*Office of the*
*Citizenship and Immigration Services Ombudsman*

**U.S. Department of Homeland Security**
Washington, DC 20528

Homeland Security

# RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

| | |
|---|---|
| To: | Eduardo Aguirre, USCIS Director |
| | Cc: Admiral Jim Loy |
| From:: | Prakash Khatri, CIS Ombudsman |
| Date: | September 27, 2004 |
| Re: | Recommend the expansion of the Premium Processing Service (PPS) to include employment-based change-of-status (I-539) applications. |

## I. BACKGROUND

Premium Processing Service (PPS) allows U.S. businesses to pay a $1,000 fee for the 15-calendar day processing of their petitions and applications. USCIS guarantees that within 15 days USCIS will issue either an approval notice, a notice of intent to deny, a request for evidence or a notice of investigation for fraud or misrepresentation. If USCIS fails to process the petition within 15 days, it will refund the $1,000 to the company and continue to process the petition as part of the PPS In addition to receiving expedited processing, companies who participate in the program may use a dedicated phone number and e-mail address to check on the status of or to ask questions about their petitions and applications.

At this time, USCIS has designated only the Form I-129, (Petition for Nonimmigrant Worker), for Premium Processing. Classifications within the Form I-129 eligible for Premium Processing are:

- E-1 Treaty Trader;
- E-2 Treaty Investor;
- H-1B Temporary Workers in Specialty Occupations
- H-2A Agricultural Worker
- H-2B Temporary Worker
- H-3 Trainee
- L-1 Intra-company Transferees
- O-1 and O-2 Aliens of Extraordinary Ability or Achievement
- P-1, P-2 and P-3 Athletes and Entertainers
- Q-1 International Cultural Exchange Aliens.
- R-1 Temporary Workers in Religious Occupations
- TN NAFTA Professionals

## II. JUSTIFICATION

The Form I-539 is used to request extension of stay for applicants in a variety of nonimmigrant categories, such as: 1) persons in H-4, L-2, E-1, E-2 or TD status and other dependent categories who are filing for change of status to F-1 or J-1 (to pursue or continue their education or training); and 2) individuals in H-1B or L-1 status who now seek dependent H-4 or L-2 status (because they no longer desire to engage in sponsored employment directly).

These employment-based derivative applicants who seek either to cast off, or assume, the status of nonimmigrant dependents are not -- but should be -- eligible for PPS. These change of status applications have been taking up to a year or more to "routine process," despite the fact that INA § 212(a)(9)(B)(iv) only allows a maximum of 120 days beyond the visa expiration for the processing of an nonfrivolous visa extension or change of status before the individual begins to accrue "unlawful presence" time within the United States.

These cases need PPS not merely for expedited processing, but to enable the applicants to fully comply with the immigration laws. Under current law (INA § 212(a)(9)(B)) and in the absence of clear regulations interpreting "unlawful presence," petitioners and nonimmigrant beneficiaries face a real dilemma – comply with the law by departing when their current visa expires (which often requires lengthy separation from their families in the U.S.), or submit a petition or application to change their status, which if approved would lead to a benefit grant; but if denied, would trigger grounds of inadmissibility for three to ten years.

According to the USCIS Backlog Reduction Plan, timely routine processing of employment-based non-immigrant applications is not anticipated to occur for another two or more years. In the interim, immigration customers need a means to meet industrial needs and insure compliance with the law. In the short term, PPS would provide that means.

## III. BENEFITS

### *A. Customer Service:*

Until the backlog is eliminated and Form I-539 applications are timely processed, immigration customers would be guaranteed processing that prevents their accrual of "unlawful presence." This guarantee currently exists for all other non-immigrant employment-based applications and the addition of Form I-539 change-of-status and extension applications is appropriate and reasonable.

### *B. USCIS Efficiency:*

As all other non-immigrant employment-based applications currently are included within PPS, the addition of Form I-539 change-of-status and extension applications would allow USCIS

to have uniformity in its overall handling of non-immigrant employment-based applications, while generating the requisite revenue to make the addition of Form I-539 to the PPS inventory self-sustaining.

*C. National Security:*

National security would be enhanced by virtue of a reduction in unnecessary cases filed before the immigration court, thus reducing the already-clogged court dockets and allowing for more timely adjudication of removal cases at the immigration court.