

This discrepancy is best reflected in Appendix 1, which provides servicewide data on denials for selected forms. In 1993, the denial rates for green card applications were four percent, but by 2003 this figure grew to over 20 percent nationally with some offices such as New York denying as many as 47 percent of green card applications. The most recent data provide some hope that recent reductions in processing times may help reduce the volume of ineligible applicants who may file incomplete or fraudulent applications solely for procuring interim benefits.

USCIS is reviewing its forms to update them and revise instructions. The agency is seeking to ensure that information provided on its website and through its website links are consistent. The importance of making sure these changes are implemented within a reasonable time cannot be overemphasized. Without the changes, there is more confusion than necessary in an already unwieldy process.

B. Backlogs and Pending Cases

Thanks to the dedication and leadership of staff in support centers, field offices, and service centers, there has been a substantial reduction in the backlog. The Ombudsman appreciates the detailed backlog data provided by the 2006 Annual Report Response (at pp. 4-6). Unfortunately, USCIS has not received the unqualified praise it rightfully deserves for progress made under the old definitions. Instead, the agency's redefinition of the backlog obscures the issue and raises questions about its backlog reduction efforts.

1. Backlog Definition and Data

USCIS reports on September 2006 backlog data in its 2006 Annual Report Response, *i.e.*, the end of the 2006 fiscal year and the target for elimination of the backlog. In its Response (at p. 5), USCIS stated: “[t]he overall backlog, using exactly the same methodology as was used to calculate the original backlog of 3.85 million in 2004, is now just over 1 million (1,020,042).”¹⁷ By March 2007, and using that same calculation, USCIS had a backlog of 1,275,795.¹⁸

In last year's annual report (at pp. 6-11), the Ombudsman analyzed USCIS' redefinition of its backlog. That analysis is not repeated here, as the backlog redefinition is unchanged. The current definition continues to consider “backlogged” only the cases pending after subtracting those cases not yet ripe for adjudication, “where even if the application or petition were approved today, a benefit could not be conferred for months or years to come. [Unripe cases are] excluded from the number of cases in the backlog but remain in the pending.”¹⁹

The funds provided to jumpstart USCIS' backlog elimination project have expired and the total number of pending cases has increased. This result does not bode well for USCIS as it

¹⁷ The sum of USCIS' “active suspense” cases by category for September 2006 is 1,139,059. *See* USCIS' 2006 Annual Report Response (at pp. 4-5); *see also* Figure 1.

¹⁸ *See* USCIS' Processing Report, March 2007.

¹⁹ Ombudsman's 2006 Annual Report (at p. 8), *citing* USCIS Backlog Elimination Plan (BEP), 3rd Quarter FY 04 Update (Nov. 5, 2005) at 4.

must rely on only its own resources to continue the backlog reduction effort. This could be particularly problematic if there is comprehensive immigration reform.

The DHS Inspector General's assessment cited in last year's annual report remains true today: "[. . .] reclassifications, as well as the strategy of relying upon temporary employees, may benefit USCIS in the short-term, [but] will not resolve the long-standing processing and IT problems that contributed to the backlog in the first place. Until these problems are addressed, USCIS will not be able to apply its resources to meet mission and customer needs effectively."²⁰

The data on pending I-130 petitions for foreign national relatives, the largest component of backlogged benefits applications, illustrate these problems. According to USCIS records, the agency had 1,244,166 pending I-130 petitions through March 2007 of which 818,206 USCIS classifies as "active suspense" cases or those cases excluded from the pending count for calculation of the backlog.²¹ The number of active suspense cases has increased about ten percent or over 100,000 additional cases compared to the pending numbers reported in the Ombudsman's 2006 Annual Report (at pp. 18-19).²²

In its May 1, 2007 Production Update (FY 07, 1st Qtr.²³), USCIS explains:

The re-appearance of a backlog is a symptom of the fact that the fees charged by USCIS currently do not recover its full costs. Furthermore, while the temporary subsidy of appropriated dollars ended September 30, 2006, USCIS has not yet implemented the proposed filing fee rule to allow it to fully recover costs and ensure that capacity is sufficient to keep up with demand.²⁴

Referring to its redefinition of the "backlog," an updated report stated that "USCIS has implemented 'Active Case Management' (ACM)" and:

Pursuant to ACM, cases that do not have an available visa or an FBI name check, and cases that are in suspense for other reasons deemed beyond USCIS' control have been taken out of the

²⁰ Ombudsman's 2006 Annual Report (at pp. 8-9), *citing* DHS Inspector General Report "USCIS Faces Challenges in Modernizing Information Technology," OIG-05-41 (Sept. 2005) at 28; http://www.dhs.gov/interweb/assetlibrary/OIG_05-41_Sep05.pdf (last visited June 3, 2007).

²¹ *See* USCIS Production Status Report, Mar. 2007.

²² "For each application type, USCIS removes from the calculated backlog the total number of pending applications that it is unable to complete due to statutory caps or other bars, including applications where a benefit is not immediately available to the applicant or beneficiary (such as "non-ripe" Form I-130, Relative Alien Petitions where a required visa number is not available, and I-485 cases where the visa number is no longer available due to regression . . .") USCIS Backlog Elimination Plan, 3rd Quarter FY 06 Update (Dec. 11, 2006) at 1.

²³ USCIS has replaced quarterly "Backlog Elimination Plan" reports with "Production Updates," so-called because the Backlog Elimination Plan was officially retired at the end of FY 06 ("After eliminating the I-485 backlog, and nearly eliminating the I-130 backlog at the end of [FY 06], a backlog for these form types has reappeared . . .") USCIS Production Update, 1st Quarter FY 07 Update (May 1, 2007) at 2).

²⁴ *Id.*, at 3.

production queue. This allows USCIS to focus its attention on those cases which are ripe for adjudication.²⁵

As stated in the 2006 Annual Report, the Ombudsman remains concerned that such formulations obscure USCIS' continued difficulty to timely process applications and petitions. As further explained below, it is particularly troublesome that USCIS continues to rely upon future applicants to pay for these backlogged cases excluded by redefinition.

In its Response to the Ombudsman's 2006 Annual Report recommendation (AR 2006 – 01), USCIS agreed in principle to provide a breakdown of all incomplete cases by the number of months pending and application type, and stated (at p. 7):

USCIS is committed to working to develop systems that would give this level of detail to help manage both overall workload and individual cases Under its Transformation Program, USCIS has already begun a multi-year redesign of its current business environment [which] will give USCIS new operational data and reports, including the type of data described in the recommendation. Given the constraints of existing legacy case management systems, USCIS would today need to perform a cumbersome, labor intensive, recurring manual audit of all pending files in order to compile the suggested data. Such audits would be cost prohibitive.

USCIS states that the constraints of existing management systems prevent it from providing information on discrete processing times of each application. This is in conflict with previous outputs from those systems, which can provide the necessary data. The Ombudsman has observed many USCIS facilities using such data drawn from the three most commonly used systems -- CLAIMS 3, CLAIMS 4, and the Marriage Fraud Amendment System.

USCIS has opted not to use its limited financial resources to extract data from current systems and prefers to spend it on prospective systems that are years in the planning. For example, USCIS has not made corrections to the CLAIMS 3 system to capture data on applicants' priority date information, country of nationality, and the preference category under which the application is filed that USCIS must review before the application is accepted for green card processing. The Ombudsman first raised this issue 42 months ago with senior USCIS leadership and proposed several solutions over that time. Instead of fixing CLAIMS 3 now, USCIS is waiting for the "case management system" it has promised to implement for many years. Failing to correct the system annually results in hundreds, if not thousands, of wasted hours by all levels of USCIS leadership in trying to account for an often asked question by Congress, the Ombudsman, stakeholders, and others: "Exactly how many employment-based green card applications does the agency have pending?" USCIS still cannot answer that question today with certainty.

²⁵ *Id.*

Figure 1: USCIS Cases Excluded from the USCIS “Backlog”

	March 2007 (most recent final data available)	as of end of September 2006 (end of FY 06 and "backlog" elimination goal)
Total -- Pending Customer Action	137,405	150,122
<i>Customer did not file necessary evidence or material</i>	122,608	135,155
<i>Customer failed initial naturalization test and second opportunity was scheduled</i>	14,797	14,967
Total -- Unripe Due to Limits on Annual Immigration	869,544	823,439
<i>Processed applications for green cards that cannot be approved due to annual statutory limits</i>	29,303	39,121
<i>I-130 relative petitions</i>	799,043	710,119
<i>Asylum-based green card applicants</i>	41,198	74,200
Total -- Pending Other Agency Action	309,791	264,262
<i>No appointment for oath of allegiance is scheduled within month of USCIS decision for naturalization cases where the federal courts have exclusive jurisdiction over the oath</i>	2,417	1,552
<i>USCIS is waiting for the investigations requested of other agencies</i>	11,879	6,879
Total -- FBI Name Check Cases	295,495	255,831
<i>USCIS is waiting for FBI name check results for naturalization applicants who have not been interviewed</i>	149,003	98,764 ¹
<i>USCIS is waiting for FBI name check result for otherwise processed cases or interviewed cases</i>	146,492 ²	157,067
TOTAL -- Pending Cases Not Included in "Backlog"	1,316,740	1,237,823

¹ USCIS did not provide this number in its Response to the Ombudsman's 2006 Annual Report, which shows September 2006 data. Consequently, the data point above is from USCIS' November 2006 Production Status Report.

² The separate USCIS FBI Pending Name Check Aging Report of May 4, 2007 indicates the pending number of FBI name checks for both green card and naturalization cases has increased to 329,160.

Sources: USCIS Production Status Report (Mar. 2007); USCIS Production Status Report (Nov. 2006); USCIS Response to the Ombudsman's 2006 Annual Report (May 18, 2007), at 4-5.


2. Adjudications of Backlogged Cases


From numerous visits to USCIS facilities, the Ombudsman has observed that adjudicators prefer to work on the cases that are easiest to complete. Adjudicators pick the “low hanging fruit” first because supervisors base performance evaluations on the number of cases completed. Consequently, adjudicators put aside the most difficult and time-intensive cases. These cases remain pending, perhaps for years, while backlog reduction appears generally to be succeeding.

The Ombudsman fully supports USCIS efforts to quickly and efficiently complete the cases. However, the current drive to complete large numbers of cases presents problems. For

example, USCIS provides field offices resources based on what is needed to complete a typical case. It is the Ombudsman's understanding that if field offices have a workload of 1,000 cases and USCIS determines each case usually takes one hour to complete, USCIS will provide financial support for 1,000 hours. Cases that take longer than an hour to complete are not provided additional resources in the office's budget. Offices with more than the average numbers of difficult cases or offices that try to work the difficult cases thoroughly will not be adequately funded because the number of completions will be low. Meanwhile, offices that push to complete the easy cases will see their budgets grow. One field office visited by the Ombudsman has a large number of long-pending cases which require substantial adjudicator hours. However, officers at that office indicate that they cannot address the older, difficult cases without negatively affecting their productivity report to USCIS headquarters.

RECOMMENDATION AR 2007 -- 02

The Ombudsman has observed that newer cases are processed more quickly while cases more than six months old are increasingly backlogged. The Ombudsman supports the USCIS drive to maximize case completions, but attention needs to be directed at clearing older cases. 

The Ombudsman recommends that USCIS provide a clearer picture of the current backlog by providing information on the number of pending cases by form type with receipts that are: (1) less than 90 days; (2) less than 180 days; (3) less than one year; (4) less than two years; (5) less than three years; (6) less than four years; and (7) greater than four years. 

3. Backlogged Form I-130 Petitions for Foreign National Relatives

In its Response to the Ombudsman's 2006 Annual Report (at pp. 8-9) and the recommendation (AR 2006 – 03) regarding the timely processing of I-130s, USCIS stated that it is not practical to process them as soon as they are received:

Where the person will not be able to immigrate within a year due to the overall limits on legal immigration, USCIS' goal . . . is to process the case twelve months ahead of visa availability to ensure that DOS has sufficient time to complete their part of the processing. This process ensures that an eligible person's eventual immigration to the United States will not be delayed by USCIS processing . . .

USCIS believes having different service levels for different kinds of applications, which reflect relative time sensitivity and risk, while using those with less time sensitivity as a buffer, results in a system that is more cost effective for both USCIS and its customers.

Further, while processing a relative petition immediately, even if the person will thereafter have to wait to immigrate, may appear

ideal [. . .], the evaluation is best performed closer to the time the person would actually receive the benefit. In addition, USCIS is currently evaluating the impact of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-249, which adds additional public safety screening requirements before a petition is approved to protect the relative being sponsored. It may be appropriate that those checks should similarly be done closer to the time at which the person would actually be able to immigrate.

Despite making several valid points, USCIS is merely delaying the inevitable and, in effect, increasing the cost to the agency to process these cases. The cost to complete the current backlog of over 800,000 I-130 petitions is more than \$225 million today, based on USCIS' cost estimates explained in its proposed fee rule.²⁶ Because applicants paid for these petitions when they were submitted in previous years, their payments do not cover today's costs or future USCIS costs to process them. Each year that processing is delayed the cost to USCIS will increase if for no other reason than to account for inflation. Thus, the fact that USCIS can process each of these petitions to conclusion now and chooses by policy not to do so is fiscally unwise.

In addition, the impact on beneficiaries is significant. By statute, certain approved petitions terminated by the petitioner's death are reinstated for humanitarian reasons for the petitioner's beneficiaries.²⁷ By USCIS not approving I-130 petitions in a timely manner, beneficiaries cannot benefit from this important humanitarian exception.

²⁶ See 72 Fed. Reg. 4,888, 4,909 (Feb. 1, 2007).

²⁷ See Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150; see also 8 C.F.R. § 205.1(a)(3)(i)(C) (petition revoked automatically by petitioner's death may be reinstated for humanitarian reasons by the Attorney General on sponsored alien's request). USCIS has interpreted this provision to apply to beneficiaries only of approved petitions and generally has refused to extend this to pending petitions.