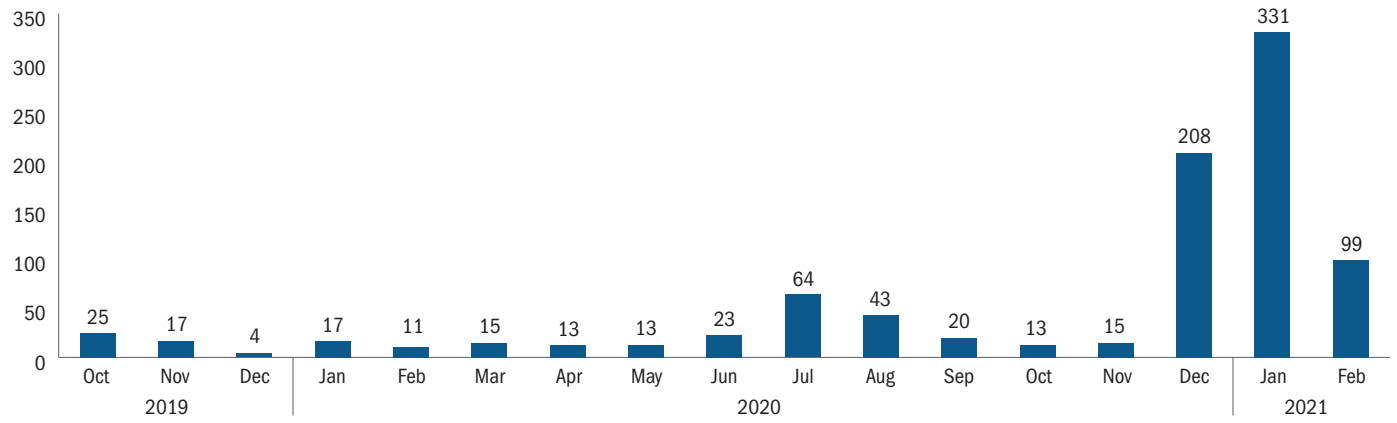
[439] *See* USCIS Webpage, "Check Case Processing Times," https://egov.uscis.gov/processing-times/ (accessed May 20, 2021). An estimated processing time is posted for specific form types based on the field office or service center location.

[440] Information provided by stakeholders (Nov. 13, 2021).

[441] Because the applicants had not received receipt notices, the Contact Center was unable to find them in any USCIS system and could not assist, which increased the numbers seeking assistance from the CIS Ombudsman.

[442] Information provided by stakeholders (Nov. 18, 2021).

Figure 6.1: CIS Ombudsman Requests for Case Assistance of OPT Form I-765 by Month for Calendar Years 2019–2021



Students wanted assurance their applications had been accepted.[443] In response to recommendations made by the CIS Ombudsman to USCIS on this issue, the agency temporarily increased hours worked at lockboxes and changed the OPT filing location to provide receipt notices more promptly.[444] However, requests received by the CIS Ombudsman for case assistance continued for several months until the "frontlog" of these applications was resolved. *See* Figure 6.1 *(CIS Ombudsman Requests for Case Assistance of OPT Form I-765 by Month for Calendar Years 2019–2021)*.

The CIS Ombudsman saw a steep increase in requests for case assistance concerning OPT, receiving 638 requests between December 2020 and February 2021, almost 20 times more than received in those same months in 2019 and 2020. *See* Figure 6.1 *(CIS Ombudsman Requests for Case Assistance of OPT Form I-765 Received by Month for Calendar Years 2019–2021)*.

While USCIS took steps to mitigate the harm to students, including allowing them to refile rejected applications and extending the validity period of work authorization, some damage had been done; employers rescinded offers and some students departed the United States instead of risking status violations that may bar them from future visits.[445]

Bringing this issue to the forefront did, however, produce a silver lining for international students. On April 12, 2021, USCIS announced that F-1 students seeking OPT can now file Form I-765 online.[446] This significant step forward assists students with the very issues that created the receipt difficulties, ensuring students have the ability to obtain reassurance of filing, and get timely access to employment authorization benefits when eligible.

CONSIDERATIONS AND RECOMMENDATIONS

Advising foreign students is full of challenges. USCIS and SEVP can take steps to improve oversight of the program, enhance the overall student experience, and make it easier for DSOs to fulfill their responsibilities.

- *Foster collaboration through an effective DHS working group involving headquarters and field participants.* One of the more intransigent dilemmas in the foreign student program is that the vast majority of the program—tracking, compliance, and monitoring of status and milestones—is overseen by ICE, while the status entry and OPT portions of the program are primarily handled by USCIS. This bifurcation allows each entity autonomy but does not foster coordination. DSOs can reach out to each entity to resolve issues under their jurisdiction, but without effective communication between USCIS and SEVP, one entity may not be aware of issues that may impact the other's operations. Although the two agencies certainly communicate on these issues, more communication at a strategic level is needed.

  A well-coordinated working group would be composed of representatives from both SEVP and USCIS components concerned both with policy and with its

[443] *See* 8 C.F.R. § 214.2(f)(11)(i)(B)(2). For post-completion OPT, the Form I-765 must be properly filed with USCIS within the time period that is 90 days prior to and 60 days after the program end date.

[444] USCIS Alert, "USCIS Lockbox updates" (Jan. 8, 2021); https://www.uscis.gov/news/alerts/uscis-lockbox-updates (accessed Mar. 26, 2021).

[445] *Id*.

[446] USCIS Webpage, "F-1 Students Seeking Optional Practical Training Can Now File Form I-765 Online" (Apr. 12, 2021); https://www.uscis.gov/news/news-releases/f-1-students-seeking-optional-practical-training-can-now-file-form-i-765-online (accessed May 25, 2021).

implementation at the processing levels, with a third party to assist in offering a unifying perspective. DOS, as an interested stakeholder, should also be given a seat at the table.

The working group should include both headquarters and field components to address the full range of issues impacting DSOs and students. The Terms of Reference would include: 1) facilitating the identification and sharing of best practices by each component and identifying actions to promote the effective and efficient administration of international student issues; 2) developing and issuing coordinated guidance, mitigating communication gaps, and creating a unified data set; and 3) proposing program improvements and resolving inefficiencies and the occasional conflicts in program operations. As part of the working group's authority, USCIS should consider how it can leverage its external communications to broaden the distribution of SEVP communications to all stakeholders.

- *Enhance training for DSOs to improve understanding of advanced issues and fraud.* SEVP's combination of in-person and virtual training may be sufficient for DSOs starting off in the profession, but more experienced DSOs need more advanced training opportunities to better equip them to perform day-to-day responsibilities. SETA provides a good overview of the foreign student program and its origins, but to properly carry out their day-to-day responsibilities, DSOs must also understand how to put the relevant regulations and policy guidance into practice. Offering training at progressive levels would keep DSOs engaged and prepare them for the more sophisticated scenarios they may encounter. Advanced courses could incorporate discussions on responding to certain complex scenarios and frequently-asked questions by foreign students.[447] Training could also include demonstrating how SEVP and USCIS interact with one another to improve DSOs' ability to advise international students and intervene on students' behalf to resolve technical issues.

  The CIS Ombudsman also recommends SETA include a course on detecting and reporting fraud, as recommended by the GAO.[448] The CIS Ombudsman was unable to determine whether SEVP has implemented such a training for all DSOs. More than 80 percent of DSOs who responded to our survey indicated they had not received fraud training. Although DHS (and not DSOs) has responsibility for enforcing immigration laws, DSOs can protect the integrity of the program by serving as DHS's eyes and ears on the ground.[449] DSOs need more support and tools to accomplish this.

- *Eliminate communication barriers between DSOs and USCIS.* DSOs' ability to get information about students' cases, status updates, or assistance to resolve inconsistencies between SEVIS and USCIS' database systems is important to an effective and efficient administration of these benefits. DSOs have reached out to the CIS Ombudsman for assistance because incorrect information in a USCIS system is preventing them from being able to comply with their SEVP reporting requirements in a timely manner. However, USCIS limits who can receive case-specific information or assistance to the applicants or petitioners who submitted the form and their legal representatives on record. Given students' schedules, DSOs may be more readily available to reach out to the USCIS Contact Center or wait for a call back from an immigration officer, thus reducing missed callbacks. To address privacy issues, USCIS should consider setting up a process where students can waive—with written permission—privacy issues, or amend the Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, to include a DSO representative.

[447] Information provided by stakeholders (Mar. 10, 2021).

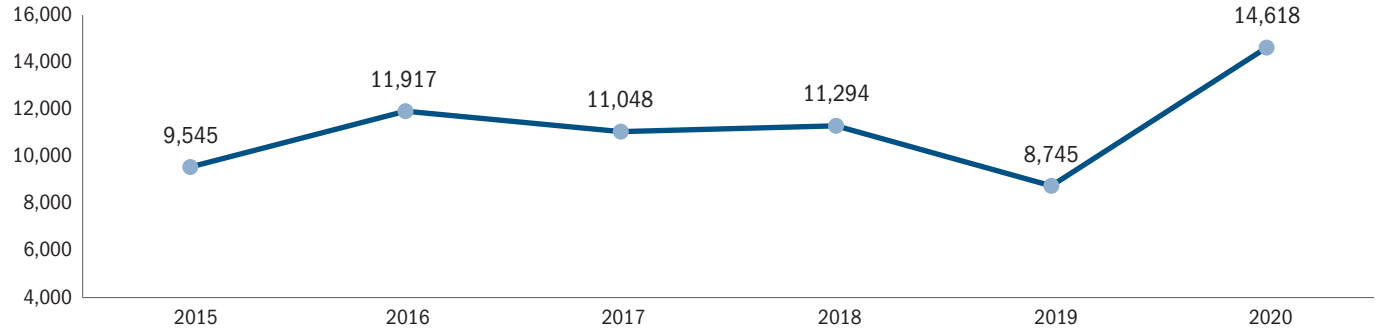
[448] GAO, "Student and Exchange Visitor Program: DHS Can Take Additional Steps to Manage Fraud Risks Related to School Certification and Program Oversight," GAO-19-297, pp. 47–49 (Mar. 2019); https://www.gao.gov/assets/700/697630.pdf (accessed Apr. 20, 2021).

[449] *Id.* at 50 (recommending mandatory compliance and fraud-risk training for DSOs).

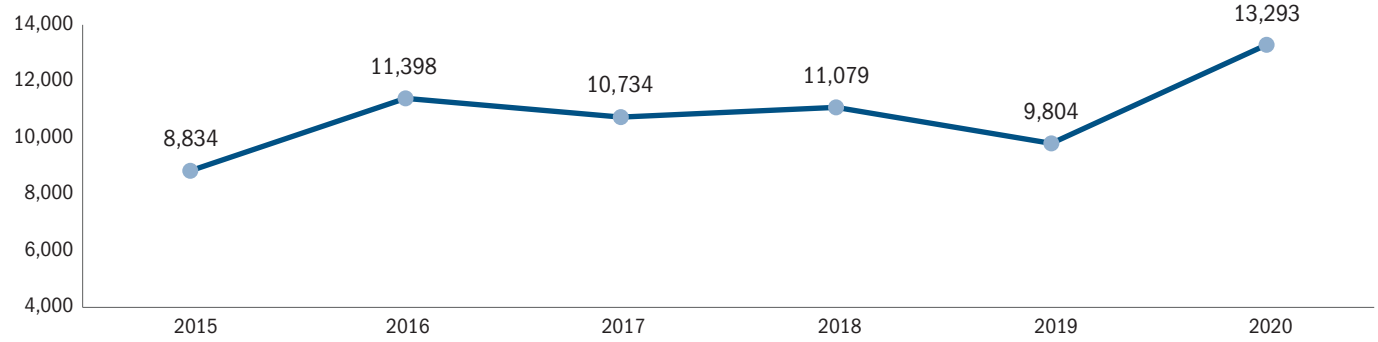
APPENDICES

CIS OMBUDSMAN BY THE NUMBERS

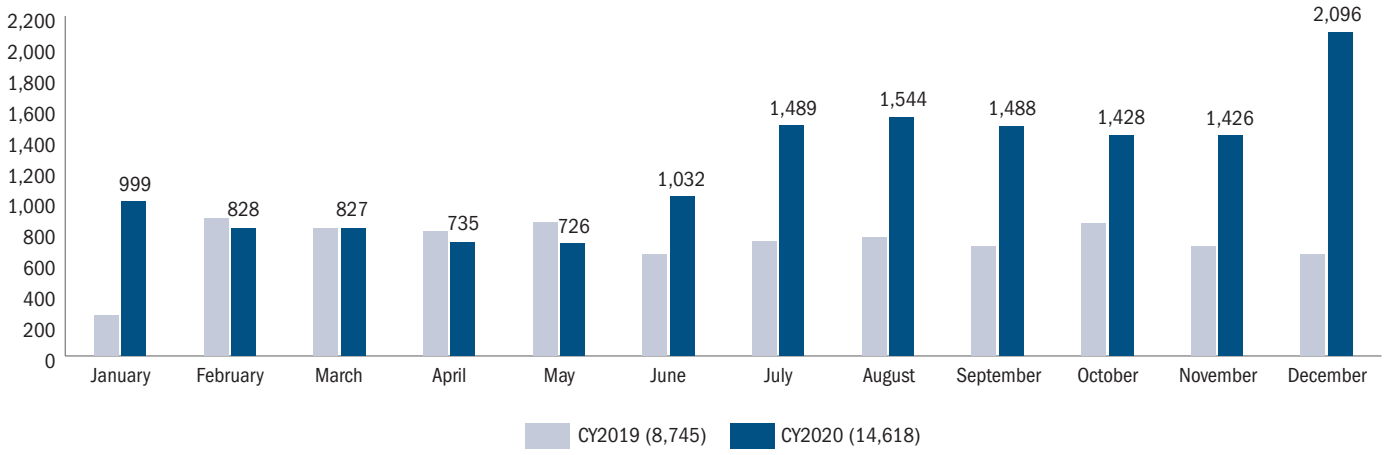
Ombudsman Requests for Case Assistance Received by Calendar Year



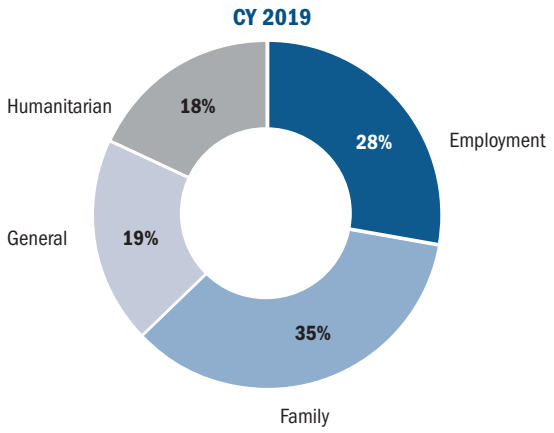
Ombudsman Requests for Case Assistance Resolved by Calendar Year

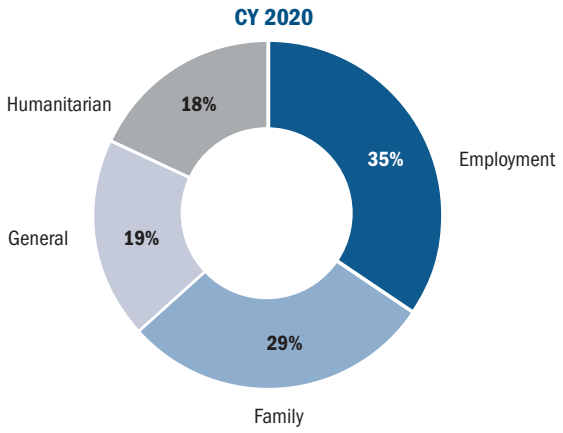


Ombudsman Requests for Case Assistance Received by Month for Calendar Years 2019 and 2020



CIS Ombudsman Requests for Case Assistance—Submission by Category





CIS Ombudsman Top Forms Requesting Case Assistance, 2020

Requests for Case Assistance Top Form Types CY 2020	# Received	% of Total Requests
I-765, Application for Employment Authorization	3,303	23%
I-485, Application to Register Permanent Residence or Adjust Status	2,697	18%
I-130, Petition for Alien Relative	1,627	11%
I-539, Application to Extend/Change Nonimmigrant Status	1,350	9%
N-400, Application for Naturalization	814	6%
I-751, Petition to Remove the Conditions of Residence	587	4%
I-129 (H-1B Classification), Petition for Nonimmigrant Worker	503	3%
I-589, Application for Asylum and Withholding of Removal	333	2%
I-131, Application for Travel Document	296	2%
I-140, Immigrant Petition for Alien Worker	282	2%

Requests for Case Assistance Top Form Types CY 2019	# Received	% of Total Requests
I-765, Application for Employment Authorization	2,280	26%
I-485, Application to Register Permanent Residence or Adjust Status	1,788	20%
I-130, Petition for Alien Relative	1,047	12%
N-400, Application for Naturalization	733	8%
I-751, Petition to Remove the Conditions of Residence	275	3%
I-589, Application for Asylum and Withholding of Removal	228	3%
I-131, Application for Travel Document	226	3%
I-140, Immigrant Petition for Alien Worker	206	2%
I-539, Application to Extend/Change Nonimmigrant Status	160	2%
I-290B, Notice of Appeal or Motion	133	2%

Top Ten States Where Applicants Reside and the Top Five Primary Form Types

California

Requests Received: 2,239

Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	551	25%
I-485, Application to Register Permanent Residence or Adjust Status	437	20%
I-539, Application to Extend/Change Nonimmigrant Status	235	10%
I-130, Petition for Alien Relative	199	9%
N-400, Application for Naturalization	120	5%

Texas

Requests Received: 1,724

Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	385	22%
I-485, Application to Register Permanent Residence or Adjust Status	354	21%
I-130, Petition for Alien Relative	245	14%
I-539, Application to Extend/Change Nonimmigrant Status	180	10%
N-400, Application for Naturalization	103	6%

New York

Requests Received: 1,467

Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	367	25%
I-765, Application for Employment Authorization	317	22%
I-130, Petition for Alien Relative	157	11%
N-400, Application for Naturalization	128	9%
I-751, Petition to Remove Conditions on Residence	79	5%

Florida

Requests Received: 1,351

Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	342	25%
I-765, Application for Employment Authorization	267	20%
I-130, Petition for Alien Relative	166	12%
N-400, Application for Naturalization	106	8%
I-751, Petition to Remove Conditions on Residence	56	4%

New Jersey

Requests Received: 665

Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	189	28%
I-539, Application to Extend/Change Nonimmigrant Status	115	17%
I-485, Application to Register Permanent Residence or Adjust Status	111	17%
I-130, Petition for Alien Relative	61	9%
I-751, Petition to Remove Conditions on Residence	29	4%

Illinois

Requests Received: 568

Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	113	20%
I-765, Application for Employment Authorization	111	20%
I-130, Petition for Alien Relative	69	12%
N-400, Application for Naturalization	57	10%
I-539, Application to Extend/Change Nonimmigrant Status	51	9%

Georgia

Requests Received: 528

Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	121	23%
I-765, Application for Employment Authorization	119	23%
I-130, Petition for Alien Relative	58	11%
I-539, Application to Extend/Change Nonimmigrant Status	49	9%
N-400, Application for Naturalization	38	7%

Virginia

Requests Received: 528

Top Primary Form Types:	Count	% of Total
I-485, Application to Register Permanent Residence or Adjust Status	110	21%
I-765, Application for Employment Authorization	103	20%
I-130, Petition for Alien Relative	72	14%
N-400, Application for Naturalization	45	9%
I-539, Application to Extend/Change Nonimmigrant Status	45	9%

Maryland

Requests Received: 476

Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	120	25%
I-485, Application to Register Permanent Residence or Adjust Status	99	21%
I-130, Petition for Alien Relative	68	14%
N-400, Application for Naturalization	29	6%
I-539, Application to Extend/Change Nonimmigrant Status	23	5%

Washington

Requests Received: 436

Top Primary Form Types:	Count	% of Total
I-765, Application for Employment Authorization	110	25%
I-539, Application to Extend/Change Nonimmigrant Status	94	22%
I-485, Application to Register Permanent Residence or Adjust Status	56	13%
I-130, Petition for Alien Relative	27	6%
I-751, Petition to Remove Conditions on Residence	20	5%

UPDATES TO THE CIS OMBUDSMAN'S 2020 RECOMMENDATIONS

2020 Recommendation	USCIS Response	CIS Ombudsman Update
Immigration Benefits in the Age of COVID-19		
Surge in demand for information and assistance due to the closure of USCIS facilities.	USCIS coordinated a national public engagement initiative to support the agency's reopening efforts with emphasis on local outreach to ensure local stakeholders knew what to expect as USCIS offices reopened and to allow stakeholders to provide targeted feedback.	The CIS Ombudsman will continue to seek ways to improve managing public expectations and make recommendations to USCIS accordingly.
Policy and program statements on critical immigration status questions.	USCIS addressed operational challenges due to the pandemic at uscis.gov/coronavirus including policy updates, operational changes, and implementation dates.	The CIS Ombudsman recognizes USCIS efforts to inform the public on operational challenges and initiatives to meet those challenges, and encourages the agency to efficiently keep stakeholders informed through proactive communications strategies.
National stakeholder meetings.	Agency staff successfully transitioned to virtual outreach using webinar and virtual meeting platforms. USCIS coordinated several successful engagement opportunities and expects to keep adding more opportunities.	The CIS Ombudsman suggests USCIS coordinate additional public engagement events and encourages the agency to collaborate with government partners to expand outreach and delivery of information.
The Geometry of the Naturalization Backlog		
Improve concurrent processing of Form I-751/N-400	USCIS is reviewing current processes and systems capabilities to increase efficiencies when both Forms I-751 and N-400 remain pending to ensure that both applications are scheduled concurrently for interview and decision.	The CIS Ombudsman continues to support its recommendation that USCIS standardize processing of these concurrently pending benefit requests to limit processing delays and to provide supplementary guidance to officers regarding overlapping eligibility determinations.
Improve processing of Form N-648, *Medical Certification for Disability Exceptions*	USCIS appreciates the CIS Ombudsman's encouragement to move forward with proposing a process to designate or revoke the status of medical professionals authorized to complete Form N-648 and is in the process of doing so. At the same time, USCIS will consider the CIS Ombudsman recommendation to have the National Benefits Center pre-adjudicate concurrently filed Forms N-648 prior to transferring the file to the field for an interview.	The CIS Ombudsman believes centralizing Form N-648 determinations will allow the agency to better track and monitor suspicious filing patterns by doctors. USCIS should further consider pre-adjudicating at its National Benefits Center prior to transferring the file to the field office for interview.
Expand remote adjudication capabilities	The USCIS Field Operations Directorate has a strategic interest in exploring virtual interview options. The timeline to explore these options has been accelerated due to the spread of COVID-19 and a need to practice social distancing. Field offices have begun testing and implementing video interview options for Form N-400 cases.	The CIS Ombudsman encourages USCIS to explore expanding virtual capabilities beyond the need for COVID-19 social distancing by consulting with other agencies that already have the virtual infrastructure for remote adjudications. The CIS Ombudsman also encourages USCIS to consider a pilot for remote naturalization ceremonies.
Denaturalization: Maintaining the Integrity of the Naturalization Program		
Inform the public of the Benefits Integrity Office's (BIO) standards and review process.	USCIS will consider ways to better inform the public about BIO's work, as appropriate. BIO's processes involve agency investigative practices, which are law-enforcement sensitive and therefore cannot be shared with the public.	The CIS Ombudsman acknowledges there is sensitive information that cannot be shared with the public, and encourages USCIS to examine ways to effectively communicate BIO's purpose, work, and processes in a manner that is appropriate for public consumption.
Inform the public of the results BIO's denaturalization cases are having on fraud prevention.	USCIS respectfully disagrees with this recommendation at this time. The primary objective of this effort is for the U.S. Government to revoke U.S. citizenship from individuals where there is clear, convincing, and unequivocal evidence that the person committed fraud in order to obtain U.S. citizenship through naturalization.	Although the primary objective of this effort is to revoke citizenship on the face of clear, convincing, and unequivocal evidence of fraud, the CIS Ombudsman still believes there is value in studying the impact on fraud prevention to reaffirm the integrity of the process and to ensure financial resources are being used prudently.

2020 Recommendation	USCIS Response	CIS Ombudsman Update
The Challenge of Decreasing USCIS' Affirmative Asylum Backlog		
Provide estimates of affirmative asylum application processing times.	USCIS agrees with the CIS Ombudsman's recommendation that processing timeframes for all benefit programs—including those administered by asylum offices—should be made public.	The CIS Ombudsman appreciates USCIS' acknowledgement that there is a need for reporting processing times for all benefit programs and will further explore ideas to make additional recommendations on how to improve processing time accuracy reported to the public.
Make public USCIS strategies to reduce the affirmative asylum backlog.	The most recent Backlog Reduction Plan, which was completed in July 2019 and includes a comprehensive description of these efforts, including those specific to the asylum backlog, is publicly available on the USCIS website.	As of October 1, 2020, the USCIS Backlog Reduction Plan was being updated to account for the impact of the pandemic response and recent budget shortfalls. The CIS Ombudsman encourages USCIS to promptly post the updated plan on its website.
Increase national outreach efforts on asylum.	The Asylum Division will continue its efforts to provide outreach, opportunities for engagement, and information sharing with its stakeholders, as appropriate.	The CIS Ombudsman trusts that increasing national engagements may result in more consistent delivery of services between asylum offices.
Conduct triage on backlogged asylum cases to determine whether they should remain in the backlog.	The Asylum Division continues to engage in a comprehensive, proactive strategy to identify and triage cases in the backlog that fall into certain categories making it more likely they could be closed or actionable. These efforts are concentrated at the Asylum Vetting Center in Atlanta, GA.	Although USCIS works to strengthen and enhance the capacity of the Asylum Division by prioritizing cases in the backlog, the lingering backlog continues to be a substantial concern. The CIS Ombudsman will continue to monitor and make future recommendations.
When available, provide public information on impacts of COVID-19 limitations on asylum interviews to set expectations and assist stakeholders.	The Asylum Division has provided detailed and current information to the public on the impacts of COVID-19 limitations on interviews and scheduling. This information can be found under the "Asylum Appointments" section of the USCIS Response to COVID-19 website.	The CIS Ombudsman finds the information on the USCIS website helpful in providing the public with general guidelines on how the Asylum Division is responding to COVID-19. The agency may also wish to consider a series of teleconferences/webinars for public input and interaction to respond to the most pressing issues in the asylum process.
Improve USCIS data to support the integrity of the affirmative asylum program and decisions being made about program and policy concerns.	USCIS shares the CIS Ombudsman's interest in expanding the quantitative analysis to monitor the production impact of policy changes. Currently, system-development efforts are focused on a number of critical modifications that have taken priority over the development of more detailed, systematic, tracking of programmatic changes.	The CIS Ombudsman recognizes the value in streamlining asylum processes and recommends USCIS integrate better metrics and tracking measures to prioritize resources to achieve objectives.
Prepare for how to manage resources if faced with another suspension of in-person interviews, such as the one experienced during the COVID-19 national emergency.	The Asylum Division has responded swiftly and innovatively to adapt and leverage existing systems and resources, in addition to creating new ways to accomplish mission critical work, in order to safely and efficiently conduct business.	The CIS Ombudsman encourages USCIS to examine which of the actions taken during this national emergency response would be beneficial to expand or make permanent, and take inventory of limitations.
Foreign Students and Risks of Optional Practical Training		
OPT/STEM OPT Program Vulnerabilities	The report did not offer recommendations for USCIS; however, it did offer mitigation strategies that could be accomplished through operational or administrative actions. USCIS agrees that there are areas of concern in the program as outlined in the report and concurs that steps should be taken to better ensure that participants are employed pursuant to the pertinent regulations.	The CIS Ombudsman's analysis supports that USCIS could have more authority over confirming the eligibility and legitimacy of the employer, the training opportunity, and the student, and be able to verify the existing requirements and the training program, the identity of the employer, and the good standing and completion of the course of study.

2020 Recommendation	USCIS Response	CIS Ombudsman Update
InfoMod (Year Two): Accomplishments, Lessons Learned, and Current Challenges.		
Address surge in demand for information and assistance due to the closure of USCIS facilities	The Contact Center has remained fully operational through the closure and USCIS continues to support emergency appointments and partnered with the operational units to help triage inquiries.	Stakeholders continue to report delays on responses and inability to communicate with a live representative. USCIS has acknowledged contract cuts have impacted the responsiveness. The CIS Ombudsman will continue to review current systems and make appropriate additional recommendations.
Assign a unique identifier that would allow callers to bypass the intractive voice system to reach a Tier 2 representative under certain conditions (e.g., when a USCIS "call back" cycle did not result in a connection).	We are exploring ways to prioritize these callers, so that they do not have to start the process from the beginning.	As USCIS explores ways to prioritize calls and improve current systems, the CIS Ombudsman will also continue to explore new ideas for ways USCIS can streamline calls and strategies on how to reduce the volume of calls by mitigating stakeholders' need to call for assistance.
Adapt its Contact Center's Tier 1 staffing to meet the anticipated demand.	We are reviewing our call-intake process to better triage calls between live-service and self-help options. With the Tier 1 Contact Center staffing at around 700, we believe we are very close to meeting demand.	Stakeholder reports indicate that challenges meeting anticipated demand continue to be difficult to achieve. The CIS Ombudsman continues to recommend USCIS revisit and adjust its current vendor contract requirements to consider expanding live representative assistance hours to accommodate those seeking assistance.
Through modification of its vendor contract requirements, impose more rigorous competency training and testing of individuals hired to fill Tier 1 representative positions.	We monitor calls and have a quality assurance and training program in which we have a strong degree of confidence. Our Tier 1 and federal Contact Center staff work closely on training, and we have created avenues for Tier 1 to seek assistance with certain inquiry types.	Stakeholders continue to have concerns about receiving inadequate information or lack of understanding of the circumstances from representatives. The CIS Ombudsman continues to recommend revised training and that USCIS identify ways to improve services.
Beyond its current offering of communications in English and Spanish, record Contact Center instructions and messaging in multiple foreign languages.	We will review the possibility of adding other languages to our instructional material and messaging.	The CIS Ombudsman emphasizes that this recommendation aligns with USCIS' stated Language Access Plan's commitment to incorporate language access considerations and anticipates that the expanding language capabilities will reduce calling time.
Consider providing limited live foreign language capacity beyond Spanish to individuals who call the Contact Center for information or services.	We are reviewing technology to add scheduled call backs where we may be able to utilize outside language experts, but that is a technology upgrade that will require a financial investment that is currently unavailable.	The CIS Ombudsman is cognizant of the limited resources USCIS has but still recommends a pilot program to display results to justify funding an expansion of language services.
USCIS could commission an independent research company to create and manage a new Contact Center user-satisfaction survey.	We are in the process of finalizing our omni-channel survey, which will provide immediate, real-time responses to callers.	The CIS Ombudsman recommends USCIS publish the results of this survey and encourage feedback and recommendations for improvement.

HOMELAND SECURITY ACT SECTION 452

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;

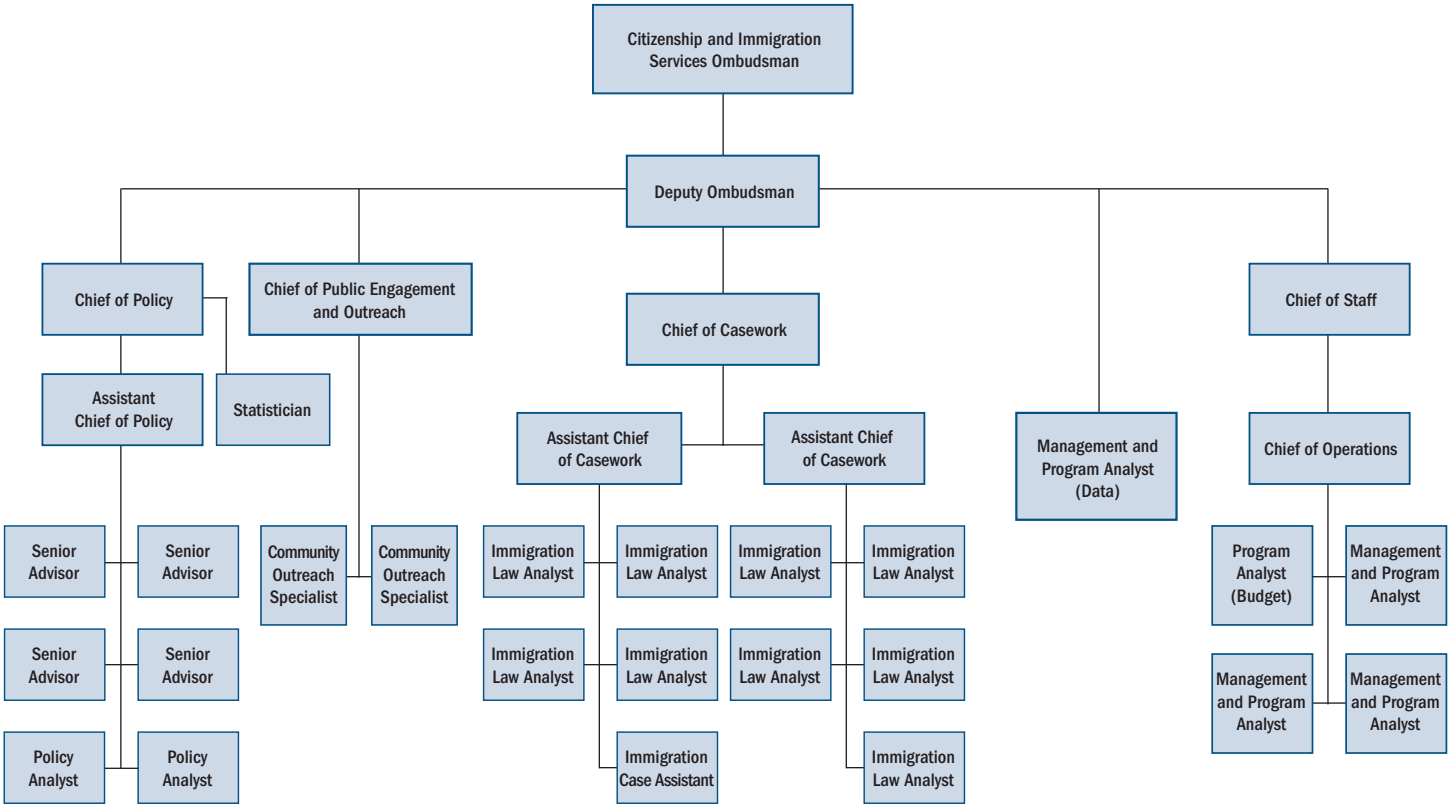
(B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(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.

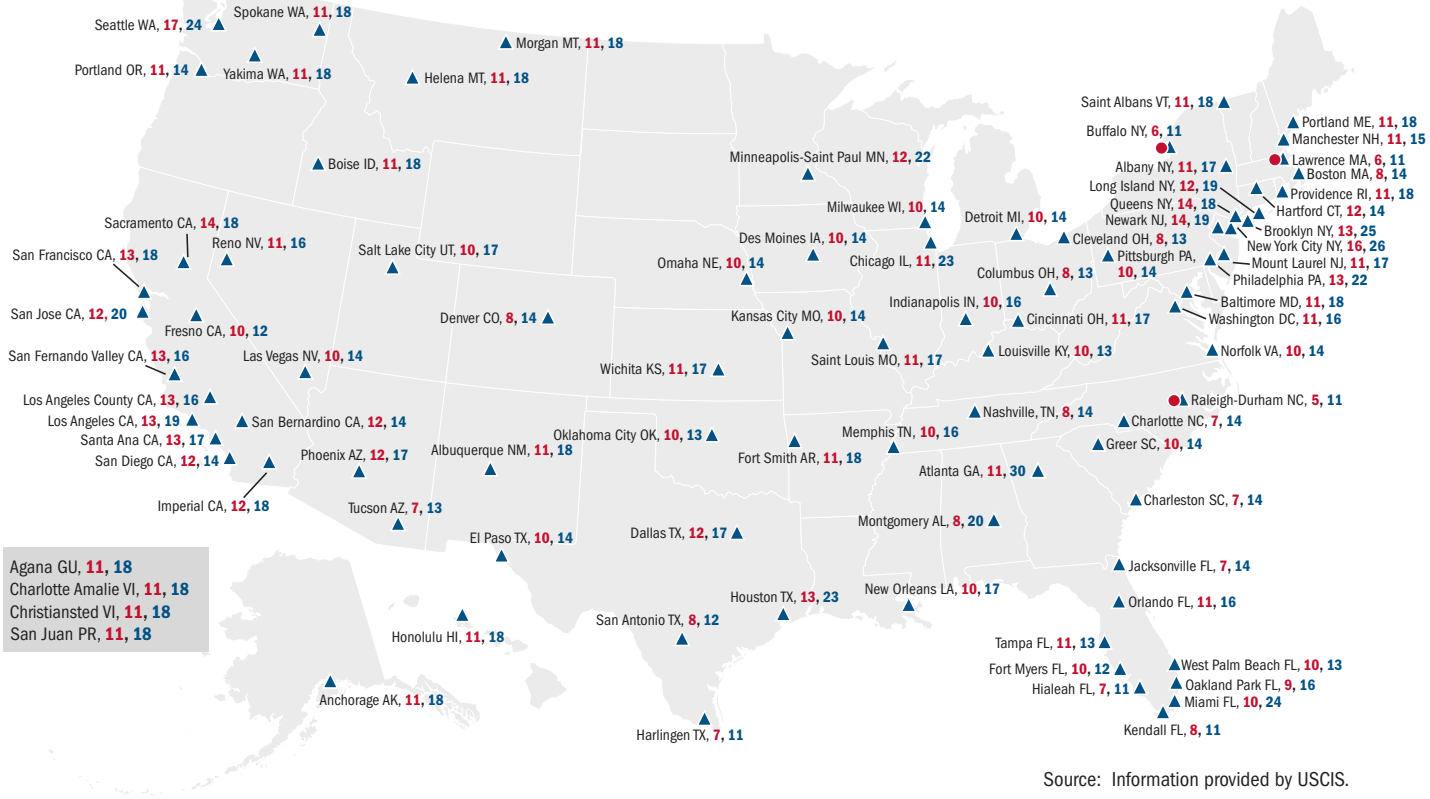
OFFICE OF THE CIS OMBUDSMAN ORGANIZATIONAL CHART



USCIS NATURALIZATION AND ADJUSTMENT OF STATUS PROCESSING TIMES

Processing Times for USCIS Field Offices for Form N-400, *Application for Naturalization*

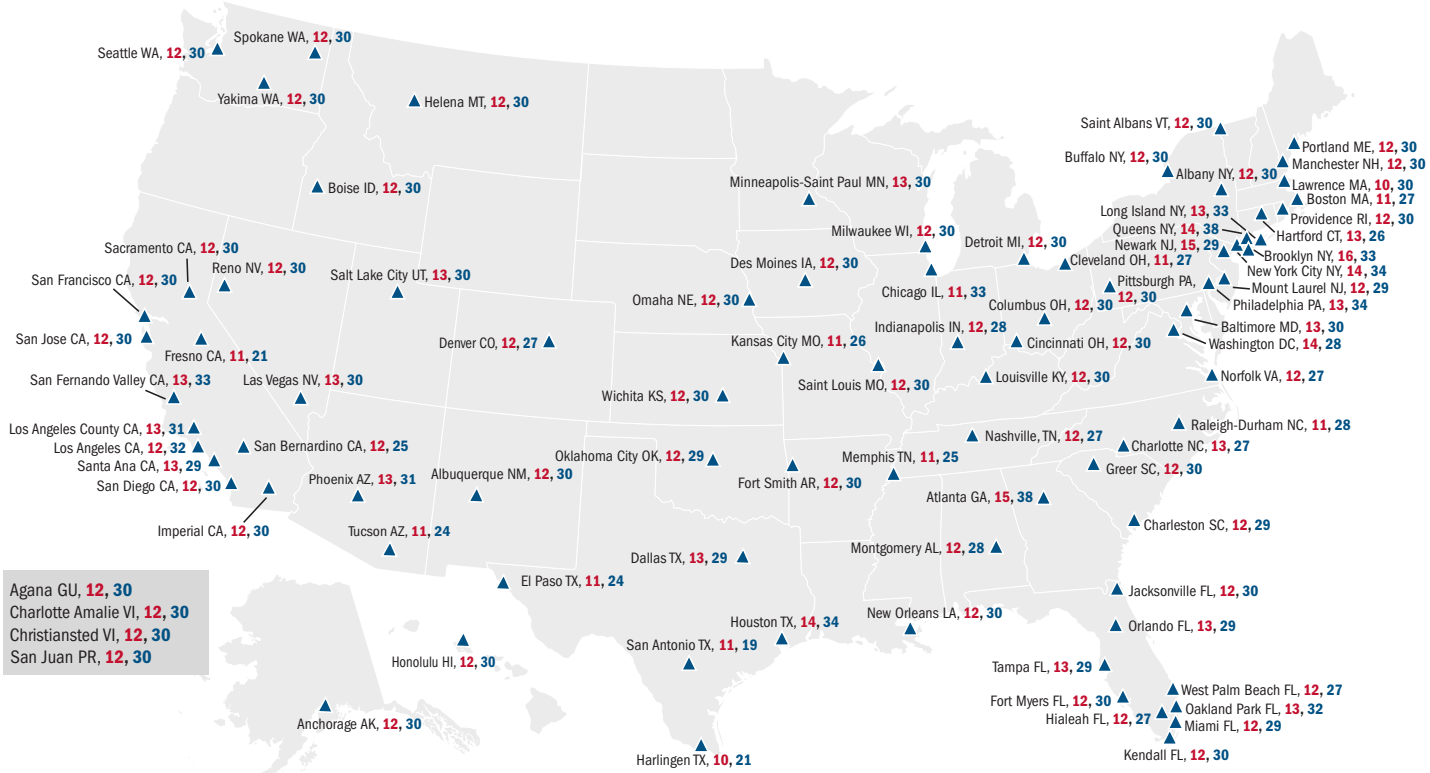
December 2020 (FY 2021 1st Quarter) ■ = 0–5 Months ● = 5–7 Months ▲ = 7+ Months **0.0** = Median **0.0** = 93rd Percentile



Source: Information provided by USCIS.

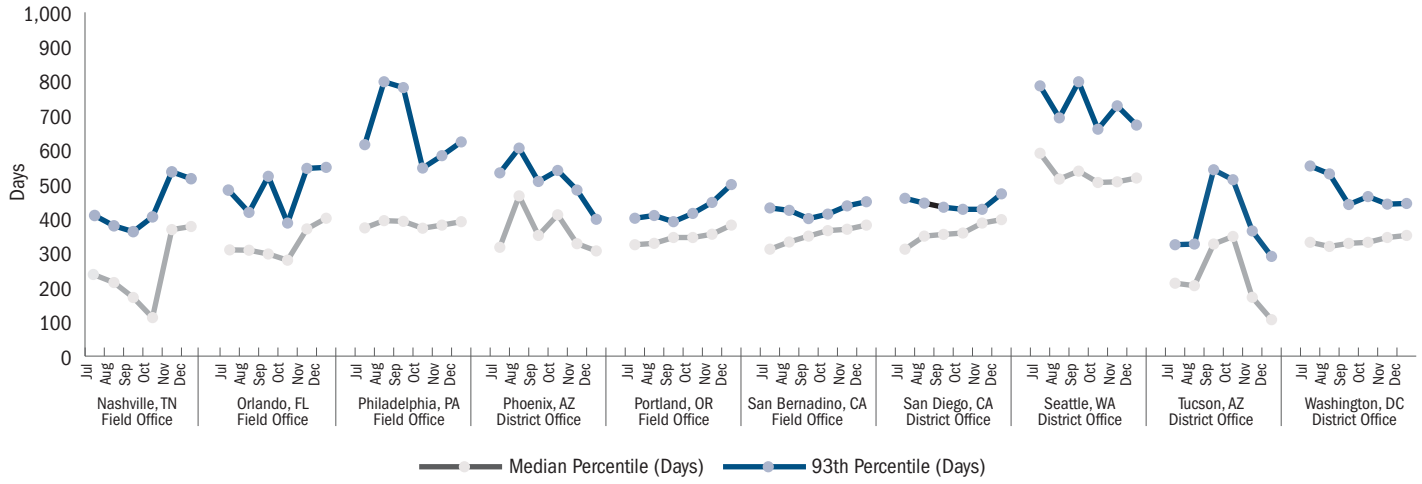
Processing Times for USCIS Field Offices for Form I-485, *Application to Register Permanent Residence or Adjust Status*

December 2020 (FY 2021 1st Quarter) ■ = 0–5 Months ● = 5–7 Months ▲ = 7+ Months **0.0** = Median **0.0** = 93rd Percentile

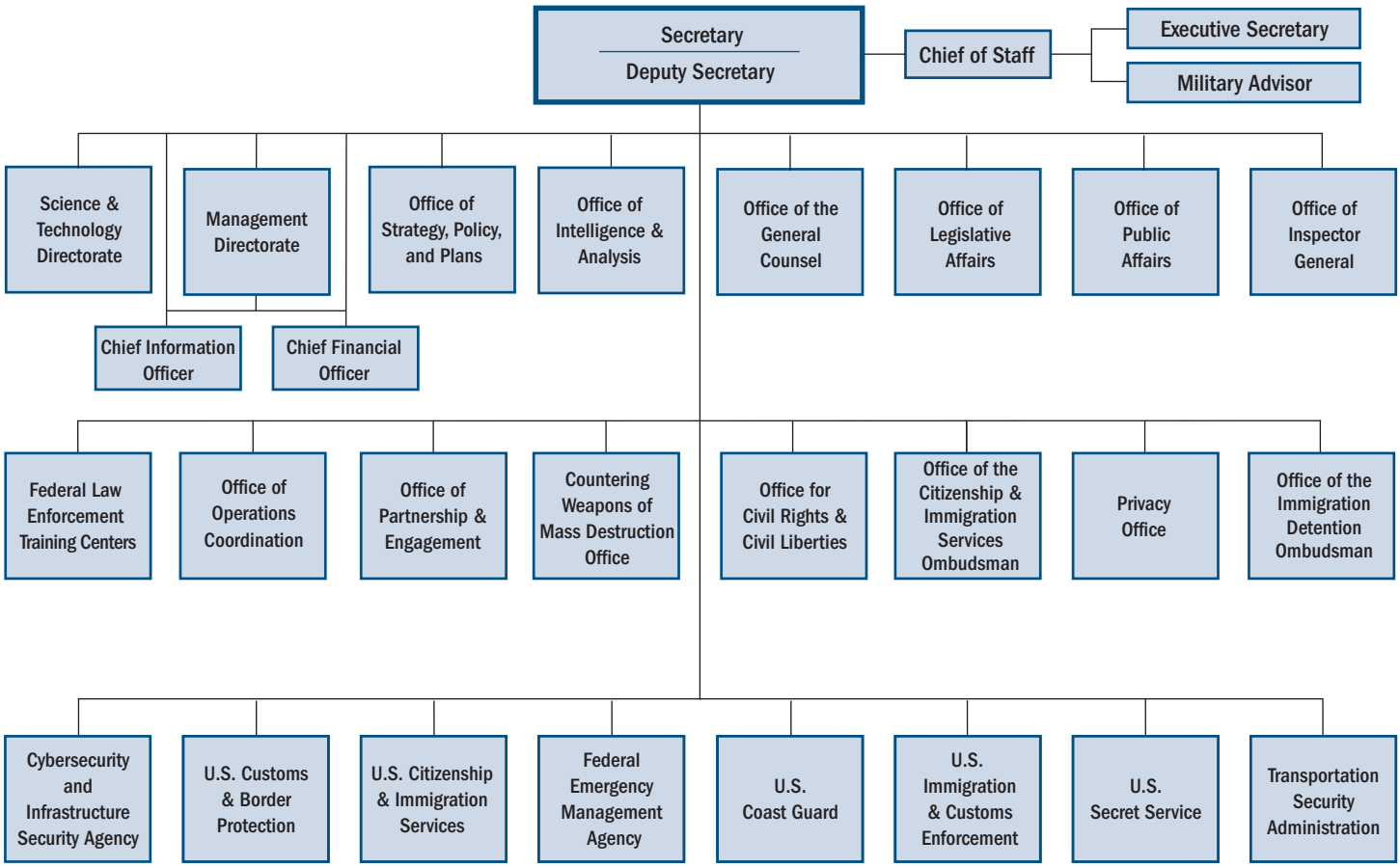


Source: Information provided by USCIS.

Median and 93rd Percentile Processing Times in Days for Form N-400 of Randomly Selected Field Offices



U.S. DEPARTMENT OF HOMELAND SECURITY ORGANIZATIONAL CHART



HOW TO REQUEST CASE ASSISTANCE FROM THE CIS OMBUDSMAN

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**.

Option 1

Submit an online request for case assistance available on the Ombudsman's website at **www.dhs.gov/cisombudsman**.

RECOMMENDED PROCESS

Option 2

Download a printable case assistance form (Form DHS-7001) from the Ombudsman's website at **www.dhs.gov/cisombudsman**.

SUBMIT A SIGNED CASE ASSISTANCE FORM AND SUPPORTING DOCUMENTATION BY:

Email:
cisombudsman@hq.dhs.gov

Fax:
(202) 357-0042

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

Individuals submitting a request from outside the United States cannot use the online request form and must submit a hard copy case assistance request form.

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.

AFTER RECEIVING A REQUEST FOR CASE ASSISTANCE, THE OMBUDSMAN:

STEP 1
Provides a case submission number to confirm receipt.

STEP 2
Reviews the request for completeness, including signatures and a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, if submitted by a legal representative.

STEP 3
Assesses the current status of the application or petition, reviews relevant laws and policies, and determines how the Ombudsman can help.

STEP 4
Contacts USCIS field offices, service centers, asylum offices, or other USCIS offices to help resolve difficulties the individual or employer is encountering.

STEP 5
Communicates the actions taken to help.

ACRONYMS

ADIT	Alien Documentation, Identification and Telecommunications
ASC	Application Support Center
BIO	Benefits Integrity Office
CBP	U.S. Customs and Border Protection
CDC	Centers for Disease Control and Prevention
CLAIMS	Computer Linked Application Information Management System
COVID-19	Coronavirus Disease 2019
CPR	Conditional Permanent Resident
CSC	California Service Center
CY	Calendar Year
DACA	Deferred Action for Childhood Arrivals
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
DOS	U.S. Department of State
DSO	Designated School Official
EAD	Employment Authorization Document
ELIS	Electronic Immigration System
EOIR	Executive Office for Immigration Review
EPS	Egregious Public Safety
EVP	Exchange Visitor Program
FCI	Formalized Check-In
FDNS	Fraud Detection and National Security Directorate
FOD	Field Operations Directorate
FY	Fiscal Year
GAO	U.S. Government Accountability Office
ICE	U.S. Immigration and Customs Enforcement
IIE	Institute of International Education
IMFA	Immigration Marriage Fraud Amendments of 1986
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IRIS	Immigration Records and Identity Services Directorate
ISO	Immigration Services Officer
LPR	Lawful Permanent Resident
MFAS	Marriage Fraud Amendment System
NBC	National Benefits Center
NRC	National Records Center
NSC	Nebraska Service Center
NTA	Notice to Appear
OCC	(USCIS) Office of the Chief Counsel
OIG	Office of Inspector General
OPLA	(ICE) Office of the Principal Legal Advisor
OPT	Optional Practical Training
PDSO	Principal Designated School Official
PSC	Potomac Service Center
PTSD	Post-Traumatic Stress Disorder
RFE	Request for Evidence
RFI	Request for Information
SAVE	Systematic Alien Verification for Entitlements
SCOPS	Service Center Operations Directorate
SETA	SEVP External Training Application
SEVIS	Student and Exchange Visitor Information System
SEVP	Student and Exchange Visitor Program
SSI	Supplemental Security Income
STEM	Science, Technology, Engineering, and Mathematics
TPO	Transformation Program Office
TPS	Temporary Protected Status
TSC	Texas Service Center
USCIS	U.S. Citizenship and Immigration Services
VAWA	Violence Against Women Act
VSC	Vermont Service Center

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

Mail Stop 0180
Washington, DC 20528
Telephone: (202) 357-8100
Toll-free: 1-855-882-8100

http://www.dhs.gov/cisombudsman

Send your comments to: **cisombudsman@hq.dhs.gov**