III. PERVASIVE AND SERIOUS PROBLEMS

The Homeland Security Act requires the Ombudsman to highlight problems that significantly impact individuals and employers applying for immigration benefits and to make recommendations for change.[9] It further requires the Ombudsman to report on USCIS' responses to these recommendations.[10]

Although the Act does not require the Ombudsman to report on the best practices of USCIS staff, this report highlights many of them. The Ombudsman recognizes the talent and professionalism of USCIS employees, particularly those in the field, who perform their jobs each day often with inadequate facilities, equipment, and training. In addition, the Ombudsman hopes that USCIS senior leadership will recognize these best practices and implement them throughout the agency so that all offices can benefit.

While USCIS has made progress in addressing some of the pervasive and serious problems identified in previous reports, core problems remain.

A. Complexity of the Immigration Process

One of the most serious problems facing individuals and employers is the complexity of the immigration process.

1. Background

While the Immigration and Nationality Act (INA) is the principal statute governing immigration to the United States, there are myriad other laws, regulations, policies, and procedures that affect whether and in what manner a foreign national may enter the United States, request temporary status, apply for a green card, and ultimately seek U.S. citizenship.

As in previous years, this annual report provides details on pervasive and serious problems. Many of them are interconnected and stem from the complexity and opaque nature of the immigration rules and the agency administering them.

In the December 2006 DHS Unified Agenda, *i.e.,* the Semi-Annual Regulatory Agenda, USCIS listed 12 regulations in the proposed rule stage, 17 regulations in the final rule stage, 31 long-term regulatory actions, and 13 recently completed regulatory actions.[11] This list totals over 70 outstanding or recently completed regulations, some addressing (or yet to address) fundamental issues of concern to individuals and employers, such as:

- Defining "lawful presence";

[9] *See* 6 U.S.C. § 272 (b).

[10] *See* 6 U.S.C. § 272 (c)(1).

[11] *See* 72 Fed. Reg. 22574, 22591-22618 (Apr. 30, 2007).

- Implementing the American Competitiveness and Workforce Improvement Act of 1998, the American Competitiveness in the Twenty-First Century Act of 2000, and other related bills; and

- Reducing the number of acceptable documents for Form I-9 employment eligibility verification purposes.

This regulatory logjam has led USCIS to use press releases, memos, website postings, and other informal forms of policy guidance to provide customers with basic information on rules and procedures. The result is a hodgepodge of disconnected, overlapping, and contradictory rules. There is no single, dispositive source to obtain basic information about immigration law. Besides confusing applicants, these attempts at policy clarification have resulted in a lack of consistent decision-making in some areas and loss of confidence in USCIS by many applicants.

In immigration, the stakes could not be higher. A single misstep by a foreign national or employer can lead to the denial of an application or petition, the loss of status and/or the accrual of unlawful status, ineligibility in the future for an immigration benefit, and even removal from the United States. Many foreign nationals attempt to navigate this labyrinth with limited English language capability. In addition, many employers are forced to retain costly in-house and outside counsel to manage immigration programs and ensure they have access to international talent. Likewise, many individual applicants resort to using expensive legal counsel in addition to paying continually rising application fees. Processes that should be simple and straightforward are unnecessarily complicated.

2. USCIS Accountability

Just as USCIS is often an indecipherable organization for customers filing for benefits and seeking information on pending applications and petitions, USCIS remains opaque for stakeholders, Congress, and a public concerned about agency accountability.

Over the past four years, USCIS has changed its definition of the immigration benefits backlogs at least two times.[12] USCIS does not make available to the public the number of cases pending longer than six months – the definition of case backlogs. Shifting definitions hinder congressional oversight and prevent stakeholders from fully understanding whether the agency is meeting its goals to provide timely and efficient services.

Additionally, from time to time USCIS transfers cases to use extra processing capacity in a particular office. The Ombudsman supports USCIS efforts to adjudicate cases expeditiously and fully leverage its human capital. However, USCIS IT systems are unreliable in tracking and providing precise numbers of pending family and employment-based green card applications when cases are transferred because different offices use separate, often unconnected, database systems.

[12] For a complete discussion of USCIS backlogs, *see* section III.B.

3. Filing Requirements and Processes

At the same time, the agency often can be nearly impenetrable for customers seeking the status of pending applications. Sometimes applicants and USCIS officials cannot pinpoint the location of a file or its status. Widespread reports continue regarding the dissemination of incorrect or incomplete information both by contract and direct-hire USCIS personnel. Seemingly simple matters like obtaining the answer on how or where to file an application, or correcting a typographic error on a receipt notice or document, can lead to hours of frustration. Some forms are filed based on jurisdiction, some on the type of form, and still others at a centralized location.

For some immigration benefits, there is no single form but rather two, three, or more forms that must be filed together. For example, the green card application can involve a combination of six or more forms selected from more than a dozen.

The following are examples of filing complexities and confusion:

a. Confusing Instructions

Many of the forms most commonly used by individuals and employers are plagued by instructions which are difficult to understand. In some cases, these difficulties are language issues for non-English speakers. In others cases, the problems involve inconsistencies or outright error. For example, one form contained an error in describing the photograph an applicant must provide. The Ombudsman learned about this error from two different applicants, brought it to USCIS' attention multiple times over two months, and was assured each time that the error would be corrected.

b. Bi-specialization

USCIS' bi-specialization initiative limited the ability of customers to file forms at their regional service center. Instead, some family-based petitions now must be filed at one of three places: the Vermont Service Center, the Nebraska Service Center (NSC), or the Chicago Lockbox.

Except for green card filings for eligible applicants in the United States submitted at the Lockbox, most other forms must be filed at either the VSC (paired with the California Service Center (CSC)) or the NSC (paired with the Texas Service Center (TSC)). However, while the VSC and CSC jointly process Form I-129 (Petition for Nonimmigrant Worker), all applicants must file those forms at the VSC. Similarly, although NSC and TSC both process green card applications stemming from I-140 employment-based petitions and concurrently-filed I-140/I-485 green card applications, the NSC is the designated filing location.

c. Concurrently Filed Applications

The process differs for concurrently-filed I-130/I-485 green card applications, since applicants must still file I-130s at the service center with jurisdiction over the petitioner's place of residence. That is, these family-based solo filings have not yet been integrated into bi-specialization. Moreover, there is no clear filing location for I-130/I-485 green card applications.

The current I-130 instructions (November 30, 2007 expiration date) direct petitioners to the service center with jurisdiction over their place of residence (and list the four service center addresses and the respective states they cover).[13] However, it is the Ombudsman's understanding that these concurrent filings should be filed at the Lockbox.

d. Disagreement Between Forms and Website

The green card application and contradictory instructions on the USCIS website illustrate the confusion in filing locations. The website states that family-based green card applications should generally be filed at the Chicago Lockbox. However, on the form itself, the first page of instructions lists 36 states and four other U.S. jurisdictions (D.C., Guam, Puerto Rico, and the U.S. Virgin Islands) whose residents should use the Lockbox, while saying nothing about the filing location for residents of the other 14 states. Filing location is next discussed on page four in the context of where to send concurrently-filed I-140/I-485 green card applications, which is not at the Lockbox, but the NSC. Finally, on page five, the instructions state:

> In all other instances: File this application at the USCIS service center or local office that has jurisdiction over your place of residence, or submit the form to the USCIS Lockbox Facility. For details on where to file your application, read the additional instructions that may be included with this form, call our National Customer Service Center at **1-800-375-5283** or visit our website at **www.uscis.gov**.[14]

It would appear that the filing location of all family-based green card applications is the Chicago Lockbox. However, customers seem to have the option of filing at the field office or a service center. The separate listing of 14 states implies that they have a different filing location, but ultimately the applicant is led back to filing at the Lockbox.

If the applicant makes one error in understanding the confusing instructions and eligibility requirements and files the application at the wrong location, USCIS often will reject it. However, the agency continues accepting incomplete filings (and ineligible applicants) at most locations, if sent to the correct location. The agency is concerned about lawsuits emanating from a 1993 lawsuit related to its rejection of apparently incomplete applications, also known as "front-desking," during the 1986 amnesty filings.[15] The agency needs to recognize that its focus is misplaced. There are a large number of ineligible applicants accepted for processing, which frustrates applicants who paid filing fees and had other expenses. USCIS creates false expectations when months or years later the agency will deny the case.[16]

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[13] *See* USCIS "Instructions, I-130 Petition for Alien Relative"; http://www.uscis.gov/files/form/I-130.pdf (last visited June 7, 2007).

[14] *See* USCIS, "Direct Mail Instructions for Persons Filing Form I-485"; http://www.uscis.gov/files/form/i-485.pdf (last visited June 3, 2007).

[15] *See* USCIS' 2006 Annual Report Response (at pp. 17, 21).

[16] *See* section IV for further discussion on front-desking and up-front processing.

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

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[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.