E. Untimely Processing and Systemic Problems with Employment-Based Green Card Applications

Although raised in the Ombudsman's 2005 Annual Report (at pp. 9-11) and 2006 Annual Report (at pp. 13-16), significant issues remain with the timely processing of employment- and family-based petitions and applications for green cards.

1. Background

The INA establishes formulas and numerical limits for regulating immigration to the United States. U.S. employers may file a petition to hire foreign workers using Form I-140. U.S. citizens and green card holders can file petitions for certain family members using Form I-130. The filing of the petition (or of the labor certification application for employment-based petitioners) establishes a "priority date." Priority dates determine a beneficiary's "place in line" relative to other beneficiaries in the same category and nationality for visa allocation.

By statute, there are formulas and limits on the annual number of employment-based visas and certain family-based visas. The Department of State (DOS) allocates these visas by estimating how many immigrant visas will be available and publishes the results in a monthly "Visa Bulletin."[35] If the number of visas available in a category exceeds demand for them, the Visa Bulletin will indicate that the category is "current." A petition in a current category filed today can be processed for a visa today. If the demand for visas exceeds what is available in a category, the Visa Bulletin will indicate a cutoff date and the issuance of visas is restricted to applicants whose priority dates are earlier than the cutoff date. Petitions with priority dates after the published date must wait until DOS advances the posted date to obtain a visa. However, cutoff dates also can "retrogress," which occurs when the actual number of applications received exceeds the number DOS estimated would be used for the visas available.

Retrogression can have serious consequences because applicants and their families who expected to obtain green cards suddenly cannot. For those applicants awaiting visas overseas, their preparations to immigrate are derailed. Plans that depend on a green card status, such as to study, advance in a job, or obtain essential credentials, are delayed. Moreover, a retrogression can have significant business consequences for employers that require predictability in staffing.

The movement of priority dates is critical to ensure: (1) orderly processing of visa applications; and (2) that visas issued do not exceed statutory limits. Priority dates also are connected with USCIS backlogs.

When priority dates are current, foreign nationals in the United States may apply for green cards and become eligible for an EAD if the green card is not processed within 90 days. Significantly, EADs may be issued and renewed for applicants who may ultimately be deemed ineligible for the green card. Importantly, there is a dynamic connection between priority dates, workloads, and backlogs, and the downstream consequences can be significant.

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[35] *See* Department of State's Visa Bulletins at http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html (last visited June 3, 2007).

For example, when employment-based visas are not used during the year they are authorized, they are lost and are not available for future use without special legislation. In FY 06, over 10,000 employment-based visas were lost, even though USCIS had an estimated 100,000 to 150,000 pending applications for employment-based green cards.[36] Based on USCIS use of visa numbers as of May 2007, at present consumption rates approximately 40,000 visas will be lost in FY 07 without a dramatic increase in USCIS requests of visa numbers.[37] As illustrated below, since 1994 there have been over 218,000 un-recaptured employment-based visas lost due to underutilization of the employment-based visas.

[36] USCIS provided estimates during monthly interdepartmental meetings. Exact figures are unavailable because USCIS has no accounting of these pending numbers by category and different agency divisions provide different estimates.

[37] DOS provided these estimates to the Ombudsman during monthly interdepartmental meetings.

Figure 9: Department of State Unused Family and Employment Preference Numbers, FY 1992-2006 (Preliminary), Printed with Permission from DOS

FY	Unused Family Preference Numbers	Unused Employment Preference Numbers	Following FY's Fam. Pref. Limit	Empl. Pref. Numbers Avail. For Recapture [1]
1992	5,388	21,171	---- [2]	---- [2]
1993	3,101	0	226,000	0
1994	6,328	29,430	253,721	1,709
1995	0	58,694	311,819	0
1996	0	21,173	226,000	21,173
1997	0	40,710	226,000	40,710
1998	20,885	53,571	226,000	53,571
1999	2,262	98,941	294,601	---- [3]
2000	52,062	31,098	226,000	---- [3]
2001	2,616	5,511	226,000	5,511 [4]
2002	31,542	0	226,000	0 [4]
2003	64,424	88,482	226,000	88,482 [4]
2004	8,435	47,307	226,000	47,307 [4]
2005	3,885	0	226,000	0
2006 [6]	----	10,296	226,000	10,296
Totals	**200,928**	**506,384**	**---**	**218,759** [5]

Note: The Unused Employment Preference Numbers total is that used in calculating the following fiscal year's Family Preference numerical limit.

[1] Employment Preference Numbers Available for Recapture total represents the unused Employment Preference numbers in a fiscal year minus the amount of the following fiscal year's Family Preference limit above 226,000.

[2]Unused Employment Preference numbers did not fall across to the following fiscal year's Family Preference limit (and vice versa) until FY 94.

[3]Employment Preference numbers unused in FY 99 and FY 00 have already been recaptured; therefore, none remain unused.

[4]Of the 141,300 Employment Preference numbers unused in FY 01 through FY 04, 50,000 have already been recaptured and used for Schedule A applicants; therefore, only the balance (91,300) remain unused.

[5]The Grand Total of Employment Preference Numbers Available for Recapture is shown as 218,759 (not 268,759), since it reflects subtraction of 50,000 numbers already recaptured from FY 01 through FY 04.

[6]Totals for FY 06 are preliminary.

This loss of visas is due to: (1) gaps in USCIS' accounting of cases; (2) USCIS not processing enough pending applications in a timely manner; and (3) the imprecise art of predicting workflows and demand surges at three federal agencies: Department of Labor (DOL) (approves labor certifications); USCIS (processes immigration petitions after completion of labor certifications and processes green card applications for applicants in the United States); and DOS (establishes priority dates and processes immigrant visas from applicants outside the United States).

There will be severe consequences from rapid fluctuations in priority dates. If the priority date became current today, due to delayed USCIS processing and thus underutilization of visa numbers, some have predicted that within a few months as many as 500,000 to 750,000 individuals now residing in the United States under a temporary worker visa could apply for a green card. Additionally, DOL's recent backlog elimination efforts, scheduled to be completed by September 30, 2007, are predicted to add 70,000 or more approved labor certifications yielding as many as 170,000 additional green card applications. As USCIS begins to complete these applications and request visa numbers from DOS, the 140,000 statutorily authorized visa numbers will be used. DOS then will be required to retrogress priority dates. Consequently, most applicants in this scenario will find themselves trapped whereas they anticipated timely receipt of a green card, their wait exceeds seven or more years. In addition, all future employment-based green card applicants effectively would be barred from applying for many years.[38]

2. Employment-Based Green Card Data Tracking and Ombudsman as Interdepartmental Liaison

The key to addressing this management issue at USCIS is to understand the dynamic interplay of priority dates and shifting workloads of three departments, and to know with greater precision and accuracy the size and details of USCIS' workloads. As recommended in the 2006 Annual Report (at p. 16, AR 2006 -- 02), the Ombudsman continues to strongly recommend that USCIS track data relating to employment-based green card applications at the time of submission to USCIS. These data should include immigrant visa classifications, priority dates, and countries of chargeability. USCIS should provide these data to DOS, either through a designated operations office at headquarters or through direct contact with USCIS service centers, so DOS can set cutoff dates with a clear understanding of pending applications. Since August 2005, the Ombudsman has hosted regular monthly meetings with USCIS, DOL, and DOS to discuss developments that affect priority dates and visa workloads.

The tri-agency meetings seek to expand inter-agency communication regarding expected new demands and surges, workflows, and priority dates. During the meetings, there is an examination of the case management systems and data collection processes used to assess workflows through each entity, particularly USCIS. USCIS is impacted the most from changes in priority dates, as it processes up to 85 percent of the employment-based visas as green card applications for individuals already living in the United States.[39]

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[38] These data are based on analysis of information from various sources and interdepartmental meetings with USCIS, DOS, and DOL.

[39] *See* "2006 Yearbook of Immigration Statistics," DHS Office of Immigration Statistics, at Table 6.

Although USCIS stated in its 2006 Annual Report Response (at p. 8) that it provides detailed data to DOS, the tri-agency group identified gaps in USCIS' data. Through these discussions, the Ombudsman learned that accounting and processing methods differ at the Nebraska and Texas Service Centers (where USCIS processes employment-based petitions). Encouragingly, at these meetings and at a recent Ombudsman-initiated meeting at the NSC in May, USCIS staff has demonstrated a commitment to addressing these problems. USCIS is continuing to evaluate and improve its accounting and case management system to capture the necessary data and provide accurate numbers to DOS to ensure priority dates can be set to avoid visa loss. Finally, these discussions reveal a growing appreciation of the necessity of coordinating the work that critically affects the immigration process at the three agencies.

3. Possible Solutions to Problems with Employment-Based Green Card Processing

Despite encouraging signs, there is room to do better. In its 2006 Annual Report Response (at p. 8) to recommendation AR 2006 -- 02, USCIS stated:

> With respect to the first part of this recommendation, USCIS has previously indicated it agrees, and has already implemented corresponding changes. Detailed data on the visa impact of the USCIS holdings are now provided to DOS each month.

USCIS also added (at p. 8):

> With respect to the recommendation that USCIS assign visa numbers to cases as they are received, the process the Ombudsman describes was the process in place a number of years ago. DOS, which manages overall visa number allocations, modified that process to the procedure in effect today. It is their policy to allocate visa numbers to USCIS adjustment cases only as the point of approval is reached.

However, through the tri-agency meetings, DOS explained that the modification to the program occurred in the early 1980s because INS could not adhere to the requirements to return unused visa numbers immediately. The Ombudsman understands that DOS prefers that cases are reported qualified for a visa earlier than at approval. In the last several months, there have been several suggestions on how to accomplish that task, but operational concerns remain. The Ombudsman hopes that USCIS and DOS can reestablish the older program with improved processing and technology to ensure timely and accurate reporting of cases ready-to-issue and to prevent the future loss of visa numbers.

In the 2006 Annual Report (at p. 16, AR 2006 -- 02), the Ombudsman also recommended that USCIS assign visa numbers to employment-based green card applications as applicants file them. The Ombudsman continues to recommend that USCIS work with DOS to reinstate that process which existed in the early 1980s, wherein DOS issued visa numbers for both employment and family-based applications for applicants as they applied rather than as they

were approved. This process would ensure that USCIS does not accept more applications than the number of visas available.

Another issue with priority dates and workloads is connected to the new fee rule. The Ombudsman anticipates that when the new fee rule goes into effect in July, delays in adjudication will significantly impact the agency if it does not track visa information, including visa classifications, priority dates, and country of chargeability. Without tallying cases receipted by visa category, USCIS inevitably will accept ineligible applications and more applications than it can process in the given timeframe. The agency will not collect fees for interim benefits issued for new green card applicants, as the new fee rule requires only one payment for both. In addition, there may be large numbers of retrogressed cases and, eventually, multiple issuances of interim benefits.

As described in the Ombudsman's 2006 Annual Report (at pp. 13-16), the Ombudsman continues to be concerned about USCIS' data integrity and failure to meet its obligation to maintain an accurate count of pending employment- and family-based preference applications. Although the focus is on employment-based visa applications, similar concerns exist for family-based preference cases. The continued collaboration of these agencies supports the Ombudsman's vision of cooperation to provide benefits in a timely and efficient manner.

F. Name Checks and Other Security Checks

FBI name checks, one of several security screening tools used by USCIS, continue to significantly delay adjudication of immigration benefits for many customers, hinder backlog reductions efforts, and may not achieve their intended national security objectives. FBI name checks may be the single biggest obstacle to the timely and efficient delivery of immigration benefits. The problem of long-pending FBI name check cases worsened during the reporting period.

1. Background

As of May 2007, USCIS reported a staggering 329,160 FBI name check cases pending, with approximately 64 percent (211,341) of those cases pending more than 90 days and approximately 32 percent (106,738) pending more than one year.[40] While the percentages of long-pending cases compared to last year are similar, the absolute numbers have increased. There are now 93,358 more cases pending the name check than last year. Perhaps most disturbing, there are 31,144 FBI name check cases pending more than 33 months as compared to 21,570 last year – over a 44 percent increase in the number of cases pending more than 33 months.[41]

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[40] *See* USCIS FBI Pending Name Check Aging Report (May 4, 2007). It is important to note that USCIS does not include within its backlog cases pending due to FBI name checks. There are 155,592 FBI name check cases pending more than six months that otherwise may be part of USCIS' backlog. *See* section III.B for a discussion of USCIS backlogs.

[41] *See id.*