



**U.S. Citizenship
and Immigration
Services**

December 19, 2005

Mr. Prakash I. Khatri
CIS Ombudsman
Mail Stop: 1225
Washington, DC 20528-1225
Via E-mail to: cisombudsman@dhs.gov

Re: USCIS Response to Recommendation Concerning Transparency of USCIS Operations

The purpose of this memorandum is to acknowledge receipt of and respond to your office's recommendation that USCIS make its operations more transparent to the public. USCIS appreciates and welcomes the recommendation of the CIS Ombudsman and readily agrees that the public should be given more information regarding some of its operations. In fact, USCIS is already in the process of implementing several changes, which should directly address most of your office's specific recommendations. However, for the reasons discussed herein, USCIS maintains that any internal agency deliberations regarding which decisions are chosen to become adopted/precedent decisions should not be made public.

I. RECOMMENDATION OF THE OFFICE OF THE CIS OMBUDSMAN

The CIS Ombudsman has recommended that the USCIS Administrative Appeals Office ("AAO") make available to the public through publication of a regulation or otherwise: (1) the appellate standard of review; (2) the process under which cases are deemed precedent decisions; (3) the criteria under which cases are selected for oral argument; and (4) the AAO statistics on its decision making.

II. RESPONSE TO THE RECOMMENDATION OF THE OFFICE OF THE CIS OMBUDSMAN

- A. Recommendation that the appellate standard of review be made available to the public through publication of a regulation or otherwise.**

The technical standard of review under which the AAO reviews cases is not codified in statute or regulation or published on the public AAO website. The AAO reviews all cases on a *de novo* basis, pursuant to Second and Ninth Circuit Court of Appeals decisions (See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *Spencer Enterprises Inc. v. US*, 229 F.Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff. 'd.* 345 F.3d 683 (9th Cir. 2003)).

Although this standard of review is apparent in case law and in AAO decisions, USCIS is currently seeking to publish this standard of review in the Federal Register as part of USCIS Interim Rule 1615-AB24: "Administrative Appeals Office: Procedural Reforms to Improve Efficiency." Once published, title 8 of the Code of Federal Regulations will be amended to read in part: "[t]he AAO reviews *de novo* any question of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction." 8 C.F.R. § 103.3(h)(2)(i) of USCIS Interim Rule 1615-AB24. In addition, the supplementary information defines the term in plain language, noting that "the term *de novo* means that the AAO reviews a case as if the original decision never took place. In a *de novo* review, the AAO is not required to give deference to or take notice of the findings made in the original decision." USCIS Interim Rule 1615-AB24 at page 14.

USCIS believes this change to the regulations will be sufficient to inform the general public of the standard of review applied to matters appealed to the AAO.

B. Recommendation that the process under which cases are deemed precedent decisions be made available to the public through publication of a regulation or otherwise.

USCIS immediately reports final adopted decisions on the appropriate government website. See USCIS website, <http://uscis.gov/graphics/lawsregs/decisions.htm>. When adopted decisions become precedent decisions, they are published by the U.S. Government Printing Office in bound volumes titled "Administrative Decisions Under Immigration and Nationality Laws of the United States," and also are available through the USCIS public reading rooms and private on-line legal databases (Lexis/Nexis and WestLaw), as well as other sources. See 8 C.F.R. § 103.9(a). Any internal agency deliberations regarding which decisions are chosen to become adopted/precedent decisions, however, should not be made public.

The basis for adopted decisions is the same as it is for precedent decisions, i.e., that the matter involves a novel issue of law or fact and is necessary to provide clear and uniform guidance concerning the proper implementation and administration of the statute and regulations where applicable regulations are unclear or silent. The purpose of an adopted decision, therefore, is to provide immediate standardization in decision making by USCIS service centers and field offices until such time as the decision can complete the necessary reviews to be designated as a precedent decision.

While USCIS uses various approaches in choosing which decisions to adopt and/or designate as precedent, these decisions ultimately result from internal agency discussions and deliberations on whether an issue of law or fact is novel, whether clear and uniform guidance is needed, and whether the decision being reviewed will provide this clear and uniform guidance. The specifics of this internal deliberative process, however, have been protected by Congress through the

Freedom of Information Act's (FOIA) "deliberative process exemption" and through a generally accepted discovery privilege as a balance against and as a limit to the public's right to information. See 5 U.S.C. § 552(b)(5). The need for such a privilege is best summarized in *Cofield v. City of LaGrange, Georgia* as follows:

The deliberative process privilege, which is well established in the law, is intended to "prevent injury to the quality of agency decisions." *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S. Ct. 1504, 1516, 44 L.Ed.2d 29 (1975). The principal policy bases underlying this privilege are to encourage open, frank discussions within the agency, to protect against premature disclosure of proposed policies and to avoid public confusion that might arise from disclosing internal memoranda or other information that did not form the basis for a final agency decision. See, e.g., *Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C.Cir. 1982). To avoid chilling the decision-making process, this privilege protects documents because the deliberative process itself would be harmed by disclosure. *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C.Cir. 1987).

Cofield v. City of LaGrange, Georgia, 913 F. Supp. 608, 615 (D.D.C. 1996). Therefore, as supported by the exemption in FOIA and by 30 years of case law on this matter, publicizing the internal deliberative process by which USCIS determines which decisions should be deemed precedents would run the risk of: (1) lessening the quality of agency adopted decisions; (2) discouraging open and honest discussions within the agency; (3) disclosing prematurely proposed policies before they are finalized; and (4) possibly confusing the public with internal memoranda that ultimately do not form the basis for the final agency decision. *Id.*

By protecting the internal deliberative process, USCIS seeks to prevent complicating an already complex process, stifling internal discussion of policy options, and opening the agency to additional litigation. As previously noted, full notice to the public is more appropriate in the formal "notice and comment" rulemaking process through the Federal Register. For those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, USCIS believes its website and FOIA reading room should more than satisfy the requirements of 5 U.S.C. § 552(a)(2)(B). Moreover, USCIS is always open to informal suggestions from the public as to the areas of law that need clarification through a precedent or adopted decision.

C. Recommendation that the criteria under which cases are selected for oral argument be made available to the public through publication of a regulation or otherwise.

Affected parties desirous of the opportunity for oral argument must explain in writing specifically why oral argument is necessary. 8 C.F.R. § 103.3(b)(1). USCIS has sole authority to grant or deny a request for oral argument. 8 C.F.R. § 103.3(b)(2). In general, the AAO will grant an oral argument where the branch chief and director or deputy director determine that the case involves an unusually complex or novel question of law or fact that cannot be adequately expressed in writing.

USCIS is currently seeking to make this requirement more apparent through the publication of USCIS Interim Rule 1615-AB24: "Administrative Appeals Office: Procedural Reforms to Improve Efficiency." Once published, title 8 of the Code of Federal Regulations will be amended to read in part: "[r]equests for oral argument should be limited to matters involving an unusually complex or novel question of law or fact." 8 C.F.R. § 103.3(h)(4)(i) of USCIS Interim Rule 1615-AB24. USCIS believes this change to the regulations will be sufficient to inform the public of the requirements for an oral argument request to be approved.

D. Recommendation that the statistics on decision-making by the Administrative Appeals Office be made available to the public through publication of a regulation or otherwise.

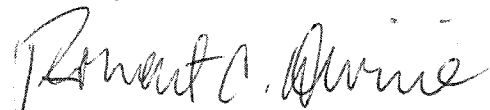
USCIS maintains detailed data on, among other matters, the number of receipts received by month and year, the number of decisions issued by month and year, and the number of sustains and denials by the AAO. Statistics on AAO decision-making are currently published monthly on the DHS intranet site. Once the necessary technical issues are resolved, the data will be added to the USCIS Internet site, so that the information is available to the public.

III. CONCLUSION

USCIS appreciates and welcomes the recommendations of the CIS Ombudsman to permit and allow for greater transparency in USCIS operations. USCIS readily agrees that the public should be given more information regarding: (1) the appellate standard of review; (2) the criteria under which cases are selected for oral argument; and (3) AAO decision-making statistics.

As detailed above, USCIS is already in the process of addressing these specific recommendations through its website as well as through the publication of USCIS Interim Rule 1615-AB24 in the Federal Register. Although USCIS believes any internal agency deliberations regarding which decisions are chosen to become adopted/precedent decisions should not be made public, *supra*, once a final decision is reached, USCIS concurs that the public should have immediate access to the final decision. Again, USCIS is always open to informal suggestions from the public as to the areas of law that need clarification through a precedent or adopted decision.

Sincerely,



Robert C. Divine
Acting Deputy Director, USCIS

cc: Michael Jackson, Deputy Secretary